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INTRODUCTION

The decade between 1985 and 1995 witnessed a resurgence in debate over questions of statutory interpretation.[1] Prior to this, the "Legal Process" approach of the 1950s seemed to resolve most questions of statutory interpretation. Under this approach, popularized by Henry Hart and Albert Sacks in *The Legal Process: Basic Problems in the Making and Application of Law*,[2] courts paid careful attention "to the context and the particular application of the statute."[3] Through this analysis, a court

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1. *See generally* William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992); Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 533 (1992); *Symposium on Statutory Interpretation*, 66 CHI.-KENT L. REV. 301 (1990).

2. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

3. Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1601 (1991). On the Legal Process school generally, see *id.* at 1599-1614 (discussing the Legal Process school as developed in HART & SACKS, *supra* note 2); William N. Eskridge & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 694-99 (1987) (also discussing the Legal Process school developed by Henry M. Hart and Albert M. Sacks).

"could discern the statutory purpose. Once selected, the court could test the purpose along a range of applications, with the goal being to avoid an irrational pattern of applications."[4] Under this approach, resort could be "made to the legislative history to glean the statutory purpose."[5] Where leeway existed in determining what the statute meant after considering legislative history and purpose, the "task for the court" was "to fit the statute into the legal system as a whole" to make "coherent public policy."[6]

By 1985, the illusion that the Legal Process school of the 1950s had brought agreement to the proper approach to statutory interpretation had become fractured in a number of ways. In the Supreme Court, Chief Justice Burger and Justice Rehnquist began this process of fracturing in the late 1970s and early 1980s when they questioned the validity of the Legal Process approach, particularly its broad use of legislative history and legislative purpose in statutory interpretation.[7] In doing so, they supported what has been called an "originalist" approach to statutory interpretation.[8] Originalism resolves interpretive questions by asking how the enacting Congress would have decided the question. As has been noted, "[o]riginalism accepts that there will be questions left unresolved by Congress but requires that these gaps be filled by faithful execution of Congress's desires . . . . The court asks only what the enacting Congress would have done; subsequent events or the state of the world today are not a basis for decision."[9]

Justice Scalia's appointment to the Supreme Court in 1984 invigorated this questioning of the Legal Process school. Justice Scalia's "New Textualism" approach to questions of statutory interpretation was stated as a clear alternative to the Legal Process school.[10] Under this ap-

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4. Zeppos, *supra* note 3, at 1601.

5. *Id.* at 1605.

6. *See id.* at 1601.

7. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 221 (1979) (Rehnquist, J., dissenting) ("Today, however, the Court behaves much like the Orwellian speaker earlier described . . . . Accordingly, without even a break in syntax, the Court rejects 'a literal construction of [the statute]' in favor of newly discovered 'legislative history' . . . ."); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 n.29 (1978) (Burger, C.J., delivering the opinion of the Court) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning.").

8. *See generally* Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1078-80 (1992) (summarizing an originalist approach to statutory interpretation).

9. *Id.* at 1078-79.

10. *See generally* Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663 (1991); Zeppos, *supra* note 3, at 1614-20.

proach, statutory interpretation focuses almost exclusively on the plain meaning of the statute's text, augmented by consideration of the text of related statutes (statutes *in pari materia*), and by consideration of traditional canons of statutory construction.[11] Legislative history, because it is not part of the statute's text, should not be used to help determine a statute's meaning.[12] During the 1980s, Justice Scalia's New Textualism approach gained some support, particularly among Chief Justice Rehnquist and Justices O'Connor and Kennedy.[13] Justice Thomas has also indicated strong support for Justice Scalia's New Textualism model of statutory interpretation.[14]

Over the last five years, support has waned for Justice Scalia's New Textualism model of statutory interpretation. Only Justice Thomas has remained a consistently faithful ally.[15] Justices Stevens, Souter,

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11. *See* William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1133-40 (1992); Zeppos, *supra* note 3, at 1615-16.

12. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990); Zeppos, *supra* note 3, at 1615-17.

13. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring, joined by Rehnquist, C.J., and O'Connor, J.) ("[I]t does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable."); Zeppos, *supra* note 3, at 1598-99 (discussing Chief Justice Rehnquist and Justice Kennedy's support for the New Textualism model). *But see* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 705, 711-37 (1989) (O'Connor, J., delivering the opinion of the Court, joined by Rehnquist, C.J., White, J., and Kennedy, J., concurring) (using legislative history to help interpret the statute); *id.* at 738 (Scalia, J., concurring) ("I join Parts I and IV of the Court's opinion, and Part III except insofar as it relies upon legislative history.").

14. *See* James Fagan, *The Legal Phoenix: The Plain Meaning Rule is Dead, Long Live the Rule*, 29 CAL. W. L. REV. 373, 385 n.79 (1993) (citing, *inter alia*, United States v. R.L.C., 503 U.S. 291, 311-12 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

15. *See, e.g.*, Atherton v. FDIC, 117 S. Ct. 666, 676-77 (1997) (O'Connor, J., concurring in part and concurring in the judgment, joined by Scalia, J., and Thomas, J.) ("I join all of the Court's opinion, except to the extent that it relies on the notably unhelpful legislative history . . . . With such plain statutory language in hand, there is no reason to rely on legislative history."); Holly Farms Corp. v. NLRB, 116 S. Ct. 1396, 1406-07 (1996) (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., Thomas, J., and Scalia, J.) ("[T]he Court's conclusion . . . runs contrary to common sense and finds no support in the text of the relevant statute."); United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment, joined by Thomas, J.) ("The Court attempts to minimize the amendment's harshness . . . , quoting some post-legislation legislative history (another oxymoron)

Ginsburg, and Breyer clearly reject the New Textualism model of statutory interpretation.[16] Although initially sympathetic to Justice Scalia's approach, Chief Justice Rehnquist and Justices O'Connor and Kennedy, typically reject it now as well.[17] However, a majority of the Court shows no inclination to advocate a return to the Legal Process school. Rather, the approach to statutory interpretation sketched by Justice Breyer in law review articles and Supreme Court cases seems to represent the majority approach on the current Supreme Court.[18]

The intent of this Article is to place into context the various approaches of the Supreme Court regarding questions of statutory interpretation. In undertaking this task, I will use a conceptual scheme developed elsewhere to analyze approaches to judicial decision-making. That scheme states that in American legal history there have been four main approaches to judicial decision-making: natural law, formalism, Holmesian, and instrumentalism.[19] Understanding these four types of judicial decision-making styles can help make sense of the various arguments concerning statutory interpretation used by the Court today.

In pursuit of this goal, Part I of this Article will examine the various versions of natural law, formalist, Holmesian, and instrumentalist approaches to statutory interpretation. This discussion will conclude that Justice Scalia's New Textualism is an example of a formalist approach,

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to show that, despite the uncontested plain meaning of the statute, Congress never meant it to apply . . . .").

16. *See, e.g., Holly Farms Corp.*, 116 S. Ct. at 1401 & n.6 (Ginsburg, J., delivering the opinion of the Court) (stating that legislative purpose and legislative history is critical in making sure statutory exemptions are not "expansively interpreted" contrary to legislative intent); Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 116 S. Ct. 637, 643-45 (1996) (Stevens, J., concurring, joined by Breyer, J.) (contra Justice Scalia, legislative history is "useful to conscientious and disinterested judges trying to understand the statute's meaning"); American Nat'l Red Cross v. S.G., 505 U.S. 247, 252-65 (1992) (Souter, J., delivering the opinion of the Court) (using precedent, purpose, and legislative history to augment the ordinary meaning of the statute's words).

17. *See, e.g.*, Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 921 (1997) (Scalia, J., concurring) (no other Justice joining Justice Scalia in applying his textualism model to reject the use of legislative history); *Bank One Chicago, N.A.*, 116 S. Ct. at 645 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.")

18. *See, e.g.*, O'Neal v. McAninch, 513 U.S. 432 (1995) (Breyer, J., delivering the opinion of the court); Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 513 U.S. 414 (1995) (Breyer, J., delivering the opinion of the Court); Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). For elaboration of this approach to statutory interpretation, see *infra* text accompanying notes 21-46.

19. *See* R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 20 PEPP. L. REV. 531, 532-63 (1993).

Originalism is an example of a Holmesian approach, the Legal Process school is an example of an instrumentalist approach, and Justice Breyer's approach is a modern version of the traditional natural law approach to statutory interpretation. Part II of this Article will put into context the modern Supreme Court debate, concluding that the Court is likely to adopt a modern version of the traditional natural law model of statutory interpretation. As discussed herein, this approach has great affinities with a Holmesian approach. As part of this approach, the use of legislative purpose to help interpret a statute, and resort to legislative history to help illuminate legislative intent, will be discussed. Part III will provide a brief conclusion.

I. FOUR STYLES OF INTERPRETATION AND STATUTORY INTERPRETATION DOCTRINE

As I have discussed more fully elsewhere, it can prove useful to analyze American legal history in terms of four major judicial decision-making styles: natural law, formalism, Holmesian, and instrumentalism.[20] The following discussion presents a summary of these four decision-making styles in the context of statutory interpretation.

A. The Natural Law Approach

As developed during the 17th and 18th centuries in England and the United States, the natural law approach to interpretation calls for a judge to interpret a statute in light of the framer's intent, as revealed by the traditional sources for determining intent.[21] These sources include, among other things, the plain meaning of the statutory language, the

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20. *See generally* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994) [hereinafter Kelso, *Styles of Constitutional Interpretation*]; Kelso, *supra* note 19, at 532-63; *see also* R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 101-23, 261-310, 388-423 (1984) [hereinafter KELSO & KELSO, STUDYING LAW] (discussing the four decision-making styles in the context of common-law, statutory, and constitutional decision-making); Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 98-108 (1996) [hereinafter Kelso & Kelso, *Transformations*] (summarizing the four decision-making styles).

21. *See generally* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1006-08 (1991); Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

purpose behind the law or "mischief to be remedied," and traditional maxims of statutory construction.[22] Because judges in the natural law tradition understood the limits of human capacity to express intent perfectly in the literal words used, the literal (or ordinary) meaning of words in the statute was never sufficient under a natural law approach to determine the statute's plain meaning. Rather, in addition to focusing on the ordinary meaning of words used in the statute, the purpose behind the words used was critical in the initial stage of determining the words' plain meaning.[23]

In his 1833 work, *Commentaries on the Constitution of the United States*, Supreme Court Justice Joseph Story summarized these then-

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22. *See* Baade, *supra* note 21, at 1013-43; *see also* WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 363-67 (1953). Crosskey notes:

> The rules of interpretation ordinarily followed in the eighteenth century, and, likewise, the modes of draftsmanship then in use, were, in certain important particulars, different from those in common use today. Thus, the eighteenth-century draftsman felt no obligation to spell out every last detail in the documents he drew. This was sometimes done; and when it was done, the results, in point of verbosity and opacity, were about what they are in such efforts today. But, in the eighteenth century, there was a well-recognized alternative to this now familiar technique, another and simpler method, which seems quite generally to have been preferred in documents addressed to public comprehension. Under this simpler method, the over-all purpose of a document was stated carefully in general terms.

Id. at 363-64.

23. *See* CROSSKEY, *supra* note 22, at 363-64. Crosskey notes:

> [T]he over-all purpose of a document was stated carefully in general terms; details were put in, only where, for some particular reason, details seem required; and the rest was left to the rules of interpretation customarily followed by the courts. The rules that were followed were partly a result, and partly the cause, of this method of drafting. Justified by the fact that no draftsman is possessed of an infinite prescience, they were calculated to give a just and well-rounded interpretation to every document, in the light of its declared general purpose; or, if its purpose was not declared, then, in the light of its apparent purpose, so far as this could be discovered.

Id. at 364; *see also* Moore, *supra* note 21, at 383-84.
Moore explains:

> Once a judge determines the ordinary meaning of words that make up a text and modifies that ordinary meaning with any statutory definitions or case law developments, there is still at least one more task. A judge must check the provisional interpretation reached from these ingredients with an idea of how well such an interpretation serves the purpose of the rule in question.
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> The necessity for asking this question of purpose Lon Fuller made familiar to us in his famous 1958 debate with H.L.A. Hart.

Id.

prevalent rules of interpretation.[24] As stated by Justice Story in 1833, "the reason and spirit of the law, or the causes, which led to its enactment, are often the best exponents of the words, and limit their application."[25] Writing more than a century later, Professor William Crosskey, of the University of Chicago, underscored this method of interpretation as focusing on the purpose underlying the statutory language.[26] This regard for the "cause" or "reason" for a law is stated most famously in *Heydon's Case*, a 1584 decision.[27]

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24. *See* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 397-456 (1833). For a commentary on Justice Story and his place in the natural law tradition of the eighteenth and early nineteenth centuries, see JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION (orig. ed. 1971, reissued ed. 1990). Professor McClellan states:

> Among the American lawyers and judges of this creative and resourceful era in legal development [the early nineteenth century], Judge Story stands out as possibly the most learned and influential defender of the natural law tradition. To Story it was imperative that American lawyers understand natural law in interpreting and applying the principles of the Constitution and the common law. Being "a philosophy of morals," natural law was to Story the substratum of the legal system, resting "at the foundation of all other laws."

Id. at 65.

25. STORY, *supra* note 24, § 400.

26. *See* CROSSKEY, *supra* note 22, at 363-67. As Crosskey noted about 18th century theories of statutory interpretation:

> "The fairest and most rational method to interpret the will of the legislator, is," says Blackstone, "by exploring his intentions at the time when the law was made, by *signs* the most natural and probable." "These signs," he then goes on to explain, "are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law." As for the last of these — that is, "the reason and spirit of [a law]; or the cause which moved the legislator to enact it," — it is, says Blackstone, "the most universal and effectual way of discovering the true meaning of a law, when the words are dubious."

Id. at 366.

27. 76 Eng. Rptr. 637 (1584). The "Rule of Heydon's Case", as stated by Lord Coke, provides:

> [F]or the sure and true . . . interpretation of all statutes in general (be they penal . . . or beneficial, restrictive or enlarging the common law,) four things are to be discerned and considered: . . . 1st. What was the common law before the making of the Act . . . . 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such . . . construction as shall suppress the mischief, and advance the remedy, and to suppress subtle invention and evasions for con-

In addition to this focus on a statute's purpose, the natural law approach also has great respect for precedent.[28] This is particularly true in the area of statutory interpretation.[29] Thus, prior judicial interpretations of the statute which stand as precedents to its meaning are very important under a natural law approach to interpretation.

The natural law approach also has great respect for judges exercising "practical reason" to resolve conflicting interpretations of a statute.[30] This is particularly true when deciding which canons of construction to adopt in a particular case.[31]

> tinuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act.

Id. at 638.

28. *See generally* R. Randall Kelso & Charles D. Kelso, *How the Supreme Court is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 985-86 (1996). Kelso & Kelso state:

> Judges who believe very strongly in this traditional common-law commitment [to reasoned elaboration of the law] may choose to follow precedents they believe are wrongly decided even if those precedents do not represent settled law and there has been no substantial reliance upon them . . . . The judges who most often have this stronger commitment to precedent are judges in the natural law tradition.

Id.

29. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283-84 (1995) (O'Connor, J., concurring). Justice O'Connor wrote:

> Were we writing on a clean slate, I would adhere to that view . . . . But, as the Court points out, more than 10 years have passed since *Southland*, several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance on the Court's interpretation . . . . After reflection, I am persuaded by considerations of *stare decisis*, which we have said "have special force in the area of statutory interpretation," to acquiesce in today's judgment. Though wrong, *Southland* has not proved unworkable, and, as always, "Congress remains free to alter what we have done."

Id. (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)); *see also Patterson*, 491 U.S. at 172-73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

30. *See generally* Warren Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 495-504 (1979) (discussing the use by Aristotle, Aquinas, and Plowden of practical reason and following the equity of a statute).

31. *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 547 (1992). Farber states:

> As Llewellyn demonstrated, the traditional canons can be readily arranged in conflicting pairs. Typically, the two canons in a given pair are not directly contradictory, but instead their domains are defined by qualifications such as 'unless the context dictates otherwise.' Application of these conflicting canons may require a good deal of judgment.

Id. This view that canons of construction must be used cautiously is an old, tradi-

In theory, a natural law approach to interpretation could counsel that, where leeway exists, the judge should be willing to depart from the legislature's actual intent to interpret a statute in a way to achieve a "just" result.[32] Some natural law theories have been criticized on this ground.[33] However, natural law judges in the American tradition have operated out of the Enlightenment vision of a society based upon a social contract.[34] Under this social contract vision, the role of the judge in statutory interpretation is to follow the in-fact intent of the legislature.[35]

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tional view of the common law. *See* STORY, *supra* note 24, § 448 ("[While] maxims [of construction], rightly understood and rightly applied, undoubtedly furnish safe guides to assist us in the task of exposition[,] . . . they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text, and the objects [purpose] of the instrument.").

32. *See, e.g.*, Farber, *supra* note 31, at 540-41; Moore, *supra* note 21, at 358 (discussing whether judges should place a "good" interpretation on statutory language based upon "[t]he meanings of words, the direction of precedent, and the nature of goodness"). Farber uses the phrase "practical reason" to slip from a restrained natural law interpretation model to a more judicially activist model, and permits consideration not only of "text, legislative history [and] statutory purpose," but also of "contemporary public policy." *See* Farber, *supra* note 31, at 540-41. Such an approach is more appropriately viewed as a version of instrumentalism, as Farber's cites to Karl Llewellyn suggest. *See id.* at 537-40; *infra* notes 95-96 and accompanying text.

33. *See* Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 771-72 (1991) (criticizing the approach of Professor Michael Moore); *see also supra* note 32.

34. *See generally* R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, But the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1067-73 (1995) (discussing how the Enlightenment's concept of government as a social contract limits judicial discretion to following those principles placed into the Constitution or statutes).

35. *See generally* Kelso & Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at 159-65 (contrasting the American natural law tradition with a "Platonic Guardian" natural law model where judges impose natural law principles upon society). Remaining faithful to the American natural law model of interpretation, Professor Michael Moore has rejected the broader implications of his natural law theory of interpretation by limiting the judge to following the in-fact intent of the drafters of a document. *See supra* note 32 and accompanying text. *See generally* Moore, supra note 21, at 314-18 (discussing six basic values that "justify the judge in accepting a humbler, more constrained mode of decisionmaking" based in part on the separation of powers observation that "[b]ecause legislatures represent the majority's wishes better than courts do, democracies' legislatures should have their wishes carried out by a judge even if that judge disagrees with the wisdom of such wishes"); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 133-37

In determining statutory purpose, and in determining legislative intent more generally, one must decide whether resort to legislative history is ever appropriate. The traditional English and American rule of the 17th and 18th centuries was that resort to legislative history was never appropriate.[36] During the 19th century, the American practice evolved to permit the use of legislative history to help determine legislative intent.[37]

Two natural law approaches to interpretation thus exist. One approach—call it a narrow approach—limits the use of legislative history, perhaps banning it entirely, or at least limiting its use to help interpret ambiguous statutes or statutes whose plain meaning would lead to an absurd result. The traditional natural law approach of the 18th and 19th centuries in America favored this narrow natural law approach to interpretation.[38]

A second approach—call it a broader approach—counsels the wisdom of permitting resort to legislative history in every case to help determine legislative intent. This is the approach that evolved during the 20th century in America.[39] Modern American natural law theories of interpretation tend to favor this 20th century American approach.[40]

(1989) (advancing a limited vision of the judge's role as applied to constitutional interpretation).

36. *See* Baade, *supra* note 21, at 1006-12. Though widely accepted as true, this conclusion regarding non-use of legislative history in 17th and 18th century England and America has been questioned. *See, e.g.*, Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151 (1993). A brief discussion of this debate appears in KELSO & KELSO, STUDYING LAW, *supra* note 20, at 154-55 & nn.118-22.

37. *See* Baade, *supra* note 21, at 1043-62. The English rule has also recently been changed to permit limited use of "statements by a minister or other proponent of the bill" where "the legislative language is ambiguous or obscure, or if it would lead to an absurd result." William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1, 12 (1994).

38. *See* Baade, *supra* note 21, at 1013-43; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 935-44 (1985).

39. *See, e.g.*, United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'").

40. This tendency is consistent with the basic premises of the traditional natural law model of interpretation, updated to reflect contemporary use of legislative history as an aid in statutory interpretation. For example, as Chief Justice Marshall noted in *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805): "Where the mind labours to discover the design of the legislature, it seizes every thing [sic] from which aid can be derived." This is true even though Justice Marshall might well be "shocked" by the contemporary use of legislative history. *See* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 622 (1991) (Scalia, J., concurring) (claiming that the Court's practice of using legislative history "would have shocked John Marshall"). Chief Justice Marshall lived in the traditional natural law age when resort to legislative history

Justice Breyer's approach to statutory interpretation reflects this modern natural law approach to statutory interpretation. Justice Breyer's approach places great weight on statutory language, purpose, and precedent.[41] Justice Breyer also supports the use of legislative history to move beyond literal interpretation of a statute and to aid consideration of legislative purpose in interpreting a statute.[42] This is particularly true, Justice Breyer has noted, in five kinds of cases: "(1) avoiding an absurd result; (2) preventing the law from turning on a drafting error; (3) understanding the meaning of specialized terms; (4) understanding the 'reasonable purpose' a provision might serve; and (5) choosing among several possible 'reasonable purposes' for language in a politically controversial law."[43] Justice Breyer also supports the use of practical reason to aid interpretation when the statute is not otherwise clear.[44]

Justice O'Connor's opinion in *Bailey v. United States*[45] also represents a good example of this modern natural law approach. As Justice O'Connor noted,

> We start, as we must, with the language of the statute . . . . We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. "The meaning of statutory language, plain or not, depends on context." . . . [C]anon[s] of construction [are also used]. The amendment['s] [legislative] history . . . casts further light on Congress'[sic] intended meaning."[46]

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to aid interpretation was not the norm. *See supra* notes 36-38 and accompanying text. Even at that time, however, Chief Justice Marshall pushed the limits of the traditional non-use of legislative history. *See Mortier*, 501 U.S. at 610 n.4 (White, J.) (invoking Chief Justice Marshall's opinion in Wallace v. Parker, 31 U.S. (6 Pet.) 680, 687-90 (1832), to support the use of legislative history in statutory interpretation).

41. *See, e.g.*, O'Neal v. McAninch, 513 U.S. 432, 445 (1995) (Breyer, J., delivering the opinion of the court) (looking to "the considerations underlying" the habeas corpus statute).

42. *See, e.g.*, Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 513 U.S. 414 (1995) (Breyer, J., delivering the opinion of the Court) (relying upon statutory language, purpose, and legislative history to interpret the statute).

43. Breyer, *supra* note 18, at 861.

44. *See id.* at 847; *O'Neal*, 513 U.S. at 443-44 (Breyer, J., delivering the opinion of the court) ("Third, our rule has certain administrative virtues . . . [which] are not determinative, but offer a practical caution against a legal rule that, in respect to precedent and purpose, would run against the judicial grain.").

45. 116 U.S. 501 (1995).

46. *Id.* at 506-07 (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)).

B. The Formalist Approach to Statutory Interpretation

As discussed in previous articles, formalist judges follow a positivist approach to judicial decision-making.[47] This means a formalist sees the judge as a scientist who attempts to decide cases in light of existing positive law.[48] In statutory interpretation cases, a judge focused on existing positive law would naturally tout the virtues of following the original "positive" intent of the legislature which enacted the statute under consideration.

At the same time, the formalist's general preference for logic and symmetry means that a formalist approach prefers doctrinal development in which the judge's sole function is to apply rules mechanically to the case at hand.[49] A formalist prefers clear, bright-line rules.[50] Because inquiry into the in-fact intent of a legislature can be a messy proposition, a formalist judge is likely to be tempted to dispense with original intent in favor of asking merely what the statute's words mean. Determining the meaning of a statute's words can be done in a more mechanical fashion. Thus, the classic formalist line is perhaps best stated by the maxim that the court is not to determine legislative intent, but rather to interpret solely what the statute's words mean.[51] In making this determination,

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47. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). *See generally* Kelso, *supra* note 19, at 533-38.

48. *See* EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 91-109 (rev. ed. 1974) (discussing positivism in legal philosophy, and in its relation to "law as science" and the separation of law and morals). *See generally* Kelso, *supra* note 19, at 536-37.

49. *See* Kelso, *supra* note 19, at 533 & n.14; *see also* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

50. *See* Kelso, *supra* note 19, at 535-38; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); *see also* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 555-56 (1995) (Thomas, J., concurring, joined by Scalia, J.) ("The test I have proposed would produce much the same results as the *Sisson* analysis without the need for wasteful litigation over threshold jurisdictional questions. Because *Sisson* departed from a century of precedent, is unworkable, and is easily replaced with a bright-line rule, I concur only in the judgment.").

51. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that text as any ordinary Member of Congress would have read them."). *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1996). One authority for this "objective" approach to statutory interpretation is the oft-quoted line of Justice Holmes, "We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). However, as has been noted, in his actual approach to statutory interpretation, Holmes followed an originalist approach which did focus on actual "subjective" legislative intent, rather than the formalist or textualist approach to statutory interpretation discussed here. *See* Zeppos, *supra* note 8, at 1127. In addition, the critical inquiry in any approach to statutory interpretation is determining which sources the judge is permitted to consider to guide interpreta-

most formalist judges will resort not only to dictionary definitions of words, but also to grammatical maxims of construction to help determine what the words mean.[52]

Three variations of the formalist approach have appeared in Anglo-American legal history. They are the Literal Rule, the Golden Rule, and the Plain Meaning Rule. Under the Literal Rule, the court should follow the statute's literal meaning even if that meaning leads to an absurd result. This literal meaning is determined by considering the dictionary meaning of the statute's words, supplemented by basic rules of grammar as reflected in traditional grammatical maxims of statutory construction. Thus, as stated in the 1892 English case of *Regina v. City of London Court Judge*, "[I]f the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity."[53] Under this approach, *only* if the statute is ambiguous, and thus has no plain meaning, should a court depart from what the statute literally requires. To my knowledge, no American court has ever adopted such an extreme approach in practice.[54]

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tion, not categorical labels. Thus, although the above passage from Holmes, as well as passages from Justice Felix Frankfurter, do speak of rejecting a subjective search for legislative intent in favor of an objective inquiry into legislative meaning, both Holmes and Frankfurter rejected formalist limitations on the use of legislative history and the formalist Plain Meaning Rule, in favor of using legislative purpose and legislative history to help determine objective legislative intent. *See generally* KELSO & KELSO, STUDYING LAW, *supra* note 20, at 282-84, 291-93 (analyzing Frankfurter on legislative purpose and history and discussing the limited difference between the categorical labels of an objective versus subjective theory of intent). Based upon this rejection of formalist limitations, the Holmesian approach to statutory interpretation is distinguishable from a formalist approach. *See generally infra* text accompanying notes 80-94.

52. *See* Zeppos, *supra* note 3, at 1616 ("Justice Scalia has invoked some of the venerable canons of statutory interpretation.") (citing United States Dep't of Justice v. Julian, 486 U.S. 1, 15 (1988) (Scalia, J., dissenting); *see also* Eskridge & Frickey, *supra* note 1, at Appendix A (listing the canons of statutory interpretation).

53. 1 Q.B. 273, 290 (1892). *See generally* KELSO & KELSO, STUDYING LAW, *supra* note 20, at 280 (discussing the Literal Rule of statutory interpretation).

54. However, pure literalness has "attracted adherents" at various points in American legal history. *See, e.g.*, WILLIAM L. REYNOLDS, JUDICIAL PROCESS 198 (1980). Reynolds states:

> In theory, at least, this approach has attracted the attention of a number of courts, and was particularly popular in England in the Nineteenth Century. One reason for that popularity was the strong belief by the English courts in the primacy of Parliament. Paradoxically, the literal rule also attracted adherents because it *limited* the scope of legislation. For that reason, literal-

A second version of formalism is the Golden Rule of statutory interpretation. The Golden Rule differs from the Literal Rule in that under the Golden Rule the plain meaning of a statute should not be followed if its leads to an absurd result. Thus, under the Golden Rule, a court should depart from the literal text of a statute if the text is ambiguous *or* the literal meaning would create an absurd result.[55] As stated in the famous English case of *Grey v. Pearson*, "[T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency but no further."[56] Similar is the famous American case of *Hamilton v. Rathbone*.[57] In *Hamilton*, the Court stated:

> The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.[58]

A third version of formalism is represented by the Plain Meaning Rule. Carefully stated, the Plain Meaning Rule does not preclude a court from considering purposes stated on the face of the statute when determining the meaning of particular language. As Justice Marshall's classic phrasing of the plain meaning rule indicated in *Sturges v. Crowninshield*,[59] "any other provision in the same instrument"[60] may be consulted, including statements of purpose, to determine a statute's plain meaning.[61] In con-

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> ness was prevalent in [the United States] at the turn of the present century, when judicial hostility toward the legislature reached its peak.

55. *See, e.g.*, Hamilton v. Rathbone, 175 U.S. 414, 420-21 (1899); Grey v. Pearson, 10 Eng. Rep. 1216, 1234 (1857). *See generally* KELSO & KELSO, STUDYING LAW, *supra* note 20, at 280-82 (discussing *Hamilton* and *Grey*).

56. *Grey*, 10 Eng. Rep. at 1234.

57. 175 U.S. 414 (1899).

58. *Id.* at 419.

59. 17 U.S. (4 Wheat.) 122 (1819).

60. *Id.* at 202-03.

61. *See id.* The entire passage from Chief Justice Marshall's opinion reads as follows:

> Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of [the] words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe

trast, under the Golden Rule of statutory interpretation as stated in *Hamilton*, "the purpose intended to be accomplished" by the statute and the "mischiefs intended to be remedied"[62] cannot be considered to create an ambiguity even if that purpose is stated in the statute itself.[63] This refusal to consider purposes stated upon the face of the statute in determining a statute's plain meaning applies even more strictly under the Literal Rule of *City of London County Judge*.[64]

This aspect of the difference between the Golden Rule and Plain Meaning Rule of statutory interpretation has not always been carefully noted by courts. For example, American courts have occasionally held that the Plain Meaning Rule restricts a court from considering purposes stated on the face of the statute.[65] Some courts have also held that the Plain Meaning Rule counsels a court not to consider material intrinsic to the statute such as the statute's title and preamble.[66] As Justice Marshall's statement of the Plain Meaning Rule makes clear, however, such a narrow view of what material is properly considered is rejected under a proper application of the Plain Meaning Rule.[67]

A similar difference exists with respect to use of statutes *in pari materia* to aid in determining a statute's meaning. A narrow view—typically adopted by adherents of the Literal and Golden Rule—prevents use of statutes *in pari materia* to aid in determining the plain meaning of a statute, stating that the court is only to look to the statute under consid-

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> the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

Id.; *see also* United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) ("It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole."). In *Fisher*, Chief Justice Marshall considered the statute's title, purpose, and statutes *in pari materia* to help determine the statute's meaning. *See id.* at 386-90.

62. *See Hamilton*, 175 U.S. at 419.

63. *See id.*; *see also supra* text accompanying note 58.

64. 1 Q.B. 273, at 290 (1892). *See also supra* note 53 and accompanying text (discussing the Literal Rule of statutory interpretation).

65. *See* Johnson v. Southern Pac. Co., 117 F. 462, 465 (8th Cir. 1902), *rev'd on other grounds*, 196 U.S. 1 (1904).

66. *See In re* Camden Shipbuilding Co., 227 F. Supp. 751, 753 (D. Me. 1964).

67. *See supra* notes 59-61 and accompanying text (discussing Marshall's view of the Plain Meaning Rule). *See generally* KELSO & KELSO, STUDYING LAW, *supra* note 20, at 280-82 (discussing a proper understanding of the Plain Meaning Rule and its differences from the Literal and Golden Rules of statutory construction).

eration to determine its plain meaning.[68] A broader view, adopted more by adherents of the Plain Meaning Rule, counsels that like use of a statute's title, preamble, or statements of purpose on the face of the statute, use of statutes *in pari materia* is appropriate to determine the plain meaning of a statute.[69]

There is also a disagreement among formalist approaches to statutory interpretation concerning which canons of statutory construction are appropriate to adopt. A narrow view states that only those canons of construction directly related to grammatical meaning, so-called verbal maxims of construction, should be used. Such a list of verbal maxims includes: "construe technical words technically; expression of one thing excludes another (*expressio unius est exclusio alterius*); where general words follow an enumeration of specific words, the general words are to be held as applying only to the same general kind or class as the specific words (*esjudem generis*);" words are to be read in context with neighboring words in the same document (*noscitur a sociis);* and qualifying or limiting words refer to the last antecedent term.[70] A broader view states that so-called policy maxims of construction are also appropriate to use. Such policy maxims reflect background understandings which inform statutory interpretation, but are not tied directly to grammatical text. Such policy maxims include: strict construction of penal statutes; liberal construction of remedial statutes; no man should profit from his own wrong; clear expression is needed for legislative provisions to have retroactive application; and presume reasonableness of legislative purpose.[71]

Despite these disagreements among the Plain Meaning Rule and the Golden and Literal Rules, all three rules agree on the impermissibility of

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68. *See Hamilton*, 175 U.S. at 419 ("But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."). Adherents to the narrow view suggest that because statutes *in pari materia* are outside the particular statute under construction, such statutes should not be resorted to unless the statute to be construed is ambiguous or has an absurd plain meaning.

69. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 233 (1975) (discussing use of statutes *in pari materia* to "reflect or buttress a sincere attempt by the courts to ascertain the [plain] meaning of the statute as read in its proper context.").

70. *See generally* Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at 131 n.38 (discussing verbal maxims). These maxims are appropriately used even under a narrow approach to interpretation because they relate directly to the ordinary meaning of words in their ordinary context. For a relatively complete list of such canons of construction see Eskridge & Frickey, *supra* note 1, at Appendix A.

71. *See generally* Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at 131 n.39 (discussing policy maxims). For a relatively complete list of such canons of construction see Eskridge & Frickey, *supra* note 1, at Appendix A.

using legislative history to help determine the plain meaning of a statutory provision. Absent an ambiguous statute under the Literal Rule, or an ambiguous statute or an absurd plain meaning under the Golden or Plain Meaning Rules, all three rules preclude resort to bits of legislative history, such as committee reports, hearings, or debates, to ascertain the meaning of a statutory provision.[72]

So understood, the Plain Meaning Rule, coupled with a broad approach to statutes *in pari materia*, as well as a broad approach to the use of both verbal and policy canons of construction, is virtually identical to a narrow natural law approach to interpretation. Both involve full consideration of statutory context, both permit analysis of legislative purpose to determine legislative intent as long as the purposes are derived from considering the statute itself, and both reject use of legislative history to determine a statute's plain meaning.[73] Perhaps the main difference is that the narrow natural law approach would probably phrase the weight given to a statute's plain meaning as a "plain meaning presumption" rather than a rigid "plain meaning rule."[74]

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72. *See* Fagan, *supra* note 14, at 374-80 (discussing the Plain Meaning's and Golden Rule's rejection of legislative history in determining the plain meaning of a statute).

73. *See supra* text accompanying notes 21-27, 38 (discussing the narrow natural law approach); *supra* text accompanying notes 59-69 (discussing the broad plain meaning approach).

74. *See generally* DICKERSON, *supra* note 69, at 233 ("At best, there should be no plain meaning 'rule,' only a plain meaning 'presumption.' It may also be true that much of the judicial talk about 'plain meaning' is only a device for assigning the burden of persuasion as between parties contending over the meaning of a statute."). Of course, an additional difference between the two approaches is that the narrow natural law approach rejected use of legislative history even if the plain text of the statute was ambiguous or absurd, while under the plain meaning rule legislative history may be considered. *See generally supra* text accompanying notes 38, 72. Chief Justice John Marshall's statutory interpretation opinions are instructive in this regard. Some of these opinions suggest the adoption of a rigid plain meaning rule. *See, e.g.*, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202-03 (1819) (Marshall, C.J.); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) ("[W]here great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed."). However, some of Marshall's other opinions suggest adoption only of a "plain meaning presumption" approach. *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J., delivering the opinion of the Court) ("The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest."); Schooner Paulina's Cargo v. United States, 11 U.S. (7 Cranch) 52, 64-68 (1812) (arguing for "literal construction" of the statute, but a part of determining the statute's "real meaning," is derived from additional considerations of legislative pur-

A classic example of a modern version of a formalist Golden Rule of interpretation is Justice Scalia's textualist approach. Justice Scalia follows the Golden Rule by refusing to use purpose to determine the plain meaning of text.[75] Justice Scalia is narrow on the use of legislative history, suggesting a willingness to follow even the English practice of almost never looking to legislative history.[76] However, on the use of statutes *in pari materia* Justice Scalia adopts a broader formalist approach, permitting their use to determine a statute's plain meaning.[77] Justice Scalia also appears to adopt a broader formalist view on the canons of statutory construction, evidencing a willingness to use both verbal and policy-based canons of construction,[78] though he is skeptical of some.[79]

C. The Holmesian Approach

As discussed in previous articles, as a positivist approach, the Holmesian approach to judicial decision-making shares with the formalist approach a strong belief that the judge must follow the specific commands of the sovereign where such specific commands exist.[80] The Holmesian view thus counsels judicial deference to the dominant forces in society.[81] Under this view, the elected representatives of our democratic society—legislatures, not courts—properly balance public policy concerns.[82] Courts should thus adopt an approach towards statutory

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pose and interpreting words in other parts of the statute). In practice, of course, such a theoretical disagreement may not be very important, because if the "inconvenience" is "great" or "strong" enough, most judges will be tempted to conclude that the statute is not "plain" enough for that meaning to be enforced under either a plain meaning rule or a plain meaning presumption approach.

75. Under a Golden Rule approach, arguments based upon statutory purpose are appropriate only when the statute is ambiguous or when the statute's plain meaning is absurd. *See* Zeppos, *supra* note 3, at 1627 (stating that Justice Scalia will examine legislative purpose only if the statute's plain meaning is absurd).

76. *See id.* at 1598, 1615-16; *see also supra* notes 13-17. *But see* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (expressing sympathy for the American Golden Rule approach which permits use of legislative history where "a statute which, if interpreted literally, produces an absurd . . . result.").

77. *See* Zeppos, *supra* note 3, at 1615.

78. *See id.* at 1616.

79. *See, e.g.*, Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581-86 (1989-90) (questioning the value of the policy maxim that remedial statutes are to be liberally construed).

80. *See generally* Kelso, *supra* note 19, at 541-43.

81. O.W. HOLMES, THE COMMON LAW 36 (Mark DeWolfe Howe ed., Bel Knap/Harvard University Press 1963) (1881) ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."); *see also* Kelso, *supra* note 19, at 542-43.

82. *See* G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633, 655 (1982) ("Holmes' [sic] job at the Supreme Court consisted of, in many

interpretation which counsels that a judge should follow the in-fact intent of the legislature which enacted the statute.

However, because the "life of the law has not been logic: it has been experience,"[83] the Holmesian approach rejects the formalist preference for mechanically applied rules.[84] Because of this rejection, under a Holmesian approach, a judge can properly look not only to the clear text of the statute, but also to clear inferences of statutory purpose,[85] both as revealed in the statute itself and in the statute's legislative history.[86] The classic Holmesian style thus rejects a plain meaning rule limitation on resort to legislative history in favor of an originalist approach to statutory interpretation.[87] A Holmesian judge finds it appropriate to resort to legislative history in every case, but only to effectuate the in fact intent of the legislature. A Holmesian judge does not attempt to justify any particular sound social policy interpretation of a statute through resort to isolated bits of legislative history.[88] As with constitutional law, the heydey of the Holmesian approach to statutory interpretation spanned the period of 1937-1954.[89]

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instances, reviewing the constitutionality of actions of a legislature . . . . Deference to legislative policymaking was consistent with the views Holmes had developed on the Massachusetts [Supreme] Court."); *see also* Kelso, *supra* note 19, at 542-43.

83. HOLMES, *supra* note 81, at 5.

84. *See id.* ("The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.").

85. *See, e.g.*, United States v. Whitridge, 197 U.S. 135, 143 (1905) (Holmes, J., delivering the opinion of the court) ("[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.") (citing Georgia R.R. & Banking Co. v. Smith, 128 U.S. 174, 181 (1888).

86. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-44 (1947) (discussing the statutory interpretation theory of Holmes and resort to legislative history).

87. *See* Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J., delivering the opinion of the court) (noting that the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."); Zeppos, *supra* note 8, at 1084 (distinguishing "textualism" from "originalism" by noting that while textualists, like Justice Scalia, "discourage inquiry into nontextual sources such as legislative history", legislative history is, in fact, "one of the main sources of originalist methodology."); *see also supra* notes 8-9 and accompanying text (summarizing the originalist methodology).

88. *See* Frankfurter, *supra* note 86, at 543-44 ("Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute."); *see also* Kelso, *supra* note 19, at 544-45 & nn.37-40 (discussing the Holmesian approach to statutory interpretation).

89. *See generally* Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at

As with the natural law and formalist approaches, there is a narrow and broad version of the Holmesian approach to statutory interpretation. Under the narrow view, the judge adopts a strict originalist vision, and follows precisely the specific intent of the legislature which enacted the statute, without any reference to broader legislative purpose[90] or later events.[91] Under a broader Holmesian view, if the legislature had a broad purpose in mind, the court should give effect to that purpose.[92] Under the broader view, subsequent enactments, like administrative interpretations of statutes, can also play a role in determining what the statute means.[93] Modern Holmesians tend to share this broader vision of a judge's role in statutory interpretation cases.[94]

195-200. For a discussion of Chief Justice Rehnquist's use of this model of statutory interpretation, grounded in Holmes's skepticism of moral values and the resulting deference to the moral choices made by the legislature, see Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 642-46 (1994).

90. *See generally* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (discussing a model of statutory interpretation focusing on the use of legislative history to determine the specific intent of the legislature on the specific question before the court).

91. *See* Zeppos, *supra* note 8, at 1079 ("[E]vents subsequent to the enactment of the statute [are] not relevant."); *see also* United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring, joined by Thomas, J.) ("The Court attempts to minimize the amendment's harshness by characterizing it as 'a curative measure,' quoting some post-legislation legislative history (another oxymoron) . . . .").

92. *See* Frankfurter, *supra* note 86, at 539. Frankfurter states:

> [T]he purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.

Id.; *see also* Eskridge, *supra* note 90, at 1482-84, 1502-03 (discussing the use of legislative history to help determine the legislature's general intent in passing a statute).

93. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863-64 (1984) (reasoning that an agency's interpretation of a legislative act should be given "deference" because "[an] agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."). *See generally* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990) (discussing the reach of the Supreme Court's decision in *Chevron* and limitations on the principles set forth in the case); Russell L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-*Chevron *Assessment*, 22 MEM. ST. U. L. 411 (1992) (current volumes of this law review are cited as U. MEM. L. REV.).

94. *See generally* Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945) (early example of deference to later agency construction); Eskridge, *supra* note 90, at 1502-03 (stating that the general intent model prevailed after 1939). For example, Chief Justice Rehnquist is an ardent supporter of the *Chevron* rule. *See* Merrill, *supra* note 89, at 644-45.

D. The Instrumentalist Approach

The instrumentalist approach to statutory interpretation requires a clear focus on how the correct purposes or policies of the statute would be either advanced or retarded in the context of a particular case.[95] For an instrumentalist judge, the act of interpreting a constitution, statute, or prior common law decision will often call for consideration of sound social policy to resolve leeway in the law. Furthermore, there may be cases in which the law does not command a particular result because the law does not cover the exact situation or because each of two conflicting rules arguably applies. In either case, a judge must make law to help achieve a sound social policy result.[96]

The narrow instrumentalist approach is reflected in the Legal Process school of Hart and Sacks.[97] Under this approach, judicial creativity is limited to interpreting a statute in such a way as to "fit the statute into the legal system as a whole."[98] In pursuing this task, the court is supposed to depart from a pure originalist model by presuming that "'the legislature was made up of reasonable persons pursuing reasonable purposes reasonably,'"[99] even if the court knows that the statute was the product of "'short-run currents of political expedience.'"[100] Gaps left in statutes are filled in by the courts to "rationalize the law," making it "fair, coherent, and purposive," while based on the legislature's actual general purposes in enacting the law.[101]

A classic example of such an approach in practice is Justice Brennan's opinion in the famous statutory interpretation case of *United*

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95. *See generally*, Kelso, *supra* note 19, at 534. For a classic account of instrumentalist methodology, see KARL LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 217 (1962) ("On the side both of case-law and of statutes, where the reason stops there stops the rule; and in working with statutes it is the normal business of the court not only to read the statute but also to implement that statute in accordance with purpose and reason.").

96. *See generally* Kelso, *supra* note 19, at 534-38. *See also* Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 864 (1981) ("[Instrumentalism] necessarily addresses official legal personnel, their roles as 'social engineers,' and the technical skill they must deploy in those roles.").

97. *See* Zeppos, *supra* note 3, at 1600.

98. *See id.* at 1601 (citing HART & SACKS, *supra* note 2, at 1411, 1414).

99. *See id.* (quoting HART & SACKS, *supra* note 2, at 1415).

100. *See id.* (quoting HART & SACKS, *supra* note 2, at 1414).

101. *See id.* at 1602.

Steelworkers of America v. Weber.[102] In *Weber*, the Court held that Title VII does not prohibit voluntary affirmative action by private employers.[103] The Court rejected the argument that the clear text of the statute prohibited affirmative action, reasoning instead that such a reading would violate the broad purpose of the Act to aid minorities.[104] Justice Brennan used bits of legislative history to support this interpretation of Title VII.[105] The Holmesian originalist critique of this interpretation, which appeared in Justice Rehnquist's dissent in the case, was that Justice Brennan's opinion in *Weber* disregarded clear text, and followed a selective reading of legislative history to produce a result compatible not with congressional intent, but with Justice Brennan's view of sound social policy.[106]

An even broader instrumentalist approach to statutory interpretation uses the Legal Process justification for judicial creativity as a stepping-stone for even more creative judicial interpretation and law-making. As noted by Professor John Kernochan, "[s]ome statutes, by virtue of their generality, or otherwise, clearly contemplate judicial creativity."[107] Kernochan continues, "Resort to purpose will resolve many [problems, but] there is often leeway in defining purposes . . . . Where such leeway remains, legislative choices must be made by the courts . . . . The considerations beyond [legislative] intent to be weighed in [interpretation] we may label 'policy' or 'public policy.'"[108]

An example of a court following such an approach to statutory interpretation is *West Winds, Inc. v. M.V. Resolute*.[109] In *West Winds*, the court stated,

> [A] court interpreting a statute should: 'ask itself not only what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society. This approach is required by the insuperable difficulties of readjusting old legislation by the legislative process and by the fact that it is obviously impossible to secure an omniscient legislature.'[110]

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102. 443 U.S. 193 (1979).

103. *See id.* at 209.

104. *See id.* at 201.

105. *See id.* at 202-04.

106. *See id.* at 220-22 (Rehnquist, J., dissenting); *see also* Maltz, *supra* note 33, at 773-76 (discussing *Weber*); Zeppos, *supra* note 3, at 1619 (discussing *Weber*).

107. John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 356 (1976).

108. *Id.* at 356-57.

109. 720 F.2d 1097, 1101 (9th Cir. 1983).

110. *Id.* (quoting Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 469 (1950)). For an in-depth discussion and defense of this very activist model of judicial interpretation see GUIDO CALABRESI, A COMMON LAW FOR THE AGES OF STATUTES (1982). Even the *West Winds* court acknowledged,

II. THE MODERN SUPREME COURT'S APPROACH TO STATUTORY INTERPRETATION

Four main issues separate the various approaches to statutory interpretation discussed above. First is the question of what level of judicial creativity is appropriate in statutory interpretation cases. Second is the question of the appropriate use of legislative history to aid in statutory construction. Third is the question of the use of legislative purpose in statutory construction. Fourth is the question of the appropriate use of subsequent enactments or agency interpretations to guide interpretation of a statute. Focusing on how the modern Supreme Court is resolving these four questions can frame which approach to statutory interpretation the current Court has adopted.

With regard to judicial creativity, it is clear that the modern Supreme Court has rejected the judicial creativity approach of instrumentalism. Such judicial creativity or policy-making typically appears today only in the occasional opinion from Justice Stevens in dissent.[111]

Regarding legislative history, it is clear that the modern Supreme Court has rejected the limitations on legislative history associated with formalism or the traditional natural law approach. Legislative history is routinely used today to help guide statutory interpretation, thus rejecting the traditional natural law approach.[112] Legislative history is also used without a prior finding that the statute's plain meaning is ambiguous or absurd, thus rejecting the formalist Golden Rule or Plain Meaning Rule lim-

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however, that:

> [d]espite the general validity of this approach to statutory interpretation, the judiciary is not the proper branch of government to update complex statutes when legislative decisionmaking is necessary. For example, in the case of the Bankruptcy Reform Act's creation of a new intermediate level of debt priorities covering contributions, Congress was the only branch of government capable of making the necessary change.

West Winds, 720 F.2d at 1102.

111. *See, e.g.*, United States v. Wells, 117 S. Ct. 921, 936 (1997) (Stevens, J., dissenting) (noting the difference between contemporary statutory interpretation and an earlier view when "Congress looked to the courts to play an important role in the lawmaking process by relying on common-law tradition and common sense to fill gaps in the law.").

112. *See, e.g.*, Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264 (1996); Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 513 U.S. 414 (1995); Stephanie Wald, *The Use of Legislative History in Statutory Interpretation: Cases in the 1992 U.S. Supreme Court Term; Scalia Rails But Legislative History Remains on Track*, 23 SW. U. L. REV. 47 (1993).

itations on statutory interpretation.[113] Only Justices Scalia and Thomas argue with relative consistency for a formalist limitation on the use of legislative history.[114]

With regard to purpose, the Court has warmly embraced purposive analysis in its recent cases.[115] This embrace rejects the narrow version of a Holmesian originalist approach which does not countenance such a broad use of purpose.[116]

Finally, the Court today routinely defers to agency construction of administrative statutes to aid in interpreting a statute's meaning.[117] This use of post-enactment agency construction underscores the court's rejection of a narrow Holmesian model.[118]

The only approaches to statutory interpretation thus not rejected by consideration of these four questions regarding statutory construction are a broad Holmesian approach and a modern natural law approach. Under either of these two statutory interpretation models, text and ordinary meaning are primary, but resort can always be had to legislative purpose and to legislative history to check on legislative purpose.[119] Judicial creativity is limited to the creativity intended by the drafters of the statute.[120] Further, under either approach a court will be willing to acknowledge that sometimes the drafters of a statute may intentionally leave a statutory problem unresolved, intending for an agency or the court to resolve the problem in light of later acquired information and experience.[121]

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113. *See, e.g.*, Atherton v. FDIC, 117 S. Ct. 666, 676-77 (1997) (O'Connor, J., concurring, joined by Scalia, J., and Thomas, J.) (chastising the majority for relying on legislative history even with "plain statutory language in hand").

114. *See supra* notes 11-18 and accompanying text.

115. *See, e.g.*, O'Neal v. McAninch, 513 U.S. 432, 444-45 (1995) (noting that the Court's conclusion was consistent with the basic purposes of a writ of habeus corpus); *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 416 (1995) (beginning statutory interpretation analysis by describing "the general purpose" of the Act); Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 192 (1995) (noting that "[w]hile the meaning of the text is by no means clear, this is in our view the only reading that comports with the statutory purpose . . . .").

116. *See supra* text accompanying note 90.

117. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *See generally* Weaver & Schweitzer, *supra* note 93; Sunstein, *supra* note 93.

118. *See supra* text accompanying note 91.

119. *See supra* text accompanying notes 21-26, 36-46 (discussing the natural law model); *supra* text accompanying notes 83-89 (discussing the Holmesian model).

120. *See supra* text accompanying notes 32-35 (discussing the natural law model); *supra* text accompanying notes 81-84, 86 (discussing the Holmesian model).

121. *See supra* notes 21-23 and accompanying text (noting, among other things, under the natural law model, courts had a duty to resolve statutory problems); *supra* text accompanying notes 92-94 (discussing that under the Holmesian model courts

There is, potentially, one slight difference between a broad Holmesian and a modern natural law approach. Related to the last observation above, this difference is the extent to which a judge will be willing to conclude that the legislature intended to leave a problem open for judicial or agency resolution in light of the legislature's purpose. Legislators operating under a natural law tradition are slightly more likely to leave problems open for later judicial or agency construction than legislators operating under a Holmesian tradition. This is because the natural law tradition relies more on reasoned elaboration of the law by later official actors,[122] while the Holmesian tradition is a positivist tradition relying on positive enactments by democratically-elected legislative bodies.[123] Because judges have a tendency to presume that the legislature is operating out of the same interpretative tradition as the judge,[124] a modern natural law judge may be slightly more willing than a Holmesian judge to conclude that the legislature intended to leave a statute open in this way.

In most cases, however, this difference will be slight and hard to detect in practice. Judges in both traditions will conclude in some cases that the legislature intended to leave a statutory provision open for later agency or judicial resolution. Furthermore, this difference is even less pronounced than it may first appear. Natural law judges in the American tradition, operating out of the Enlightenment vision of society based

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may resort to general purpose and post-enactment agency interpretation to help guide statutory interpretation).

122. *See generally* Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at 157-59; Kelso, *supra* note 34, at 1058-60, 1063-64. As this author has noted in a previous article:

> [W]hen history indicates that the Framers and ratifiers embedded broad natural law concepts in the Constitution, like those dealing with the First Amendment, equal protection, and due process, they may have intended "to provide no hard-and-fast answers . . . and to let the answers develop over time in a common-law fashion. After all, the framers were common-law lawyers."

Id. at 1060 (quoting DANIEL FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 77 (1993)).

123. *See* Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at 195-200; Kelso, *supra* note 34, at 1061-63. As this author has noted in a previous article:

> Holmesian judges are less likely than natural law judges to conclude that the Framers and ratifiers intended some concept in the Constitution to reflect an Enlightenment natural law principle. Instead, Holmesian judges are more likely to conclude that the Framers and ratifiers had a specific meaning in mind, which they intended to remain fixed.
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> *Id.* at 1062 (citations omitted).

124. *See* Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at 148-49.

upon a social contract, see their role not to create such openings, or leeway, in a statute, but rather to follow the in-fact intent of the legislature—the same view as judges in the Holmesian tradition.[125]

This substantial similarity between a broad Holmesian approach and a natural law approach to statutory interpretation has been noted as far back as the heyday of Holmesian interpretation in the 1940s and early 1950s.[126] For example, commenting upon the famous Holmesian Judge Learned Hand's approach to statutory interpretation,[127] Professor Robert Lancaster noted in 1956:

> In his *Courts on Trial*, Judge Jerome Frank . . . commented on th[e] practice of Hand's of appealing to the equity of a statute. Commenting on the case of *Usatorre v. The Victoria* he said: 'It there appears that a great American judge [who tells me that he has never studied Aristotle], has expressed views that are a modernized paraphrase of that ancient Greek's thesis.' The learned judge goes on to point out in copious footnotes to the *Usatorre* case the similarity between Hand's technique and that of Aristotle and even Plowden.[128]

Professor Lancaster summarized Judge Learned Hand's approach as follows:

> 1. If the words of the statute are so clear and plain as to admit of no doubts as to how they should be applied; if they clearly express the purpose and intent of the lawmakers, the task of the judge is a relatively easy one; he applies the law as it is written to the solution of the judicial problem before him and lets the chips fall where they may.
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> 2. If the words of the statute are so general as to give little guidance, the judge who is principally concerned with effectuating the intent and realizing the implicit

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125. *See generally id.* at 159-65 (contrasting the American natural law tradition with a "Platonic Guardian" natural law model where judges impose natural law principles on society); Kelso, *supra* note 34, at 1067-73 (discussing how the Enlightenment concept of government as a social contract limits judicial discretion to following those principles placed into the Constitution, or in statutory interpretation into the statute, by the framers and ratifiers of those documents); *supra* text accompanying notes 32-35, 80-88 (stating that natural law and Holmesian approaches are following the in-fact intent of the legislature).

126. *See supra* text accompanying note 89 (discussing the 1940s and early 1950s as heydey of Holmesian interpretation). This period followed a formalist period of interpretation which existed from the Civil War until the 1920s and 1930s. *See* Kelso, *supra* note 19, at 533, 552-63. In addition, the Holmesian heyday pre-dated the instrumentalist Legal Process approach of the late 1950s. *See supra* text accompanying notes 3-7, 97-101 (discussing the Legal Process approach of the 1950s as a version of instrumentalism).

127. For discussion of Judge Learned Hand as a follower of the Holmesian model of judicial decision-making, see Merrill, *supra* note 89, at 629 n.24. *See also* Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at 196 n.372; Kelso, *supra* note 19, at 544 n.37, 545 n.40.

128. Robert S. Lancaster, *Judge Learned Hand and The Limits of Judicial Discretion*, 9 VAND. L. REV. 427, 449 (1956) (alteration in original) (citation omitted).

> purpose of the legislators, must seek to discover that intent and that purpose from the words themselves, the context in which they are used, both rhetorical and cultural, and from a case study of the history of the particular piece of legislation as it was hammered out in the final give-and-take that preceded its final acceptance and final phrasing. Once this intent and this purpose is so discovered the judge must decide the case before him in such a way as to give meaning to the intent of the legislature and fulfillment to its purposes.
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> 3. However, if the lawmakers patently had no intent in respect to the issues before the judge, if they obviously failed to envisage circumstances arising as they did arise, then the judge has his difficult hours. Since he is charged with the responsibility of going no further than the legislators would have gone had they the case before them, it is the judge's duty to fathom out the half-emerged purposes behind the legislation and to savor the very spirit of the enactment. The judicial function here might be compared to what the expert mender does with a hole burned in a fine coat which he reweaves — that is, he fits into the legislative omission legal material of the same pattern and design in such a way as give [sic] succor to those half-expressed, upthrusting purposes, that groping intent.
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> 4. When it is impossible to dig out any intent, when no underlying purpose may be even dimly discerned, the judge should attempt to weigh and balance the competing interests and compromise them in the spirit of the times, never going so far as to accept what, in his opinion, is not yet acceptable in the society of which he is a part, but still moulding the law gently and by degrees in such a manner as to help in giving expression to the jural aspirations of his age. And all of this must be done with such good sense and proper restraint, with such understanding and sympathy as neither to violate the established principles of social conduct nor jeopardize the prestige and high dignity of the judicial office.[129]

In the near future, most Supreme Court decisions can be predicted to reflect this kind of approach to statutory interpretation. As Judge Hand himself noted, this approach represents a middle course between the extremes of either a formalist or instrumentalist approach to statutory interpretation.[130]

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129. *Id.* at 450-51. For a more extensive discussion of Judge Hand's theory of statutory interpretation, with extended quotes from Judge Hand's opinions and law review articles on point, see *id.* at 443-50.

130. *See* Usatorre v. The Victoria, 172 F.2d 434, 441-42 n.16 (1949).

> As I have said, there are two extreme schools . . . . One school says that the judge must follow the letter of the law absolutely. I call this the dictionary [formalist] school. No matter what the result is, he must read the words in their usual meaning and stop where they stop. No judges have ever carried on literally in that spirit, and they would not be long tolerated if they did . . . . The other school would give them almost complete latitude. They argue that a judge should not regard the law; that this has never really been done in the past, and that to attempt ever to do it is an illusion. He must

Of course, within this broad center, certain variations may appear. Occasionally Justice O'Connor, Justice Kennedy, or Chief Justice Rehnquist may join in an opinion reflecting a formalist Plain Meaning Rule approach to statutory interpretation.[131] Occasionally, Justice Breyer, Justice Ginsburg, or Justice Souter may express some sympathy for a narrow instrumentalist Legal Process approach.[132] However, as indicated earlier, the interpretation models of Justices Breyer and O'Connor, as well as Chief Justice Rehnquist, and Justices Kennedy, Souter, and Ginsburg, are more properly described as falling within a broad Holmesian, modern natural law approach to statutory interpretation.[133]

> conform his decision to what honest men would think right, and it is better for him to look into his own heart to find out what that is [an instrumentalist approach].

Id. (quoting Judge Learned Hand).

In contrast, Judge Hand's approach has been dubbed "the proliferation of purpose." *See* Frankfurter, *supra* note 86, at 529. Under this approach it is appropriate to use legislative history to help determine the in-fact intent of the legislature. *See id.* at 538-44. For an argument that Judge Learned Hand would not consult legislative history today given its misuse in recent times, see Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992).

131. *See, e.g.*, Atherton v. FDIC, 117 S. Ct. 666, 676-77 (1997) (Justice O'Connor joining in a Plain Meaning Rule concurrence with Justices Scalia and Thomas); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 463-64, 471-74 (1989) (Kennedy, J., concurring, joined by Rehnquist, C.J., and O'Connor, J.) (Justice Kennedy's concurrence followed a plain meaning approach to reject the majority's analysis which was explicitly grounded in the approach of Judge Learned Hand). As noted earlier, because Chief Justice Marshall operated out of the traditional natural law ban on the use of legislative history to aid statutory construction, a number of his opinions for the Supreme Court also suggest a Plain Meaning Rule, or at least a "plain meaning presumption", approach. *See supra* notes 40, 61, 74 and accompanying text.

132. *See, e.g.*, Breyer, *supra* note 18, at 847 (citing, with approval, HART & SACKS, *supra* note 2, though done in the context of a natural law concern with "coherence and workability, and widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the 'reasonable expectations' of those to whom it applies"). For discussion of the importance of a natural law tradition of coherence, workability, and reasoned elaboration of the law, see Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at 164-65.

133. *See supra* notes 16-18 and accompanying text (noting that all six of these Justices reject Justice Scalia's textualist approach); *supra* notes 41-42, 44-46 and accompanying text (discussing opinions authored by Justices O'Connor and Breyer, and joined by Justices Kennedy, Souter, and Ginsburg, as following a modern natural law approach to interpretation); *supra* notes 89-94 and accompanying text (analyzing Chief Justice Rehnquist as a follower of a broad Holmesian model of statutory interpretation). This basic agreement on how to approach questions of statutory interpretation does not guarantee, of course, the Court will always reach consistent and predictable conclusions in individual cases. This is particularly true for complex and technical statutes, where the interplay of statutory language, legislative policy choices, and background legislative purposes may be difficult for the Court to untangle. For exam-

III. CONCLUSION

This Article has suggested that four main approaches to judicial decision-making have existed in American legal history. These four approaches can be called natural law, formalism, Holmesian, and instrumentalism. Ten years ago, the Court was decidedly split among these four approaches, with one formalist (Justice Scalia); two Holmesians (Chief Justice Rehnquist and Justice White); four instrumentalists (Justices Brennan, Marshall, Blackmun, and Stevens); and two emerging modern natural law voices (Justices O'Connor and Kennedy).[134] The proper approach to statutory interpretation was thus in flux.

On the current Supreme Court, however, this fragmentation has been resolved. Among the current Justices on the Supreme Court, there appear to be five Justices who, to varying extents, approach cases most closely from a modern natural law approach: Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. The Court also has: one clear Holmesian (Chief Justice Rehnquist); two formalists (Justices Scalia and Thomas); and one moderate instrumentalist (Justice Stevens).[135] As discussed earlier in this Article, for statutory interpretation purposes the broad Holmesian and modern natural law approaches agree on a basic model of statutory interpretation.[136] Thus, six Justices on the current Supreme Court share a basic agreement on how to approach questions of statutory interpretation.

Given this fact, there should be relatively few disagreements in the near future on the Supreme Court regarding the proper approach to statutory interpretation. After a decade of debate and sorting out various statutory interpretation theories prompted by the fragmentation on the Supreme Court of a decade ago, we may be headed again for a period of relative quiet in statutory interpretation doctrine.[137]

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ple, although the Court appears to have rejected the more formalist approach to bankruptcy cases of the early 1990s, *see generally* Carlos J. Cuevas, *The Rehnquist Court, Strict Statutory Construction, and the Bankruptcy Code*, 42 CLEV. ST. L. REV. 435, 440-44 (1994), recent bankruptcy cases, although using a modern natural law approach which focuses on ordinary meaning, purpose, precedent, legislative history, canons of construction, and practical reason, have not been a model of clarity. *See, e.g.*, United States v. Reorganized CF & I Fabricators of Utah, Inc., 116 S. Ct. 2106 (1996).

134. *See generally* Kelso, *supra* note 19, at 581-602 & n.266.

135. *See generally* Kelso, *Styles of Constitutional Interpretation*, *supra* note 20, at 227 & n.604.

136. *See supra* text accompanying notes 119-33.

137. Of course, unlike the quiet between the 1950s and 1980s, which was the prod-

uct of a relative consensus on the Legal Process approach to statutory interpretation, the new consensus reflects a modern natural law/broad Holmesian model of interpretation. This is the approach that was predicted to emerge over a decade ago at the beginning of the ferment concerning statutory interpretation. *See* KELSO & KELSO, STUDYING LAW, *supra* note 20, at 314 ("[T]he temper of the Court seems to indicate a return to a Holmesian approach. As noted, this is also the same as the Natural Law approach, updated to permit the use of legislative history materials to discover legislative purpose."). For a brief summary of this approach to interpretation, in outline form, see *id.* at 272-74. For a similar, but more detailed, listing of sources of statutory construction see Zeppos, *supra* note 8, at 1138-41.