BOOK REVIEW

Statutory Interpretations and the Therapy of the Obvious

*Edward L. Rubin**

JUDGING STATUTES. By Robert A. Katzmann. New York: Oxford University Press. 2014. Pp. 184. $24.95.

I. INTRODUCTION

Arthur Koestler wrote that "the more original a discovery the more obvious it seems afterward."[1] The same may be said about theories of law, and specifically about Robert Katzmann's new book, *Judging Statutes*.[2] Judge Katzmann's approach to statutory interpretation seems so plausible and balanced that it is hard to believe that anyone ever believed anything else. In this particular case, however, there is in fact an "anything else." It is, of course, Justice Antonin Scalia's campaign to displace intentionalist or purposivist approaches to interpretation with what has come to be called "textualism,"[3] and his related effort to rule out reliance on

* University Professor of Law and Political Science, Vanderbilt University Law School.

1. ARTHUR KOESTLER, THE ACT OF CREATION 109 (Penguin Books 1990) (1964).

2. ROBERT A. KATZMANN, JUDGING STATUTES (2014).

3. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650–56 (1990); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)); Abbe R. Gluck, *The States as Laboratories of Statutory*

legislative history.[4] While Scalia has failed to persuade a majority of Supreme Court Justices, judges in general, or scholarly observers, his belligerently stated views have produced observable results in the increased reluctance of judges to utilize other interpretive approaches, and the continued reluctance of scholars to dismiss his arguments as patently incorrect.[5] Katzmann makes the implicitly recognized defects in Scalia's arguments genuinely obvious. Once it has been widely read, as it definitely should be, the judicial and scholarly reluctance will, ones hopes, be overcome. Nothing is likely to persuade Scalia, but this book should have the salutary effect of leaving him alone to wave his dictionary at the empty air.

This is not the only sense, however, in which Katzmann has revealed the obvious. There is, in American legal scholarship, a longstanding and deeply embedded reluctance to recognize the impact of legislation on our legal system. It is glaringly apparent in the case of legal education, where most law schools continue to offer a first-year required curriculum that either predominantly or exclusively focuses on common law, and to teach upper-level statutory subjects through the lens of judicial decisions. Judges and practicing lawyers do not have the luxury to be so unrealistic, but even when they have come to terms with the pragmatic significance of modern legislation, they, like the legal academy, have failed to recognize its conceptual significance. The result has been a general difficulty in integrating statutes, and specifically their undeniably political character, with legal doctrine. Legal Process scholars made a good start in carrying out this necessary enterprise, but their conceptual difficulties, revealed in a certain skittishness about political reality, caused them to miss the obvious solution.

Katzmann's book provides this missing solution, the second and more significant way in which he reveals the overlooked obvious. It is a virtue of this book that it is brief and crisply written, with none of the unnecessary elaboration that more than occasionally afflicts legal scholarship. But it is a defect of the book that, in its modesty, it does not fully explicate the way in which it embraces the nature of the

Interpretation: Methodological Consensus and the New Modified Textualism, 119 YALE L.J. 1750, 1762–63 (2010).

4. For a general statement of his views, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1998); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

5. *See* KATZMANN, *supra* note 2, at 44–47; Gluck, *supra* note 3, at 1754 ("And far from being 'dead,' Justice Scalia's textualist statutory interpretation methodology has taken startlingly strong hold in some states . . . ."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29–36 (2006).

modern legal system and solves the longstanding problem of integrating politically motivated statutes with the legal doctrine by which such statutes are judged.

Part II of this Review discusses the way that *Judging Statutes* provides the obvious answer to Justice Scalia's textualism. In doing so, it summarizes the book, which deals explicitly with the subject. Part III discusses the way that the book resolves the difficulties that the Legal Process School encountered in its effort to integrate law and politics, and thus provides the obvious answer to this apparent dilemma. In doing so, this Review goes beyond the book's specific claims and considers its long-term impact.

II. JUDGING STATUTES AS LEGISLATION

Katzmann begins the book with an introduction describing the issues that he faces as a judge when dealing with a case that involves the meaning of a statute.[6] Since he serves in a court of general jurisdiction, these issues are, of course, the general question of statutory interpretation. But once he has introduced the problem, Katzmann does not proceed to a discussion of the judicial role or to the theory of statutory interpretation. Rather, he describes the way in which the legislature—Congress in his case—enacts statutes.[7] He then describes the process that agencies, the primary implementer of modern legislation, use to implement these statutes, and the various ways, apart from statutory language, by which Congress makes its views about this process known to the agencies: confirmation hearings, disapprovals of specific regulations,[8] and the committee reports that accompany virtually all important bills.[9] As Katzmann points out, the agencies are exquisitely sensitive to these signals. With respect to committee reports, he makes the obvious but often-ignored point that these reports are not only executive summaries for busy legislators but also instructions to the implementing agency.[10]

---

6. KATZMANN, *supra* note 2, at 3–10.

7. *Id*. at 11–22.

8. As Katzmann notes, the legislative veto (allowing either chamber, one chamber, or a committee to negative a regulation without further action) was declared unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). But he also notes that Congress has continued to use this device, through both formal and informal means, relying on its power rather than its legal right. KATZMANN, *supra* note 2, at 25–26; *see* Congressional Review Act, 5 U.S.C. §§ 801–803 (2012) (requiring agencies to submit regulations to Congress prior to their effective date).

9. KATZMANN, *supra* note 2, at 23–28.

10. *Id*. at 25 ("[I]f Congress passes energy legislation with an accompanying committee report providing detailed direction to the Department of Energy, it is unfathomable that the Secretary of Energy or any other responsible agency officials would ignore that report, let alone

Katzmann's discussion of these topics is brief, and anyone familiar with the basics of American government will not learn very much from them. But the essential point, which must be learned and relearned, is that the task of interpreting statutes necessarily begins with understanding and appreciating the way those statutes are created, and the way they function in defining and controlling the basic operation of our governmental system. In making this point, Katzmann joins a trend in recent statutory scholarship, and he particularly relies on work by Lisa Bressman, Abbe Gluck, William Eskridge, Victoria Nourse, Jane Schacter, and Cass Sunstein.[11] Standard theories of statutory interpretation have tended to treat statutes as written documents that simply appear before a court, a text presenting linguistic problems that the court must solve. A variation of this approach analogizes the judge's task to literary criticism and suggests that some of the techniques that have been developed for understanding literary texts can be used by judicial interpreters as well.[12] While there is a good deal to be learned from this insight, it dangerously invites the seductive premise of "juriscentrism"—namely, the idea that judges are the primary creators of the law. This was true in the common law era, when the English monarchy was content to have judges formulate legal rules as long as those rules were "common" to all its subjects, but it is obviously no longer a reality. In the modern administrative state, legislatures and agencies formulate the law. Judges play a subsidiary role. The texts that are presented to them are not merely verbal formulations that merit attention on the basis of their intrinsic quality, like literary works. Rather, these texts, often of barbarous linguistic quality, are exercises of government authority, the basic instructions that guide the complex operations of the regulatory

not read that report."). Katzmann's example involves the Department that Rick Perry forgot, although he was quite certain that he wanted to abolish it. *Id.* This jejune approach to modern government (would we really be willing to rely on market forces to ensure the safety of nuclear power plants or control the export of nuclear technology?) provides a reminder of how readily American public discourse discounts the central role of regulation, and thus modern legislation.

11. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pts. 1 & 2), 65 STAN. L. REV. 901 (2013), 66 STAN. L. REV. 725 (2014); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

12. For a comprehensive and thoughtful discussion, see GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (2000).

process. The judge's role is subsidiary to the legislature and the agencies. This is Katzmann's basic and essential message.

It is only at this point, having established the institutional structure in which the task of modern statutory interpretation is set, that Katzmann addresses the approach and techniques that judges should utilize. The basic approach that follows from his realistic and contextualized view of the interpretive project is purposivist: it is the job of the judge to interpret the statute so that it achieves the result that the legislature intended.[13] As everyone agrees, this enterprise begins with the text of the statute. In a good number of cases, that will be the end of the inquiry, as no question is raised about the meaning of the relevant provisions. In other cases, and for a variety of reasons, the meaning will be less than clear, and judges will need to rely on additional sources of information. One of the best sources, Katzmann argues, is legislative history.[14] This term encompasses a wide variety of materials, such as floor statements and public declarations by the sponsor, but the most reliable materials, and the ones that make reliance on legislative history a preferred technique, are committee and conference reports.

The committee report is valuable because it is produced by the same group of legislators who determined the form of the bill that the chamber voted on, thereby completing one of the formal steps by which the bill becomes a law. The conference report is valuable because it is produced by the same group of legislators who negotiated the form of the bill that the two chambers revoted on and sent to the President. In both cases, the legislators who vote and revote on the bill are more likely to read these reports than the bill itself. Thus, the reports represent the legislators' understanding of the statute that they enacted. In many cases, the committee report will elicit a written dissent from the minority. Oftentimes, that dissent will take issue with the substance of the statute, but since legislators are neither stupid nor naïve, the minority will also draw attention to any way in which the report does not accurately reflect the statutory language. Both reports will be carefully read by the implementing agency, and thus reflect the understanding of the statutory language by the institution that is primarily responsible for translating that language into governmental action. Agency officials are also likely to pay attention to a dissent from influential legislators, particularly if it seems possible that control of the chamber will shift in the next election.

13. KATZMANN, *supra* note 2, at 29–54.

14. *Id*. at 35–39.

Having drawn attention to these obvious realities, Katzmann then addresses Scalia's effort to ignore them. He identifies four rationales for Scalia's position: first, that committee or conference reports, unlike the text of an enacted law, have no constitutional status; second, that use of legislative history gives judges discretion to choose sources that support their own policy preferences; third, that ignoring legislative history will compel legislators to draft statutes more precisely; and fourth, that legislation is the product of interest group pressures that can also influence and distort the standard items of legislative history.[15] Katzmann acknowledges that these arguments have had some beneficial effects in counteracting the careless use of legislative history,[16] but he critiques them for their failure to recognize the institutional realities of our legal system.

While it is certainly true that the Constitution validates the text of properly enacted statutes as the law of the land, the interpretive question arises when the meaning of that text is uncertain. Committee and conference reports provide legally valid ways to resolve such uncertainty: the Constitution grants the two chambers authority over their procedures, and both chambers, in turn, have used this authority to establish committees and authorize reports.[17] It is also true that judges can choose among various sources of legislative history, but committee and conference reports, at least, are definitive.[18] They are almost always produced for significant legislation, and there is generally only one official report from each committee responsible for drafting the bill and bringing it to the floor.[19] If the deciding judge ignores relevant material in these reports in an effort to increase her discretion, the reviewing or dissenting judges will almost certainly draw attention to them, often with the assistance of the opposing attorneys. Scalia's preferred source of information for resolving constitutional uncertainties is the dictionary, but the law often relies on specialized, nondictionary meanings. For example, although the word "purposivism" appears prominently in

15. *Id.* at 40–42.

16. *Id.* at 44–47.

17. *Id.* at 48–49.

18. Regarding committee reports, see FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 64–80 (2008). Regarding conference reports, see CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 218–25 (3d ed. 1997).

19. Traditionally, there is one such committee in each chamber. *See* DEERING & SMITH, *supra* note 18; RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973). In recent years, there has been a tendency to refer important bills to multiple committees, *see* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 11–20 (3d ed. 2007), but the assignments themselves are unambiguous, and each committee continues to issue a report.

discussions of statutory interpretation, including Katzmann's book and this Review, it is absent from any standard dictionary of which I am aware.[20] Moreover, the absence of a nationally authorized dictionary, the proliferation of privately published dictionaries that the free market produces, and the fact that our language was developed by a foreign country and is currently subject to amendment by that country and at least three others,[21] render dictionaries much more variable—and thus their use more discretionary—than conference and committee reports.[22]

Scalia's other two rationales display a distinctly and improperly negative view of Congress as a coordinate branch of government. The uncertain meaning of statutory provisions does not typically arise from the irresponsibility of legislators[23] or from their desire to mislead the public about their subservience to special interest groups,[24] but rather from the inherent limitations of language and the enormous complexities of modern government. Pointedly ignoring the basic legislative materials that members of Congress rely on in deciding how to vote will not eliminate ambiguous statutory language; such interpretive difficulties cannot be eliminated. They inevitably arise, which is why we attach such importance to the choice of judges. And while legislators certainly want to be reelected, they are also motivated by a variety of other factors that preclude the claim that the materials they produce to support their enactments are merely special interest group distortions of those enactments.[25]

---

20. Dictionary.com, in its mechanically helpful way, suggests that the user might have meant permissivism, a definition that Justices Scalia and Thomas might want to argue for, but can hardly claim to be definitive. *See* Dictionary Definition Search for "Purposivism," DICTIONARY.COM, http://dictionary.reference.com/ browse/purposivism?s=t (last visited Dec. 27, 2014).

21. In her song "Royals," Lorde, who is from New Zealand, uses the phrase "a torn-up town, no postcode envy." LORDE, *Royals*, *on* PURE HEROINE (Universal Music Group 2013). Neither of these adjectives appear in the dictionary at the present time. What do they mean? It would be inadvisable to assume that they are not in use in her native, English-speaking country or, given that the song is a number-one hit, that they will not find their way into American usage. As this process of language growth proceeds, some dictionaries will acknowledge these words and others will not.

22. *See* KATZMANN, *supra* note 2, at 43; James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 539–64 (2013).

23. For examples of works attributing the uncertainty of statutory language to legislator irresponsibility, see THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 92–126 (2d ed. 1979); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

24. *See* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 37–41 (1982).

25. KATZMANN, *supra* note 2, at 51–53.

Katzmann makes these general arguments concrete by recounting the way he decided three statutory interpretation cases where he wrote the opinion for his court.[26] The three cases he chooses were all reconsidered by the Supreme Court, which affirmed two and reversed the third.[27] These illustrations are valuable, on their own terms, in revealing the thinking process of a leading federal judge; but their main role, of course, is to exemplify and elaborate the general approach to statutory interpretation that the book advances. Choosing cases that were reconsidered by the Supreme Court contributes to this function by providing both supportive and conflicting views. In the cases Katzmann has selected, his most notable supporter is Justice Breyer—not surprising, since Breyer is an equally committed purposivist. His most notable opponent, interestingly, is not Scalia but Justice Thomas, who wrote dissents in both of the cases that were upheld (Scalia joined one of these dissents but sided with the majority in the other) and joined the majority in the case that was reversed. Thomas is Scalia's only ally on the Court in rejecting the use of legislative history; more generally, he is another proponent of textualism, which, as he uses it, is sufficiently unsophisticated to verge into what might be more accurately described as literalism. In describing these cases, Katzmann presents his own analysis, and then the agreements and disagreements of the Justices, allowing the readers to decide for themselves which approach makes sense. By the time most readers get to this point in the book, the answer will be obvious.

III. JUDGING STATUTES AS POLITICAL ACTION

There is an old joke about a factory manager who asks a workman (yes, a work*man*—it's an old joke) to replace a machine that has been providing good service to the factory, but is now showing serious signs of wear and seems likely to fail in the coming months. "I want you to build the new machine so that it's just like the old one," the manager tells the workman. So the workman does, making new parts that are as worn down and degraded as the ones on the original machine.

---

26. *Id.* at 58–89.

27. *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (reversing Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 (2d Cir. 2005)); Dolan v. U.S. Postal Serv. 546 U.S. 481 (2006) (upholding Raila v. United States, 355 F.3d 118 (2d Cir. 2004)); United States v. Small, 544 U.S. 385 (2005) (upholding United States v. Gayle, 342 F.3d 89 (2d Cir. 2003)).

For Lewis Carroll, being more literal than a child is a sign of madness:

> "Take some more tea," the March Hare said to Alice,
> very earnestly.
> "I've had nothing yet," Alice replied in an offended tone:
> "so I can't take any more."
> "You mean you can't take any *less*," said the Hatter.[28]

Taking an instruction literally often overlooks or ignores the instruction's purpose.[29] Under what circumstances, other than a joke, would a subordinate choose to do this? After all, the only thing that the superior could possibly want the subordinate to do is to implement its purposes. A purposivist interpretation of an instruction is really the only interpretation that makes sense, the only one that the superior could possibly want. Any subordinate knows this, or at least should know it. Barring stupidity or mental impairment,[30] the main reason that the subordinate might use a literalist or textualist interpretation of the instruction, rather than a purposivist one, is to frustrate the superior's purposes or embarrass it in the eyes of some third party. This is, in other words, what modern therapists describe as passive-aggressive behavior.[31]

The history of statutory interpretation in Anglo-American law suggests that judges and juriscentric scholars harbor precisely such an attitude. England's common law judges received their authority from King Henry II during the last half of the twelfth century,[32] and for the next several hundred years, they were left to develop the law—that is, the royal law common to all of England—on their own, subject to no one other than the king.[33] The subsequent establishment of

28. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING-GLASS 73 (Penguin: Signet Classics, 1960) (1865, 1871).

29. *See* William N. Eskridge, Jr., *"Fetch Some Soupmeat*," 16 CARDOZO L. REV. 2209, 2209–10 (1995).

30. Overly literal interpretation of language is a well-known symptom of autism and related spectrum disorders. *See* Peter Mitchell, Rebecca Saltmarsh & Helen Russell, *Overly Literal Interpretations of Speech in Autism: Understanding That Messages Arise from Minds*, 38 J. CHILD PSYCHOLOGY & PSYCHIATRY 685 (1997).

31. *See* Gina M. Fusco, *Passive-Aggressive Personality Disorder (Negativistic Personality Disorder)*, *in* COGNITIVE THERAPY OF PERSONALITY DISORDERS 276 (Aaron T. Beck, Denise D. Davis & Arthur Freeman eds., 2014).

32. *See* W. L. WARREN, HENRY II, at 330–61 (1973).

33. Common law was a great innovation because, in the Early Middle Ages, law was typically local. Each county (the area ruled by a count), each city, and (frequently) each manor, had its own law, and it was by that law that disputes between residents were judged. *See* R. van

Parliament, and the gradual growth of its rulemaking power, imposed a second superior on these judges.[34] Not only did this additional authority consist in part of commoners, and thus of people who, unlike the king, were of lower social status than most judges, but—what was worse—it displayed a much greater interest in formulating law itself. English judges responded with the doctrine that statutes in derogation of the common law must be strictly construed.[35] This doctrine survives into modern times and continues to be invoked by the Supreme Court as a canon of statutory construction.[36] Although it seems to conflict with the English principle of legislative supremacy and with Article I of the U.S. Constitution, it may have made some sense at the time when common law was the dominant source of legal rules and possessed (or at least was thought to possess) an intrinsic coherence. Its justification, at that time, was first, that the coherence of the common law was an independent legal value, and second, that the legislature could be presumed to recognize that value when it enacted statutes.

With the advent of the administrative state, and its displacement of increasingly large swatches of the common law by statute, this interpretive approach is no longer viable.[37] It is one thing

---

Caenegem, *Government, Law and Society*, *in* THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350–C. 1450, at 174, 179–88 (J.H. Burns ed., 1988); WARREN, *supra* note 32, at 317–20.

34. *See generally* JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY (2001) (describing the origins, development, and legal basis for parliamentary sovereignty in England). For a detailed study of the extent to which the English Parliament had obtained lawmaking authority by the Elizabethan era, see DAVID DEAN, LAW-MAKING AND SOCIETY IN LATE ELIZABETHAN ENGLAND: THE PARLIAMENT OF ENGLAND, 1584–1601 (2002).

35. *See* 3 NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 61:1 (7th ed. 2014); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 400–403 (1908); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12–14 (1936).

36. *See* United States v. Texas, 507 U.S. 529, 534 (1993); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). The formulation of the principle is that " '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.' " *Texas*, 507 U.S. at 534 (quoting *Isbrandtsen*, 343 U.S. at 783).

37. *See* Jefferson B. Fordham & Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 442 (1950); *see also* JAMES WILLARD HURST, DEALING WITH STATUTES 62–64 (1982) (taking issue with the "abstract character" of the presumption; Barbara Page, *Statutes in Derogation of Common Law: The Canon as an Analytical Tool*, 1956 WIS. L. REV. 78 (examining use of the presumption in nineteenth century Wisconsin courts and concluding that it did not advance the policies it purported to uphold); Pound, *supra* note 35 (arguing that the presumption is inapplicable to contemporary law); Stone, *supra* note 35, at 1298–19 (indicating that the presumption would prevent administrative agencies from performing effectively).

to strictly construe a statute allowing those who locate a mineral vein to follow it below another person's property in the situation when common law establishes general rules of property ownership, including the rule that land below the surface of a property belongs to the surface owner.[38] It is quite another thing to strictly construe regulatory statutes, such as the Interstate Commerce Act or the National Labor Relations Act, that establish comprehensive regulatory schemes in place of common law, or the Social Security Act or the Endangered Species Act that establish regulatory schemes beyond the boundaries of common law. Langdell and his immediate followers dealt with this situation by simply declaring that regulatory statutes were politics, not law. They existed, and they had to be interpreted, but common law decisions were seen as the only government action meriting study by prospective attorneys. The prevalence of this passive-aggressive approach to legislation explains the amazing fact that the first year of law school continued to consist exclusively of common law courses long after the advent of the American administrative state, and why many legal academics continue to insist—to this day—that only such courses teach the student to "think like a lawyer."[39]

After World War II, a new approach to legal scholarship, the Legal Process School, began to acknowledge that regulation had transformed American law. Legal Process featured a notably more realistic and sophisticated institutional analysis than any that had previously appeared in American legal scholarship. According to the Legal Process scholars, different institutions are better equipped to accomplish different governmental tasks. Courts are best at adjudicating disputes between adverse parties, thus maintaining civil order, but legislation is best used when the polity wants to achieve affirmative social policies.[40] If parties have a dispute regarding rights created by a statute, that dispute properly comes before a court, and

38. *See* St. Louis Mining & Milling Co. v. Mont. Mining Co., 194 U.S. 235, 237–38 (1904).

39. *See* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007) (presenting a language-based study of legal education that reveals a common base of legal reasoning among students); Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 610–11 (2007).

40. For general presentations of this institutional analysis, see, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT (1960); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Although Fuller's article was only published in 1978, it was written in 1957, revised in 1959 and 1961, and widely circulated thereafter. *See* Kenneth I. Winston, Special Editor's Note to Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 353 (1978).

the court will often be required to determine the meaning of the statute. In doing so, according to Legal Process analysis, it can be guided by the institutional function of the statute. Thus courts, in their dispute-resolution capacity, should interpret statutes in a manner that effectuates the social policy that the statute was intended to achieve. This is the mode of interpretation that is generally described as purposivism. As Legal Process became the leading approach to scholarship and teaching in the decades following the War, this purposivist interpretation took its place alongside linguistic interpretation (the language of the text) and intentionalist interpretation (the legislative history) in the standard litany of considerations that most federal judges employed when deciding a statutory case.[41]

But how does a judge determine the purpose of a statute? The Legal Process answer, famously provided by Henry Hart and Albert Sachs, is that the legislature is presumed to consist of "reasonable persons pursuing reasonable purposes reasonably."[42] This formulation has the great virtue of combining a proper respect for the unquestionable authority of legislation with an equivalent respect for the legislature. It declares that judges will treat the legislature as a coordinate branch of government and will presume that legislators are striving to achieve the public good and are capable of crafting effective instrumentalities for doing so. Purposivist interpretation, by itself, cannot resolve many of the interpretive problems that courts face, but when combined with linguistic and intentionalist approaches, it can be extremely helpful. When choosing between two possible meanings of a statutory word or phrase, it asks which one best implements the statute's general purposes. The same question can be usefully asked when choosing between two equally authoritative items of legislative history—the House and Senate Committee Reports, for example, or floor statements by the sponsor of the statute and the author of a relevant amendment.

41. For a contemporary and more fully developed version of this approach, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

42. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). This collection of materials, although not published until 1994, was drafted during the late 1950s and widely circulated in the years that followed. *See* Willliam N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HART & SACKS, *supra*, at li, lxxxvii–xcvi, cii–civ.

Katzmann's examples are instructive in this context. In one case,[43] he had to decide whether an exception to the waiver of sovereign immunity for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter"[44] applied when someone tripped over a negligently placed postal package.[45] The term "negligent transmission" was the source of the uncertainty. Katzmann relied in part on the anomaly that inclusion of this case within the exception would preclude recovery if the person tripped over a negligently placed package but not over some other object (the postal worker's jacket, for example) that had been placed in an equally negligent and injurious manner. There was some legislative history, but to choose which statements to rely upon and to buttress this choice with a more convincing rationale, Katzmann invoked the purpose of the exception. Failure to deliver a letter might result in anything from no damages (junk mail, a casual note) to massive ones (acceptance of a time-sensitive contract offer). The Postal Service could not possibly know which was which, and would thus incur excessive precautionary expense or be subject to excessive damages, whereas the sender would be in an ideal position to know whether precaution against nondelivery was needed, and to what extent. This reasoning clearly does not apply to an object that causes injury to someone, even if that object consists of mail in the process of transmission. The Supreme Court affirmed in a related case,[46] but Justice Thomas dissented, citing the dictionary definition of "transmit."[47] His opinion, which Katzmann quotes at some length, deconstructs itself.

Purposivism is thus a highly promising approach to the complex task of statutory interpretation and a healthy antidote to the passive-aggressiveness of traditional statutory interpretation, but the Legal Process School's formulation of it proved vulnerable to refutation. The Critical Legal Studies Movement's general attack against Legal Process included the argument that public officials such as legislators cannot be assumed to be "reasonable" people, or have "reasonable" purposes. Rather, they are members of a dominant elite, using the rhetoric of legality to maintain an unequal and oppressive political and social system.[48] The Law and Economics Movement

43. *See* Raila v. United States, 355 F.3d 118 (2d Cir. 2004).

44. 28 U.S.C. § 2680(b) (2012).

45. *See* KATZMANN, *supra* note 2, at 58–70.

46. *See* Dolan v. U.S. Postal Serv., 546 U.S. 481 (2006).

47. *Id.* at 493–94 (Thomas, J., dissenting).

48. *See, e.g.*, ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); Duncan Kennedy, *The Structure of Blackstone's* Commentaries, 28 BUFF. L. REV. 205, 374–79 (1979);

asserted that legislators, reasonable or rational though they may be, are not pursuing reasonable purposes but rather their own self-interest, specifically their desire to get reelected.[49] While Critical Legal Studies has faded, Law and Economics continues to exercise substantial influence, and in fact lies behind at least one of Scalia's rationales for his textualist approach. More importantly, both movements, and a variety of other cultural developments, punctured the genial, post-War sensibility that informed the Legal Process view of legislatures.[50]

Legal Process thus made a useful start in developing an interpretive approach that rejected the common law hostility toward legislation and recognized the role of statutes and agencies in the modern state. But it foundered on its Panglossian characterization of the legislature, a characterization that rapidly succumbed to more critical or cynical perspectives. There were several reasons for this lapse, but the one that is most relevant here, in the sense that it is a feature of American legal scholarship, is an unwillingness to acknowledge the centrality of politics. Legal Process managed to overcome the longstanding aversion to statutes by only sanitizing them, depicting them as the product of a calm, deliberative decisionmaking process that was akin to judicial decisionmaking, or at least the standard image of judicial decisionmaking. Its institutional analysis provided valuable therapy for the legal academy, but enough of the old passive-aggressive attitude remained to impede a fully modern interpretive approach.

Ronald Dworkin's work exemplifies this continued hostility toward legislation. Dworkin's goal was to rehabilitate judicial decisionmaking in response to the attacks from Critical Legal Studies and Law and Economics; his claim was that judges can—and should—decide cases on the basis of underlying principles that constitute the essence of our legal system.[51] After a while, it occurred to him that our

---

Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 787–788 (1983) (referring to this notion as "legislative tyranny").

49. *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); Aranson et al., *supra* note 24, at 37–41; Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347 (1991) (arguing that the development of blue sky laws in 1911–1913 was less a response to serious securities market abuses than to rivalry among interest groups responding to economic conditions).

50. *See* Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1398–1402 (1996).

51. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

legal system was no longer dominated by judicial decisions but rather by statutes. In response to this awkward but unavoidable fact, Dworkin decided that statutes should possess a quality that he called integrity, by which he meant that they would be based on the same underlying principles that in his view governed common law.[52] Like his Legal Process predecessors, the point of this rather fanciful exercise was to remove politics from legislation. He was willing to incorporate statutes into his system, but only by sanitizing them in the alembic of imagined rationality.

The solution to this problem is obvious, and Katzmann's book reveals it. His essential message is for judges to stop being passive-aggressive and accept the realities of modern government. The legislature, as the people's representative, is the dominant lawmaker in that government, and it makes law, as it is expected to, on the basis of politics. Those laws are not supposed to reflect the underlying and enduring principles of the Anglo-American legal system. They are not supposed to fit into a coherent pattern, and they need not conform to any external observer's conception of reasonableness. Rather, they state the policies that our elected representatives choose to adopt and the instructions they issue to the administrative agencies that they create to implement those policies. In other words, the legislature consists of political persons pursuing political purposes politically.

From this perspective, the courts' basic task, as we all know and yet that Katzmann still needs to tell us, is to assist the political legislature in achieving its goals.[53] A judge's role is subsidiary and secondary: subsidiary to the legislature and secondary to the agencies. To be sure, federal courts are also assigned the separate role of interpreting and enforcing the Constitution. In this context, they function as the legislature's superior, striking down its decisions if they conflict with our nation's highest law. But that same highest law instructs the courts that, in the absence of a conflict, they are the agent of the legislature and are supposed to aid it in carrying out the policies it has established, not concoct policies of their own out of resentment at the legislature's superior role or discomfort with the administrative state that the legislature has established.

As Katzmann is well aware, broad principles of this sort will not provide a set of decision rules by which individual cases can be resolved. That is one reason why he devotes a large proportion of his book to discussing specific cases, through which he can illustrate the way in which purposivist interpretation combines with the use of

52. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

53. *See* KATZMANN, *supra* note 2, at 8–10, 52, 104–05.

linguistic analysis and legislative history.[54] But his focus on the purpose of statutes, and his acceptance of their essentially political nature, provides a powerful means of disciplining the interpretive process and guiding the other techniques that courts properly employ. As he states: "In our constitutional system in which Congress, the people's branch, is charged with enacting laws, how Congress makes its purposes known—through text and reliable accompanying materials—should be respected."[55]

When the text is unclear due to the uncertainties of language, the vagaries of circumstance, or the necessary generality with which Congress must typically speak, linguistic analysis of various sorts possesses evident value. But purposivism makes clear that such analysis is not an exercise in literary criticism or verbal puzzle solving. The passive-aggressive attitude toward legislation that continues to prevail among many judges often leads them to treat the text's uncertainty as an intellectual or moral failure. They pull dictionaries off the shelf to show how more knowledgeable and more precise they are about the English language, deploy canons with fancy Latin names to demonstrate their superior grasp of phraseology and context, and roam across the length and breadth of their jurisdiction's legal code to impose coherence, logic, and order on what they see as thoughtless or ad hoc enactments. But such linguistic pyrotechnics only reveal a misunderstanding of the judge's role and of the nature of modern administrative government. Linguistic analysis should be guided by purposivism, as Katzmann suggests. The words in a statute should be interpreted according to ordinary, intuitive usage, not dictionary definitions, because they are being used by the legislature to tell agencies how to carry out its purposes. The use of canons should be limited to helping courts understand what the legislature was trying to accomplish through its statutory phraseology. Demands for some overall coherence of the legal code should be abandoned; each statute has its own purpose, and should be read on its own terms so that this purpose is advanced by the interpretive process.

Just as judges are not literary critics or linguistic analysts, they are not historians. The use of legislative history is free from most of the hostility that infuses textualist approaches, but it can become a similarly self-contained intellectual exercise, pursued for its own sake. The problem is not reliability, as Scalia suggests, because the relative

54. *See* Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559 (2010) (arguing that there is no single theory of interpretation that courts should apply at all times, but that which, and what combination of, methods of interpretation they use should depend on the requirements of a given situation).

55. KATZMANN, *supra* note 2, at 104.

value of different sources is well understood. Everyone recognizes that materials on which legislatures rely when they vote—primarily committee and conference reports, and secondarily floor statements by sponsors or amenders—carry much more weight than statements made in committee or outside the chamber. Rather, the difficulty with legislative history is context; things that have one meaning when the statute was enacted may have quite different meanings at a later time. Thus, the absence of any indication in the legislative history of the Food, Drug, and Cosmetic Act, passed by Congress in 1938, that the Act was intended to give the implementing agency authority to regulate tobacco products is not particularly relevant now that the health hazards of tobacco have become so clear.[56] Once again, the purpose of the statute—in this case, to regulate substances introduced into the body that are injurious to health—is the crucial consideration. It does not displace legislative history, but it should guide its use.

IV. CONCLUSION

To help judges and nonjudges overcome their longstanding hostility toward legislation, *Judging Statutes* provides the therapy of the obvious. It is obvious that a subordinate institution should structure its actions to advance the purposes of its superior. It is equally obvious that, in the case of legislation, those purposes are political. Modern legislation is not designed to produce a coherent body of legal rules nor to leave in place the purportedly coherent body of rules that common law judges developed. It is not designed to conform to some external standard of reason or reasonableness. Rather, it represents the political decisions of our nation's primary policymaking body, the choices that it makes in establishing and controlling the administrative process that represents the essence of modern government. That is the obvious basis for statutory interpretation that Katzmann's book reveals to us. As he says, in conclusion:

> Statutes . . . are expressions by the people's representatives of this [N]ation's aspirations . . . . That has been so throughout our country's experience, across a whole range of issues, mundane and dramatic, bearing on the very fabric of our values . . . .

56. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (holding that the FDA lacked authority to regulate tobacco products). In fact, Congress overrode this decision in the Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (codified at 21 U.S.C. § 387 (2012)). The final vote on the bill was 79–17 in the Senate and 298–112 in the House. H.R. 1256, 111th Cong. (2009). *See generally* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (discussing Congress's general practice of overriding the Supreme Court's decisions, which it does with surprising frequency).

> When judges interpret the words of statutes, they are not simply performing a task. They are maintaining an unspoken covenant with the citizenry on whose trust the authority and vitality of an independent judiciary depend, to render decisions that strive to be faithful to the work of the people's representatives memorialized in statutory language.[57]

57. KATZMANN, *supra* note 2, at 104–05.