

Common-Law Courts in a
Civil-Law System: The Role of
United States Federal Courts
in Interpreting the
Constitution and Laws



ANTONIN SCALIA

THE FOLLOWING essay attempts to explain the current neglected state of the science of construing legal texts, and offers a few suggestions for improvement. It is addressed not just to lawyers but to all thoughtful Americans who share our national obsession with the law.

THE COMMON LAW

The first year of law school makes an enormous impact upon the mind. Many students remark upon the phenomenon. They experience a sort of intellectual rebirth, the acquisition of a whole new mode of perceiving and thinking. Thereafter, even if they do not yet know much law, they do—as the expression goes—“think like a lawyer.”

The overwhelming majority of the courses taught in that first year, and surely the ones that have the most profound effect, teach the substance, and the methodology, of the common law—torts, for example; contracts; property; criminal law.

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American lawyers cut their teeth upon the common law. To understand what an effect that must have, you must appreciate that the common law is not really common law, except insofar as judges can be regarded as common. That is to say, it is not "customary law," or a reflection of the people's practices, but is rather law developed by the judges. Perhaps in the very infancy of Anglo-Saxon law it could have been thought that the courts were mere expositors of generally accepted social practices; and certainly, even in the full maturity of the common law, a well-established commercial or social practice could form the basis for a court's decision. But from an early time—as early as the Year Books, which record English judicial decisions from the end of the thirteenth century to the beginning of the sixteenth—any equivalence between custom and common law had ceased to exist, except in the sense that the doctrine of *stare decisis* rendered prior judicial decisions "custom." The issues coming before the courts involved, more and more, refined questions to which customary practice provided no answer.

Oliver Wendell Holmes's influential book *The Common Law*¹—which is still suggested reading for entering law students—talks a little bit about Germanic and early English custom. But mostly it talks about individual court decisions, and about the judges, famous and obscure, who wrote them: Chief Justice Choke, Doderidge, J., Lord Holt, Redfield, C.J., Rolle, C.J., Hankford, J., Baron Parke, Lord Ellenborough, Peryam, C.B., Brett, J., Cockburn, C.J., Popham, C.J., Hyde, C.J., and on and on and on. Holmes's book is a paean to reason, and to the men who brought that faculty to bear in order to *create* Anglo-American law.

This is the image of the law—the common law—to which an aspiring American lawyer is first exposed, even if he has not read Holmes over the previous summer as he was supposed to. He learns the law, not by reading statutes that promulgate it or treatises that summarize it, but rather by studying the judicial opinions that invented it. This is the famous case-law method,

¹ Oliver Wendell Holmes, Jr., *The Common Law* (1881).

pioneered by Harvard Law School in the last century, and brought to movies and TV by the redoubtable Professor Kingsfield of *Love Story* and *The Paper Chase*. The student is directed to read a series of cases, set forth in a text called a "casebook," designed to show how the law developed. In the field of contracts, for example, he reads, and discusses in class, the famous old case of *Hadley v. Baxendale*,² decided a century and a half ago by the English Court of Exchequer: A mill in Gloucester ground to a halt (so to speak) because of a cracked crankshaft. To get a new one made, it was necessary to send the old one, as a model, to the manufacturer of the mill's steam engine, in Greenwich. The miller sent one of his workers to a carrier's office to see how long the delivery would take; the worker told the carrier's clerk that the mill was stopped, and that the shaft must be sent immediately. The clerk replied that if the shaft was received by noon, it would be delivered the next day. The miller presented the shaft to the carrier before noon the next day and paid the fee to have it transported; but because of the carrier's neglect it was delivered several days late, with the result that several additional days passed before the mill got back into service. The miller sought, as damages for breach of the shipping contract, his lost profits for those days, which were of course many times what the carrier had received as the shipping charge. The carrier said that he was not liable for such remote consequences.

Now this was a fairly subtle and refined point of law. As was the case with most legal points that became the subject of litigation, it could not really be said that there existed a general practice that the court could impose as common, customary law. The court decided, essentially, that the carrier was right, laying down the very important rule, that in a suit for breach of contract not *all* damages suffered because of the breach can be recovered, but only those that "could have been fairly and reasonably contemplated by both the parties when they made [the] contract." The opinion contains some policy reasons for that result, citation of a few earlier opinions by English courts, and

² 9 Ex. 341, 156 Eng. Rep. 145 (1854).

citation of not a single snippet of statutory law—though counsel arguing the case did bring to the court’s attention the disposition set forth in the French Civil Code. For there *was* no relevant English statutory law; contract law was almost entirely the creation and domain of English judges.

I must interject at this point that even according to the new rule—that only reasonably foreseeable damages are recoverable—the miller rather than the carrier *should* have won the case. The court’s opinion simply overlooks the fact that the carrier was *informed* that the mill was stopped; it must have been quite clear to the carrier’s clerk that restarting the mill was the reason for the haste, and that profits would be lost while the mill was idle. But if you think it is terribly important that the case came out wrong, you miss the point of the common law. In the grand scheme of things, whether the right party won is really secondary. Famous old cases are famous, you see, not because they came out right, but because the rule of law they announced was the intelligent one. Common-law courts performed two functions: One was to apply the law to the facts. All adjudicators—French judges, arbitrators, even baseball umpires and football referees—do that. But the second function, and the more important one, was to *make* the law.

If you were sitting in on Professor Kingsfield’s class when *Hadley v. Baxendale* was the assigned reading, you would find that the class discussion would not end with the mere description and dissection of the opinion. Various “hypotheticals” would be proposed by the crusty (yet, under it all, good-hearted) old professor, testing the validity and the sufficiency of the “foreseeability” rule. What if, for example, you are a blacksmith, and a young knight rides up on a horse that has thrown a shoe. He tells you he is returning to his ancestral estate, Blackacre, which he must reach that very evening to claim his inheritance, or else it will go to his wicked, no-good cousin, the sheriff of Nottingham. You contract to put on a new shoe, for the going rate of three farthings. The shoe is defective, or is badly shod, the horse goes lame, and the knight reaches Blackacre too late.

Are you really liable for the full amount of his inheritance? Is it reasonable to impose that degree of liability for three farthings? Would not the parties have set a different price if liability of that amount had been contemplated? Ought there not to be, in other words, some limiting principle to damages beyond mere foreseeability? Indeed, might not that principle—call it presumed assumption of risk—explain why *Hadley v. Baxendale* reached the right result after all, though not for the precise reason it assigned?

What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges!

Besides the ability to think about, and devise, the “best” legal rule, there is another skill imparted in the first year of law school that is essential to the making of a good common-law judge. It is the technique of what is called “distinguishing” cases. That is a necessary skill, because an absolute prerequisite to common-law lawmaking is the doctrine of *stare decisis*—that is, the principle that a decision made in one case will be followed in the next. Quite obviously, without such a principle common-law courts would not be making any “law”; they would just be resolving the particular dispute before them. It is the requirement that future courts adhere to the principle underlying a judicial decision which causes that decision to be a legal rule. (There is no such requirement in the civil-law system, where it is the text of the law rather than any prior judicial interpretation of that text which is authoritative. Prior judicial opinions are consulted for their persuasive effect, much as academic commentary would be; but they are not *binding*.)

Within such a precedent-bound common-law system, it is critical for the lawyer, or the judge, to establish whether the case at hand falls within a principle that has already been decided.

Hence the technique—or the art, or the game—of “distinguishing” earlier cases. It is an art or a game, rather than a science, because what constitutes the “holding” of an earlier case is not well defined and can be adjusted to suit the occasion. At its broadest, the holding of a case can be said to be the analytical principle that produced the judgment—in *Hadley v. Baxendale*, for example, the principle that damages for breach of contract must be foreseeable. In the narrowest sense, however (and courts will squint narrowly when they wish to avoid an earlier decision), the holding of a case cannot go beyond the facts that were before the court. Assume, for example, that a painter contracts with me to paint my house green and paints it instead a god-awful puce. And assume that not I, but my *neighbor*, sues the painter for this breach of contract. The court would dismiss the suit on the ground that (in legal terminology) there was no “privity of contract”: the contract was between the painter and *me*, not between the painter and my neighbor.³ Assume, however, a later case in which a company contracts with me to repair my home computer; it does a bad job, and as a consequence my wife loses valuable files she has stored in the computer. *She* sues the computer company. Now the broad rationale of the earlier case (no suit will lie where there is no privity of contract) would dictate dismissal of this complaint as well. But a good common-law lawyer would argue, and some good common-law judges have held, that that rationale does not extend to this *new* fact situation, in which the breach of a contract relating to something used in the home harms a family member, though not the one who made the contract.⁴ The earlier case, in other words, is “distinguishable.”

It should be apparent that by reason of the doctrine of *stare decisis*, as limited by the principle I have just described, the common law grew in a peculiar fashion—rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it. The first case lays

³ See, e.g., *Monahan v. Town of Methuen*, 558 N.E. 2d 951, 957 (Mass. 1990).

⁴ See, e.g., *Grodstein v. McGivern*, 154 A. 794 (Pa. 1931).

on the board: “No liability for breach of contractual duty without privity”; the next player adds “unless injured party is member of household.” And the game continues.

As I have described, this system of making law by judicial opinion, and making law by distinguishing earlier cases, is what every American law student, every newborn American lawyer, first sees when he opens his eyes. And the impression remains for life. His image of the great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law. That image of the great judge remains with the former law student when he himself becomes a judge, and thus the common-law tradition is passed on.

DEMOCRATIC LEGISLATION

All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy. In most countries, judges are no longer agents of the king, for there are no kings. In England, I suppose they can be regarded as in a sense agents of the legislature, since the Supreme Court of England is theoretically the House of Lords. That was once the system in the American colonies as well; the legislature of Massachusetts is still honorifically called the General Court of Massachusetts. But the highest body of Massachusetts judges is called the Supreme Judicial Court, because at about the time of the founding of our federal republic this country embraced the governmental principle of separation of powers.⁵ That doctrine is praised, as the cornerstone of the

⁵ See *Plaut v. Spendthrift Farms, Inc.*, 115 S. Ct. 1447, 1453–56 (1995).

proposed federal Constitution, in *The Federalist* No. 47. Consider the compatibility of what Madison says in that number with the ancient system of lawmaking by judges. Madison quotes Montesquieu (approvingly) as follows: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*."⁶ I do not suggest that Madison was saying that common-law lawmaking violated the separation of powers. He wrote in an era when the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely "discovered" rather than created. It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact "make" the common law, and that each state has its own.

I do suggest, however, that once we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers) becomes apparent. Indeed, that was evident to many even before legal realism carried the day. It was one of the principal motivations behind the law-codification movement of the nineteenth century, associated most prominently with the name of David Dudley Field, but espoused by many other avid reformers as well. Consider what one of them, Robert Rantoul, had to say in a Fourth-of-July address in Scituate, Massachusetts, in 1836:

Judge-made law is *ex post facto* law, and therefore unjust. An act is not forbidden by the statute law, but it becomes void by judicial construction. The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power.

⁶ *The Federalist* No. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis in original). The reference is to Montesquieu, 1 *The Spirit of the Laws* 152 (Thomas Nugent trans., Hafner Pub. Co., N.Y. 1949).

Judge-made law is special legislation. The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish, and thereby make a new law. The legislature must act on general views, and prescribe at once for a whole class of cases.⁷

This is just by way of getting warmed up. Rantoul continues, after observing that the common law "has been called the perfection of human reason":

The Common Law is the perfection of human reason,—just as alcohol is the perfection of sugar. The subtle spirit of the Common Law is reason double distilled, till what was wholesome and nutritive becomes rank poison. Reason is sweet and pleasant to the unsophisticated intellect; but this sublimated perversion of reason bewilders, and perplexes, and plunges its victims into mazes of error.

The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodat-ing principle, a whole system of law is built up without the authority or interference of the legislator.⁸

The nineteenth-century codification movement espoused by Rantoul and Field was generally opposed by the bar, and hence did not achieve substantial success, except in one field: civil procedure, the law governing the trial of civil cases.⁹ (I have always found it curious, by the way, that the only field in which lawyers and judges were willing to abandon judicial lawmaking

⁷ Robert Rantoul, Oration at Scituate (July 4, 1836), in Kermit L. Hall et al., *American Legal History* 317, 317–18 (1991).

⁸ *Id.* at 318.

⁹ The country's first major code of civil procedure, known as the Field Code (after David Dudley Field, who played a major role in its enactment), was passed in New York in 1848. By the end of the nineteenth century, similar codes had been adopted in many states. See Lawrence M. Friedman, *A History of American Law* 340–47 (1973).

was a field important to nobody except litigants, lawyers, and judges. Civil procedure used to be the *only* statutory course taught in first-year law school.) Today, generally speaking, the old private-law fields—contracts, torts, property, trusts and estates, family law—remain firmly within the control of state common-law courts.¹⁰ Indeed, it is probably true that in these fields judicial lawmaking can be more freewheeling than ever, since the doctrine of *stare decisis* has appreciably eroded. Prior decisions that even the cleverest mind cannot distinguish can nowadays simply be overruled.

My point in all of this is not that the common law should be scraped away as a barnacle on the hull of democracy. I am content to leave the common law, and the process of developing the common law, where it is. It has proven to be a good method of developing the law in many fields—and perhaps the very best method. An argument can be made that development of the bulk of private law by judges (a natural aristocracy, as Madison accurately portrayed them)¹¹ is a desirable limitation upon popular democracy. Or as the point was more delicately put in the late nineteenth century by James C. Carter of New York, one of the ardent opponents of Field's codification projects, "the question is, shall this growth, development and improvement of the law remain under the guidance of men selected by the people on account of their special qualifications for the work" (i.e., judges) or "be transferred to a numerous legislative body, dis-

¹⁰ The principal exception to this statement consists of so-called Uniform Laws, statutes enacted in virtually identical form by all or a large majority of state legislatures, in an effort to achieve nationwide uniformity with respect to certain aspects of some common-law fields. *See, e.g.*, Uniform Commercial Code, 1 U.L.A. 5 (1989); Uniform Marriage and Divorce Act 9A U.L.A. 156 (1987); Uniform Consumer Credit Code, 7A U.L.A. 17 (1985).

¹¹ "The [members of the judiciary department], by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions." *The Federalist* No. 49, at 341 (Jacob E. Cooke ed., 1961).

qualified by the nature of their duties for the discharge of this supreme function?"¹²

But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law judge—the mind-set that asks, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?"—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law. As one legal historian has put it, in modern times "the main business of government, and therefore of law, [is] legislative and executive. . . . Even private law, so-called, [has been] turning statutory. The lion's share of the norms and rules that actually govern[] the country [come] out of Congress and the legislatures. . . . The rules of the countless administrative agencies [are] themselves an important, even crucial, source of law."¹³ This is particularly true in the federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law. Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution. Let me put the Constitution to one side for the time being, since many believe that that document is in effect a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like. I think that is wrong—indeed, as I shall discuss below, I think it frustrates the whole purpose of a written constitution. But we need not pause to debate that point now, since a very small proportion of judges' work is constitutional interpretation in any event. (Even in the Supreme Court, I would estimate that well less than a fifth of the issues we confront are constitutional issues—and probably less than a twentieth if you exclude criminal-law cases.) By far the greatest part of what I

¹² James C. Carter, *The Proposed Codification of Our Common Law* 87 (New York: Evening Post Printing Office 1884).

¹³ Friedman, *supra* note 9, at 590.

and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers. It will not do to treat the enterprise as simply an inconvenient modern add-on to the judge's primary role of common-law lawmaker. Indeed, attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation.

THE SCIENCE OF STATUTORY INTERPRETATION

The state of the science of statutory interpretation in American law is accurately described by a prominent treatise on the legal process as follows:

Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.¹⁴

Surely this is a sad commentary: We American judges have no intelligible theory of what we do most.

Even sadder, however, is the fact that the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory. Whereas legal scholarship has been at pains to rationalize the common law—to devise the *best* rules governing contracts, torts, and so forth—it has been seemingly agnostic as to whether there is even any such thing as good or bad rules of statutory interpretation. There are few law-school courses on the subject, and certainly no required

¹⁴ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

ones; the science of interpretation (if it is a science) is left to be picked up piecemeal, through the reading of cases (good and bad) in substantive fields of law that happen to involve statutes, such as securities law, natural resources law, and employment law.

There is to my knowledge only one treatise on statutory interpretation that purports to treat the subject in a systematic and comprehensive fashion—compared with about six or so on the substantive field of contracts alone. That treatise is Sutherland's *Statutes and Statutory Construction*, first published in 1891, and updated by various editors since, now embracing some eight volumes. As its size alone indicates, it is one of those law books that functions primarily not as a teacher or adviser, but as a litigator's research tool and expert witness—to say, and to lead you to cases that say, why the statute should be interpreted the way your client wants. Despite the fact that statutory interpretation has increased enormously in importance, it is one of the few fields where we have a drought rather than a glut of treatises—fewer than we had fifty years ago, and many fewer than a century ago. The last such treatise, other than Sutherland, was Professor Crawford's one-volume work, *The Construction of Statutes*, published more than half a century ago (1940). Compare that with what was available in the last quarter or so of the nineteenth century, which had, in addition to Sutherland's original 1891 treatise, a *Handbook on the Construction and Interpretation of the Laws* by Henry Campbell Black (author of *Black's Law Dictionary*), published in 1896; *A Commentary on the Interpretation of Statutes* by G. A. Endlich, published in 1888, an Americanized version of Sir Peter Maxwell's 1875 English treatise on the subject; the 1882 *Commentaries on the Written Laws and Their Interpretation* by Joel Prentiss Bishop; the 1874 second edition of Sedgwick's *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*; and the 1871 Potter's *Dwarris on Statutes*, an Americanized edition by Platt Potter of Sir Fortunatus Dwarris's influential English work.

"INTENT OF THE LEGISLATURE"

Statutory interpretation is such a broad subject that the substance of it cannot be discussed comprehensively here. It is worth examining a few aspects, however, if only to demonstrate the great degree of confusion that prevails. We can begin at the most fundamental possible level. So utterly unformed is the American law of statutory interpretation that not only is its methodology unclear, but even its very *objective* is. Consider the basic question: What are we looking for when we construe a statute?

You will find it frequently said in judicial opinions of my court and others that the judge's objective in interpreting a statute is to give effect to "the intent of the legislature." This principle, in one form or another, goes back at least as far as Blackstone.¹⁵ Unfortunately, it does not square with some of the (few) generally accepted concrete rules of statutory construction. One is the rule that when the text of a statute is clear, that is the end of the matter. Why should that be so, if what the legislature *intended*, rather than what it *said*, is the object of our inquiry? In selecting the words of the statute, the legislature might have misspoken. Why not permit that to be demonstrated from the floor debates? Or indeed, why not accept, as proper material for the court to consider, later explanations by the legislators—a sworn affidavit signed by the majority of each house, for example, as to what they *really* meant?

Another accepted rule of construction is that ambiguities in a newly enacted statute are to be resolved in such fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws. We simply assume, for purposes of our search for "intent," that the enacting legislature was aware of all those other laws. Well of course that is a fiction,

¹⁵ See 1 William Blackstone, *Commentaries on the Laws of England* 59–62, 91 (photo. reprint 1979) (1765).

and if we were really looking for the subjective intent of the enacting legislature we would more likely find it by paying attention to the text (and legislative history) of the new statute in isolation.

The evidence suggests that, despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of "objectified" intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. As Bishop's old treatise nicely put it, elaborating upon the usual formulation: "[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, *exactly, the meaning which the subject is authorized to understand the legislature intended.*"¹⁶ And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.

In reality, however, if one accepts the principle that the object of judicial interpretation is to determine the intent of the legislature, being bound by genuine but unexpressed legislative intent rather than the law is only the *theoretical* threat. The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in

¹⁶ Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* 57–58 (Boston: Little, Brown, & Co. 1882) (emphasis added) (citation omitted).

fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law. As Dean Landis of Harvard Law School (a believer in the search for legislative intent) put it in a 1930 article:

[T]he gravest sins are perpetrated in the name of the intent of the legislature. Judges are rarely willing to admit their role as actual lawgivers, and such admissions as are wrung from their unwilling lips lie in the field of common and not statute law. To condone in these instances the practice of talking in terms of the intent of the legislature, as if the legislature had attributed a particular meaning to certain words, when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man.¹⁷

CHURCH OF THE HOLY TRINITY

To give some concrete form to the danger I warn against, let me describe what I consider to be the prototypical case involving the triumph of supposed “legislative intent” (a handy cover for judicial intent) over the text of the law. It is called *Church of the Holy Trinity v. United States*¹⁸ and was decided by the Supreme Court of the United States in 1892. The Church of the Holy Trinity, located in New York City, contracted with an Englishman to

¹⁷ James M. Landis, *A Note on “Statutory Interpretation,”* 43 Harv. L. Rev. 886, 891 (1930).

¹⁸ 143 U.S. 457 (1892).

come over to be its rector and pastor. The United States claimed that this agreement violated a federal statute that made it unlawful for any person to “in any way assist or encourage the importation or migration of any alien . . . into the United States, . . . under contract or agreement . . . made previous to the importation or migration of such alien . . . , to perform labor or service of any kind in the United States” The Circuit Court for the Southern District of New York held the church liable for the fine that the statute provided. The Supreme Court reversed. The central portion of its reasoning was as follows:

It must be conceded that the act of the [church] is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used [in the statute], but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added “of any kind;” and, further, . . . the fifth section [of the statute], which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.¹⁹

The Court proceeds to conclude from various extratextual indications, including even a snippet of legislative history (highly unusual in those days), that the statute was intended to apply only to *manual* labor—which renders the exceptions for actors, artists, lecturers, and singers utterly inexplicable. The Court then shifts gears and devotes the last seven pages of its opinion to a lengthy description of how and why we are a religious

¹⁹ *Id.* at 458–59.

nation. That being so, it says, “[t]he construction invoked cannot be accepted as correct.”²⁰ It concludes:

It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.²¹

Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case.²² Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former. I acknowledge an interpretative doctrine of what the old writers call *lapsus linguae* (slip of the tongue), and what our modern cases call “scrivener’s error,” where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made. For example, a statute may say “defendant” when only “criminal defendant” (i.e., not “civil defendant”) makes sense.²³ The objective import of such a statute is clear enough, and I think it not contrary to sound principles of interpretation, in such extreme cases, to give

²⁰ *Id.* at 472.

²¹ *Id.*

²² End of case, that is, insofar as our subject of statutory construction is concerned. As Professor Tribe’s comments suggest, see *post*, at 92, it is possible (though I think far from certain) that in its application to ministers the statute was unconstitutional. But holding a provision unconstitutional is quite different from holding that it says what it does not; constitutional doubt may validly be used to affect the interpretation of an ambiguous statute, see *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407–08 (1909), but not to rewrite a clear one, see *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933).

²³ See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

the totality of context precedence over a single word.²⁴ But to say that the legislature obviously misspoke is worlds away from saying that the legislature obviously overlegislated. *Church of the Holy Trinity* is cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking.

There are more sophisticated routes to judicial lawmaking than reliance upon unexpressed legislative intent, but they will not often be found in judicial opinions because they are too obvious a usurpation. Calling the court’s desires “unexpressed legislative intent” makes everything seem all right. You will never, I promise, see in a judicial opinion the rationale for judicial lawmaking described in Guido Calabresi’s book, *A Common Law for the Age of Statutes*. It says:

[B]ecause a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, and . . . some of these laws not only could not be reenacted but also do not fit, are in some sense inconsistent with, our whole legal landscape. . . .

. . . . There is an alternate way of dealing with [this] problem of legal obsolescence: granting to courts the authority to determine whether a statute is obsolete, whether in one way or another it should be consciously reviewed. At times this doctrine would approach granting to courts the authority to treat statutes as if they were no more and no less than part of the common law.²⁵

Indeed. Judge Calabresi says that the courts have already, “in a common law way, . . . come to the point of exercising [the law-revising authority he favors] through fictions, subterfuges, and indirection,”²⁶ and he is uncertain whether they should continue

²⁴ *Id.* at 527 (Scalia, J., concurring).

²⁵ Guido Calabresi, *A Common Law for the Age of Statutes* 2 (1982) (emphasis in original).

²⁶ *Id.* at 117.

down that road or change course to a more forthright acknowledgment of what they are doing.

Another modern and forthright approach to according courts the power to revise statutes is set forth in Professor Eskridge's recent book, *Dynamic Statutory Interpretation*. The essence of it is acceptance of the proposition that it is proper for the judge who applies a statute to consider "'not only what the statute 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.'"²⁷ The law means what it ought to mean.

I agree with Judge Calabresi (and Professor Eskridge makes the same point) that many decisions can be cited which, by subterfuge, accomplish precisely what Calabresi and Eskridge and other honest nontextualists propose. As I have said, "legislative intent" divorced from text is one of those subterfuges; and as I have described, *Church of the Holy Trinity* is one of those cases. What I think is needed, however, is not rationalization of this process but abandonment of it. It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.

It may well be that the statutory interpretation adopted by the Court in *Church of the Holy Trinity* produced a desirable result; and it may even be (though I doubt it) that it produced the unexpressed result actually intended by Congress, rather than merely the one desired by the Court. Regardless, the decision was wrong because it failed to follow the text. The text is the law, and it is the text that must be observed. I agree with Justice Holmes's remark, quoted approvingly by Justice Frankfurter in his article on the construction of statutes: "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I

²⁷ William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 50 (1994) (quoting Arthur Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 Vand. L. Rev. 456, 469 (1950)).

only want to know what the words mean."²⁸ And I agree with Holmes's other remark, quoted approvingly by Justice Jackson: "We do not inquire what the legislature meant; we ask only what the statute means."²⁹

TEXTUALISM

The philosophy of interpretation I have described above is known as textualism. In some sophisticated circles, it is considered simpleminded—"wooden," "unimaginative," "pedestrian." It is none of that. To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.

Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. The difference between textualism and strict constructionism can be seen in a case my Court decided four terms ago.³⁰ The statute at issue provided for an increased jail term if, "during and in relation to . . . [a] drug trafficking crime," the defendant "uses . . . a firearm." The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for

²⁸ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538 (1947).

²⁹ Oliver Wendell Holmes, *Collected Legal Papers* 207 (1920), quoted in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring).

³⁰ *Smith v. United States*, 508 U.S. 223 (1993).

the cocaine was an unloaded firearm, which he showed to the drug-seller. The Court held, I regret to say, that the defendant was subject to the increased penalty, because he had "used a firearm during and in relation to a drug trafficking crime." The vote was not even close (6–3). I dissented. Now I cannot say whether my colleagues in the majority voted the way they did because they are strict-construction textualists, or because they are not textualists at all. But a proper textualist, which is to say my kind of textualist, would surely have voted to acquit. The phrase "uses a gun" fairly connoted use of a gun for what guns are normally used for, that is, as a weapon. As I put the point in my dissent, when you ask someone, "Do you use a cane?" you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway.

But while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible. My favorite example of a departure from text—and certainly the departure that has enabled judges to do more freewheeling lawmaking than any other—pertains to the Due Process Clause found in the Fifth and Fourteenth Amendments of the United States Constitution, which says that no person shall "be deprived of life, liberty, or property without due process of law." It has been interpreted to prevent the government from taking away certain liberties *beyond* those, such as freedom of speech and of religion, that are specifically named in the Constitution. (The first Supreme Court case to use the Due Process Clause in this fashion was, by the way, *Dred Scott*³¹—not a desirable paragon.) Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require—notably, a validly enacted

³¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).

law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.

Of all the criticisms leveled against textualism, the most mindless is that it is "formalistic." The answer to that is, *of course it's formalistic!* The rule of law is *about* form. If, for example, a citizen performs an act—let us say the sale of certain technology to a foreign country—which is prohibited by a widely publicized bill proposed by the administration and passed by both houses of Congress, *but not yet signed by the President*, that sale is lawful. It is of no consequence that everyone knows both houses of Congress and the President wish to prevent that sale. Before the wish becomes a binding law, it must be embodied in a bill that passes both houses and is signed by the President. Is that not formalism? A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbor with a video camera has filmed the crime; and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism. It is what makes a government a government of laws and not of men.

CANONS AND PRESUMPTIONS

Textualism is often associated with rules of interpretation called the canons of construction—which have been widely criticized, indeed even mocked, by modern legal commentators. Many of the canons were originally in Latin, and I suppose that alone is enough to render them contemptible. One, for example, is *expressio unius est exclusio alterius*. Expression of the one is exclusion of the other. What it means is this: If you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay. The inclusion of the one class is an implicit exclusion of the other. Another

frequently used canon is *noscitur a sociis*, which means, literally, "it is known by its companions." It stands for the principle that a word is given meaning by those around it. If you tell me, "I took the boat out on the bay," I understand "bay" to mean one thing; if you tell me, "I put the saddle on the bay," I understand it to mean something else. Another canon—perhaps representing only a more specific application of the last one—is *ejusdem generis*, which means "of the same sort." It stands for the proposition that when a text lists a series of items, a general term included in the list should be understood to be limited to items of the same sort. For instance, if someone speaks of using "tacks, staples, screws, nails, rivets, and other things," the general term "other things" surely refers to other fasteners.

All of this is so commonsensical that, were the canons not couched in Latin, you would find it hard to believe anyone could criticize them. But in fact, the canons have been attacked as a sham. As Karl Llewellyn put it in a much-cited derisive piece in the 1950 *Vanderbilt Law Review*: "[T]here are two opposing canons on almost every point. An arranged selection is appended. Every lawyer must be familiar with them all: they are still needed tools of argument."³² Llewellyn appends a list of canons in two columns, the left-hand column headed "Thrust," and the right-hand column "Parry." But if one examines the list, it becomes apparent that there really are not two opposite canons on "almost every point"—unless one enshrines as a canon whatever vapid statement has ever been made by a willful, law-bending judge. For example, the first canon Llewellyn lists under "Thrust," supported by a citation of Sutherland, is "A statute cannot go beyond its text." Hooray for that. He shows as a "Parry," with no citation of either Sutherland or Black (his principal authorities throughout), the following: "To effect its purpose a statute may be implemented beyond its text." That is *not* a generally accepted canon, though I am sure some willful judges have used it—the judges in *Church of the*

³² Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

Holy Trinity, for example. And even if it were used more than rarely, why not bring to the canons the same discernment that Llewellyn brought to the study of common-law decisions? Throw out the bad ones and retain the good. There are a number of other faux canons in Llewellyn's list, particularly in the "Parry" column. For example, Parry No. 8: "Courts have the power to inquire into real—as distinct from ostensible—purpose." Never heard of it.

Mostly, however, Llewellyn's "Parries" do not contradict the corresponding canon but rather merely show that it is not absolute. For example, Thrust No. 13: "Words and phrases which have received judicial construction before enactment are to be understood according to that construction." Parry: "Not if the statute clearly requires them to have a different meaning." Well, certainly. Every canon is simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield. But that does not render the entire enterprise a fraud—not, at least, unless the judge wishes to make it so.

Another aspect of textual interpretation that merits some discussion is the use of certain presumptions and rules of construction that load the dice for or against a particular result. For example, when courts construe criminal statutes, they apply—or should apply, or say they apply—what is known as the "rule of lenity," which says that any ambiguity in a criminal statute must be resolved in favor of the defendant.³³ There is a rule which says that ambiguities in treaties and statutes dealing with Indian rights are to be resolved in favor of the Indians.³⁴ And a rule, used to devastating effect in the conservative courts of the 1920s and 1930s, that statutes in derogation of the common law are to be narrowly construed.³⁵ And another rule, used to equally

³³ See *United States v. Bass*, 404 U.S. 336, 347–49 (1971).

³⁴ See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766–68 (1985).

³⁵ See *Robert C. Reed & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304–05 (1959).

devastating effect in the liberal courts of more recent years, that “remedial statutes” are to be liberally construed to achieve their “purposes.”³⁶ There is a rule that waivers of sovereign immunity are to be narrowly construed.³⁷ And a rule that it requires an “unmistakably clear statement” for a federal statute to eliminate state sovereign immunity.³⁸

To the honest textualist, all of these preferential rules and presumptions are a lot of trouble. It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight. How “narrow” is the narrow construction that certain types of statute are to be accorded; how clear does a broader intent have to be in order to escape it? Every statute that comes into litigation is to some degree “ambiguous”; how ambiguous does ambiguity have to be before the rule of lenity or the rule in favor of Indians applies? How implausible an implausibility can be justified by the “liberal construction” that is supposed to be accorded remedial statutes? And how clear is an “unmistakably clear” statement? There are no answers to these questions, which is why these artificial rules increase the unpredictability, if not the arbitrariness, of judicial decisions. Perhaps for some of the rules that price is worth it. There are worse things than unpredictability and occasional arbitrariness. Perhaps they are a fair price to pay for preservation of the principle that one should not be held criminally liable for an act that is not clearly proscribed; or the principle that federal interference with state sovereign immunity is an extraordinary intrusion.

But whether these dice-loading rules are bad or good, there

³⁶ See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). For more on my aversion to this particular rule, see Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581–86 (1990).

³⁷ See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34 (1992).

³⁸ See *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989).

is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it. The rule of lenity is almost as old as the common law itself,³⁹ so I suppose that is validated by sheer antiquity. The others I am more doubtful about. The rule that statutes in derogation of the common law will be narrowly construed seems like a sheer judicial power-grab. Some of the rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a “clear statement” rule is merely normal interpretation. And the same, perhaps, with waiver of sovereign immunity.

LEGISLATIVE HISTORY

Let me turn now from canons and presumptions, which have long been used in statutory construction, to an interpretive device whose widespread use is relatively new: legislative history, by which I mean the statements made in the floor debates, committee reports, and even committee testimony, leading up to the enactment of the legislation. My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative

³⁹ Sir Peter Maxwell writes that the rule dates back to the time when there were over one hundred capital offenses under English law, including “to cut down a cherry-tree in an orchard, or to be seen for a month in the company of gypsies.” Sir Peter Benson Maxwell, *On the Interpretation of Statutes* 239 (London: William Maxwell & Son 1875). See also *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.”).

indication of a statute's meaning. This was the traditional English, and the traditional American, practice. Chief Justice Taney wrote:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself*; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.⁴⁰

That uncompromising view generally prevailed in this country until the present century. The movement to change it gained momentum in the late 1920s and 1930s, driven, believe it or not, by frustration with common-law judges' use of "legislative intent" and phonied-up canons to impose their own views—in those days views opposed to progressive social legislation. I quoted earlier an article by Dean Landis inveighing against such judicial usurpation. The solution he proposed was not the banishment of legislative intent as an interpretive criterion, but rather the use of legislative history to place that intent beyond manipulation.⁴¹

Extensive use of legislative history in this country dates only from about the 1940s. It was still being criticized by such respected justices as Frankfurter and Jackson as recently as the 1950s. Jackson, for example, wrote in one concurrence:

I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including

⁴⁰ Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845) (emphasis added).

⁴¹ See Landis, *supra* note 17, at 891–92.

statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.⁴²

In the past few decades, however, we have developed a legal culture in which lawyers routinely—and I do mean routinely—make no distinction between words in the text of a statute and words in its legislative history. My Court is frequently told, in briefs and in oral argument, that "Congress said thus-and-so"—when in fact what is being quoted is not the law promulgated by Congress, nor even any text endorsed by a single house of Congress, but rather the statement of a single committee of a single house, set forth in a committee report. Resort to legislative history has become so common that lawyerly wags have popularized a humorous quip inverting the oft-recited (and oft-ignored) rule as to when its use is appropriate: "One should consult the text of the statute," the joke goes, "only when the legislative history is ambiguous." Alas, that is no longer funny. Reality has overtaken parody. A few terms ago, I read a brief that *began* the legal argument with a discussion of legislative history and then continued (I am quoting it verbatim): "Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language."⁴³

As I have said, I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law. What is most exasperating about the use of legislative history, however, is that it does not even make sense for

⁴² United States v. Public Utils. Comm'n of Cal., 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

⁴³ Brief for Petitioner at 21, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989), *quoted in* Green v. Bock Laundry Machine Co., 490 U.S. 504, 530 (1989) (Scalia, J., concurring).

those who *accept* legislative intent as the criterion. It is much more likely to produce a false or contrived legislative intent than a genuine one. The first and most obvious reason for this is that, with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by the legislative history are bound to be false. Those issues almost invariably involve points of relative detail, compared with the major sweep of the statute in question. That a majority of both houses of Congress (never mind the President, if he signed rather than vetoed the bill) entertained *any* view with regard to such issues is utterly beyond belief. For a virtual certainty, the majority was blissfully unaware of the *existence* of the issue, much less had any preference as to how it should be resolved.

But assuming, contrary to all reality, that the search for "legislative intent" is a search for something that exists, that something is not likely to be found in the archives of legislative history. In earlier days, when Congress had a smaller staff and enacted less legislation, it might have been possible to believe that a significant number of senators or representatives were present for the floor debate, or read the committee reports, and actually voted on the basis of what they heard or read. Those days, if they ever existed, are long gone. The floor is rarely crowded for a debate, the members generally being occupied with committee business and reporting to the floor only when a quorum call is demanded or a vote is to be taken. And as for committee reports, it is not even certain that the members of the issuing *committees* have found time to read them, as demonstrated by the following Senate floor debate on a tax bill, which I had occasion to quote in an opinion written when I was on the Court of Appeals:

MR. ARMSTRONG. . . . My question, which may take [the chairman of the Committee on Finance] by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as to the inten-

tion of Congress from the committee report which accompanies this bill?

MR. DOLE. I would certainly hope so

MR. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?

MR. DOLE. Did I write the committee report?

MR. ARMSTRONG. Yes.

MR. DOLE. No; the Senator from Kansas did not write the committee report.

MR. ARMSTRONG. Did any Senator write the committee report?

MR. DOLE. I have to check.

MR. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?

MR. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked. . . .

MR. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

MR. DOLE. I am working on it. It is not a bestseller, but I am working on it.

MR. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?

MR. DOLE. No.

MR. ARMSTRONG. Mr. President, the reason I raise the issue is not perhaps apparent on the surface, and let me just state it: The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.

. . . .

. . . If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.

... [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.⁴⁴

Ironically, but quite understandably, the more courts have relied upon legislative history, the less worthy of reliance it has become. In earlier days, it was at least genuine and not contrived—a real part of the legislation's *history*, in the sense that it was part of the *development* of the bill, part of the attempt to inform and persuade those who voted. Nowadays, however, when it is universally known and expected that judges will resort to floor debates and (especially) committee reports as authoritative expressions of "legislative intent," affecting the courts rather than informing the Congress has become the primary purpose of the exercise. It is less that the courts refer to legislative history because it exists than that legislative history exists because the courts refer to it. One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten "floor debate"—or, even better, insert into a committee report.

There are several common responses to these criticisms. One is "So what, if most members of Congress do not themselves know what is in the committee report. Most of them do not know the details of the legislation itself, either—but that is valid nonetheless. In fact, they are probably more likely to read and understand the committee report than to read and understand the text." That ignores the central point that genuine knowledge is a precondition for the supposed authoritativeness of a committee report, and not a precondition for the authoritativeness of a statute. The committee report has no claim to our attention

⁴⁴ 128 Cong. Rec. 16918–19, 97th Cong., 2d Sess. (July 19, 1982), quoted in *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

except on the assumption that it was the *basis* for the house's vote and thus represents the house's "intent," which we (presumably) are searching for. A statute, however, has a claim to our attention simply because Article I, section 7 of the Constitution provides that since it has been passed by the prescribed majority (*with or without adequate understanding*), it is a law.

Another response simply challenges head-on the proposition that legislative history must reflect congressional thinking: "Committee reports are *not* authoritative because the full house presumably knows and agrees with them, but rather because the full house *wants* them to be authoritative—that is, leaves to its committees the details of its legislation." It may or may not be true that the houses entertain such a desire; the sentiments of Senator Armstrong quoted earlier suggest that it is not. But if it is true, it is unconstitutional. "All legislative Powers herein granted," the Constitution says, "shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."⁴⁵ The legislative power is the power to make laws, not the power to make legislators. It is nondelegable. Congress can no more authorize one committee to "fill in the details" of a particular law in a binding fashion than it can authorize a committee to enact minor laws. Whatever Congress has not *itself* prescribed is left to be resolved by the executive or (ultimately) the judicial branch. That is the very essence of the separation of powers. The only conceivable basis for considering committee reports authoritative, therefore, is that they are a genuine indication of the will of the entire house—which, as I have been at pains to explain, they assuredly are not.

I think that Dean Landis, and those who joined him in the prescription of legislative history as a cure for what he called "willful judges," would be aghast at the results a half century later. On balance, it has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law. Since there are no rules as to how

⁴⁵ U.S. Const. art. I, 1.

much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility. If the willful judge does not like the committee report, he will not follow it; he will call the statute not ambiguous enough, the committee report too ambiguous, or the legislative history (this is a favorite phrase) “as a whole, inconclusive.” It is ordinarily very hard to demonstrate that this is false so convincingly as to produce embarrassment. To be sure, there are ambiguities involved, and hence opportunities for judicial willfulness, in other techniques of interpretation as well—the canons of construction, for example, which Dean Landis so thoroughly detested. But the manipulability of legislative history has not *replaced* the manipulabilities of these other techniques; it has *augmented* them. There are still the canons of construction to play with, *and in addition* legislative history. Legislative history provides, moreover, a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled.

I think it is time to call an end to a brief and failed experiment, if not for reasons of principle then for reasons of practicality. I have not used legislative history to decide a case for, I believe, the past nine terms. Frankly, that has made very little difference (since legislative history is ordinarily so inconclusive). In the only case I recall in which, had I followed legislative history, I *would* have come out the other way, the rest of my colleagues (who *did* use legislative history) did not come out the other way either.⁴⁶ The most immediate and tangible change the abandonment of legislative history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense. When I was head of the Office of Legal Counsel in the

⁴⁶ See *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991); *id.*, at 616 (Scalia, J., concurring).

Justice Department, I estimated that 60 percent of the time of the lawyers on my staff was expended finding, and poring over, the incunabula of legislative history. What a waste. We did not use to do it, and we should do it no more.

INTERPRETING CONSTITUTIONAL TEXTS

Without pretending to have exhausted the vast topic of textual interpretation, I wish to address a final subject: the distinctive problem of constitutional interpretation. The problem is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text. Chief Justice Marshall put the point as well as it can be put in *McCulloch v. Maryland*:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.⁴⁷

In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.

Take, for example, the provision of the First Amendment that forbids abridgment of “the freedom of speech, or of the press.” That phrase does not list the full range of communicative

⁴⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored. In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole. That is not strict construction, but it is reasonable construction.

It is curious that most of those who insist that the drafter's intent gives meaning to a statute reject the drafter's intent as the criterion for interpretation of the Constitution. I reject it for both. I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay's pieces in *The Federalist*, and to Jefferson's writings, even though neither of them was a Framers. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.

But the Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning. The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and "find" that changing law. Seems familiar, doesn't it? Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures. Recall the words I quoted earlier from the Fourth-of-July speech of the avid codifier Robert Rantoul:

"The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator."⁴⁸ Substitute the word "people" for "legislator," and it is a perfect description of what modern American courts have done with the Constitution.

If you go into a constitutional law class, or study a constitutional law casebook, or read a brief filed in a constitutional law case, you will rarely find the discussion addressed to the text of the constitutional provision that is at issue, or to the question of what was the originally understood or even the originally intended meaning of that text. The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean. Should there be—to take one of the less controversial examples—a constitutional right to die? If so, there is.⁴⁹ Should there be a constitutional right to reclaim a biological child put out for adoption by the other parent? Again, if so, there is.⁵⁰ If it is good, it is so. Never mind the text that we are supposedly construing; we will smuggle these new rights in, if all else fails, under the Due Process Clause (which, as I have described, is textually incapable of containing them). Moreover, what the Constitution meant

⁴⁸ Rantoul, *supra* note 7, at 318.

⁴⁹ See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

⁵⁰ See *In re Kirchner*, 649 N.E.2d 324, 333 (Ill.), *cert. denied*, 115 S. Ct. 2599 (1995).

yesterday it does not necessarily mean today. As our opinions say in the context of our Eighth Amendment jurisprudence (the Cruel and Unusual Punishments Clause), its meaning changes to reflect "the evolving standards of decency that mark the progress of a maturing society."⁵¹

This is preeminently a common-law way of making law, and not the way of construing a democratically adopted text. I mentioned earlier a famous English treatise on statutory construction called *Dwarris on Statutes*. The fourth of Dwarris's Maxims was as follows: "An act of Parliament cannot alter by reason of time; but the common law may, since *cessante ratione cessat lex*."⁵² This remains (however much it may sometimes be evaded) the formally enunciated rule for statutory construction: statutes do not change. Proposals for "dynamic statutory construction," such as those of Judge Calabresi and Professor Eskridge, are concededly avant-garde. The Constitution, however, even though a democratically adopted text, we formally treat like the common law. What, it is fair to ask, is the justification for doing so?

One would suppose that the rule that a text does not change would apply a fortiori to a constitution. If courts felt too much bound by the democratic process to tinker with statutes, when their tinkering could be adjusted by the legislature, how much more should they feel bound not to tinker with a constitution, when their tinkering is virtually irreparable. It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that "evolving standards of decency" always "mark progress," and that societies always "mature," as opposed to

⁵¹ *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), quoting from *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁵² Fortunatus Dwarris, *A General Treatise on Statutes, with American Notes and Additions by Platt Potter* 122 (Albany, N.Y. 1871).

rot. Neither the text of such a document nor the intent of its framers (whichever you choose) can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts.

FLEXIBILITY AND LIBERALITY OF THE LIVING CONSTITUTION

The argument most frequently made in favor of The Living Constitution is a pragmatic one: Such an evolutionary approach is necessary in order to provide the "flexibility" that a changing society requires; the Constitution would have snapped if it had not been permitted to bend and grow. This might be a persuasive argument if most of the "growing" that the proponents of this approach have brought upon us in the past, and are determined to bring upon us in the future, were the *elimination* of restrictions upon democratic government. But just the opposite is true. Historically, and particularly in the past thirty-five years, the "evolving" Constitution has imposed a vast array of new constraints—new inflexibilities—upon administrative, judicial, and legislative action. To mention only a few things that formerly could be done or not done, as the society desired, but now cannot be done:

- admitting in a state criminal trial evidence of guilt that was obtained by an unlawful search;⁵³
- permitting invocation of God at public-school graduations;⁵⁴
- electing one of the two houses of a state legislature the way the United States Senate is elected, i.e., on a basis that does not give all voters numerically equal representation;⁵⁵
- terminating welfare payments as soon as evidence of fraud is

⁵³ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁴ See *Lee v. Weisman*, 505 U.S. 577 (1992).

⁵⁵ See *Reynolds v. Sims*, 377 U.S. 533 (1964).

received, subject to restoration after hearing if the evidence is satisfactorily refuted;⁵⁶

- imposing property requirements as a condition of voting;⁵⁷
- prohibiting anonymous campaign literature;⁵⁸
- prohibiting pornography.⁵⁹

And the future agenda of constitutional evolutionists is mostly more of the same—the creation of *new* restrictions upon democratic government, rather than the elimination of old ones. *Less* flexibility in government, not *more*. As things now stand, the state and federal governments may either apply capital punishment or abolish it, permit suicide or forbid it—all as the changing times and the changing sentiments of society may demand. But when capital punishment is held to violate the Eighth Amendment, and suicide is held to be protected by the Fourteenth Amendment, all flexibility with regard to those matters will be gone. No, the reality of the matter is that, generally speaking, devotees of The Living Constitution do not seek to facilitate social change but to prevent it.

There are, I must admit, a few exceptions to that—a few instances in which, historically, greater flexibility has been the result of the process. But those exceptions serve only to refute another argument of the proponents of an evolving Constitution, that evolution will always be in the direction of greater personal liberty. (They consider that a great advantage, for reasons that I do not entirely understand. All government represents a balance between individual freedom and social order, and it is not true that every alteration of that balance in the direction of greater individual freedom is necessarily good.) But in any case,

⁵⁶ See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁵⁷ See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

⁵⁸ See *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995).

⁵⁹ Under current doctrine, pornography may be banned only if it is “obscene,” see *Miller v. California*, 413 U.S. 15 (1973), a judicially crafted term of art that does not embrace material that excites “normal, healthy sexual desires,” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).

the record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights. The most obvious refutation is the modern Court’s limitation of the constitutional protections afforded to property. The provision prohibiting impairment of the obligation of contracts, for example, has been gutted.⁶⁰ I am sure that We the People agree with that development; we value property rights less than the Founders did. So also, we value the right to bear arms less than did the Founders (who thought the right of self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may *like* the abridgment of property rights and *like* the elimination of the right to bear arms; but let us not pretend that these are not *reductions of rights*.

Or if property rights are too cold to arouse enthusiasm, and the right to bear arms too dangerous, let me give another example: Several terms ago a case came before the Supreme Court involving a prosecution for sexual abuse of a young child. The trial court found that the child would be too frightened to testify in the presence of the (presumed) abuser, and so, pursuant to state law, she was permitted to testify with only the prosecutor and defense counsel present, with the defendant, the judge, and the jury watching over closed-circuit television. A reasonable enough procedure, and it was held to be constitutional by my Court.⁶¹ I dissented, because the Sixth Amendment provides that “[i]n *all* criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him” (emphasis added). There is no doubt what confrontation meant—or indeed means today. It means face-to-face, not watching from

⁶⁰ See *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934).

⁶¹ See *Maryland v. Craig*, 497 U.S. 836 (1990).

another room. And there is no doubt what one of the major purposes of that provision was: to induce *precisely* that pressure upon the witness which the little girl found it difficult to endure. It is difficult to accuse someone to his face, particularly when you are lying. Now no extrinsic factors have changed since that provision was adopted in 1791. Sexual abuse existed then, as it does now; little children were more easily upset than adults, then as now; a means of placing the defendant out of sight of the witness existed then as now (a screen could easily have been erected that would enable the defendant to see the witness, but not the witness the defendant). But the Sixth Amendment nonetheless gave *all* criminal defendants the right to *confront* the witnesses against them, because that was thought to be an important protection. The only significant things that *have* changed, I think, are the society's sensitivity to so-called psychic trauma (which is what we are told the child witness in such a situation suffers) and the society's assessment of where the proper balance ought to be struck between the two extremes of a procedure that assures convicting 100 percent of all child abusers, and a procedure that assures acquitting 100 percent of those falsely accused of child abuse. I have no doubt that the society is, as a whole, happy and pleased with what my Court decided. But we should not pretend that the decision did not *eliminate* a liberty that previously existed.

LACK OF A GUIDING PRINCIPLE FOR EVOLUTION

My pointing out that the American people may be satisfied with a reduction of their liberties should not be taken as a suggestion that the proponents of The Living Constitution *follow* the desires of the American people in determining how the Constitution should evolve. They follow nothing so precise; indeed, as a group they follow nothing at all. Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that

there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution. *Panta rei* is not a sufficiently informative principle of constitutional interpretation. What is it that the judge must consult to determine when, and in what direction, evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle? As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy.

I do not suggest, mind you, that originalists always agree upon their answer. There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply. Sometimes (though not very often) there will be disagreement regarding the original meaning; and sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomena. How, for example, does the First Amendment guarantee of “the freedom of speech” apply to new technologies that did not exist when the guarantee was created—to sound trucks, or to government-licensed over-the-air television? In such new fields the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment.

But the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*; that the very

act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to that change is unknown and unknowable. The originalist, if he does not have all the answers, has many of them. The Confrontation Clause, for example, requires confrontation. For the evolutionist, on the other hand, every question is an open question, every day a new day. No fewer than three of the Justices with whom I have served have maintained that the death penalty is unconstitutional,⁶² *even though its use is explicitly contemplated in the Constitution*. The Due Process Clause of the Fifth and Fourteenth Amendments says that no person shall be deprived of life without due process of law; and the Grand Jury Clause of the Fifth Amendment says that no person shall be held to answer for a capital crime without grand jury indictment. No matter. Under The Living Constitution the death penalty may have *become* unconstitutional. And it is up to each Justice to decide for himself (under no standard I can discern) when that occurs.

In the last analysis, however, it probably does not matter what principle, among the innumerable possibilities, the evolutionist proposes to determine in what direction The Living Constitution will grow. Whatever he might propose, at the end of the day an evolving constitution will evolve the way the majority wishes. The people will be willing to leave interpretation of the Constitution to lawyers and law courts so long as the people believe that it is (like the interpretation of a statute) essentially lawyers' work—requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth. But if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean, in light of the “evolving standards of decency that mark the progress of a maturing society”—well, then, they will look

⁶² See *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); *Callins v. Collins*, 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting from denial of certiorari).

for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it. More specifically, they will look for judges who agree with *them* as to what the evolving standards have evolved to; who agree with *them* as to what the Constitution *ought* to be.

It seems to me that that is where we are heading, or perhaps even where we have arrived. Seventy-five years ago, we believed firmly enough in a rock-solid, unchanging Constitution that we felt it necessary to adopt the Nineteenth Amendment to give women the vote. The battle was not fought in the courts, and few thought that it could be, despite the constitutional guarantee of Equal Protection of the Laws; that provision did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot but permitted distinctions on the basis not only of age but of property and of sex. Who can doubt that if the issue had been deferred until today, the Constitution would be (formally) unamended, and the courts would be the chosen instrumentality of change? The American people have been converted to belief in The Living Constitution, a “morphing” document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.