

THEORY AND PRACTICE IN STATUTORY INTERPRETATION

Mark Tushnet[†]

I.	INTRODUCTION	1185
II.	JUSTICE SCALIA INTERPRETS A STATUTE	1187
III.	RESOLVING TEXTUAL UNCERTAINTY	1190
	A. <i>Contrasting Constitutional and Statutory Interpretation</i>	1190
	B. <i>Identifying Statutory Purposes</i>	1192
	1. <i>Some Statutes Are Simply Deals</i>	1193
	2. <i>But Some Aren't, and What to Do Then: Why the Language Used in Theorizing Causes Problems</i>	1196
IV.	CONCLUSION	1200

I. INTRODUCTION

I've heard a story about Judge Richard Posner that ought to be true. The judge, the leading figure in the world of law and economics, was visiting a friend at some law school away from his Chicago home. They went to a restaurant and had a not-very-good meal, though with decent service. They split the check, and Judge Posner's friend noticed that the judge had left a standard-size tip for the server. "Dick," the friend asked, "why are you doing that? You're never going to eat here again, so leaving a tip isn't going to incentivize the server to treat *you* well next time you're here, and you shouldn't care about how well the server treats other patrons." Judge Posner replied, "Theory is one thing, practice another."

So too for much of the debate between Justices Scalia and Breyer is over the proper methods of statutory interpretation. It is largely theoretical, something to entertain audiences who come to hear the two discuss the topic.¹ When it comes down to actually interpreting statutes, the differences between the Justices become quite small.² True, Justice Breyer will sometimes cite

[†] William Nelson Cromwell Professor of Law, Harvard Law School.

1. Actually, I think, people come to hear them discuss constitutional interpretation, where their differences over theory may have some somewhat more substantial—though not, in my view, really large—consequences. The reason for my skepticism about the consequences of theoretical disagreement in constitutional interpretation is that what are presented as differences over method may often mask disagreements on the merits independent of—antecedent to—any theoretical differences. Focusing on statutory interpretation is, in my view, more likely to be illuminating because decisions in many statutory interpretation cases are significantly less likely to be driven by antecedent views on the merits than are decisions in constitutional cases.

2. I acknowledge at the outset that my conclusion that the differences in practice between Justices Scalia and Breyer are smaller than their differences in theory rests on my impressions of their work. I can

materials such as committee reports and, rarely, statements made on the House or Senate floor that Justice Scalia would describe as legislative history and would not cite. Yet, suggestive of the narrowness of their differences, both Justices will refer to statutory predecessors of the one they are interpreting, because both consider such bills to be part of the “context” within which the statute was enacted.³ And, as I discuss below, Justice Breyer refers to legislative history because he believes—in my view, correctly—it to be part of the context in just the same way, reflecting settled practices within legislatures that cast light on the meaning of the words used in a statute.

Most often, though, the Justices disagree about the language judges should use in presenting their statutory interpretations. Justice Scalia abjures the use of the word “intent,” believing that it refers to inner mental states of individual legislators and is therefore inappropriate in statutory interpretation: Legislatures are not legislators and don’t have mental states, and in any event, legislatures as collective bodies enact statutes, which mean what they do independent of what any individual legislator thinks they mean. Justice Breyer is less hostile to referring to “intent,” but for him the word does not refer to inner mental states. Rather, it refers to the “purposes” the legislature has in enacting the statute. Justice Breyer recognizes that some statutes are simple deals, whose terms reflect political compromise rather than some reasoned judgment about just how far the statute should go in combating some perceived evil.⁴ He does not believe, though, that *all* statutes are mere political deals, and neither does Justice Scalia. Statutory purposes can be complex and qualified. Interpreting statutes in light of their purposes does not mean attempting to discern some inner mental state, although the words we ordinarily use to describe purposive interpretation evoke mental states: What problems was the legislature “trying” to solve? What evil was it “aiming at”? This linguistic quirk gives an opening for Justice Scalia’s “mental state” criticism of the search for legislative intent, but no such search is really going on. And, again importantly, Justice Scalia does not believe that all statutes lack purposes or that purposive statutory interpretation is never permissible, although he may

imagine a systematic inquiry into the differences in practice, though I know of none, and designing it would be difficult. One would want to know the answers to questions like: How much more often than Justice Scalia does Justice Breyer refer to a statute’s purposes (with the caveat that sometimes such references occur without the judge using the word “purpose” or cognates)? When Justice Breyer refers to statutory purposes, does he describe them at a higher level of abstraction than does Justice Scalia when *he* refers to purposes? Does Justice Breyer identify a single purpose more often than Justice Scalia does? To my mind, these questions are more significant than more tractable ones, such as: Does Justice Breyer refer to the materials of legislative history more often than does Justice Scalia? (The answer to that one is unquestionably yes.)

3. In this Comment I often rely on statements Justices Scalia and Breyer made in their discussion at the Texas Tech University School of Law’s Sandra Day O’Connor Distinguished Lecture on November 12, 2010, Lubbock, Texas, as recorded in my notes. Although I do not have a transcript of their discussion, I believe that I have accurately described the positions they have taken, both at the O’Connor Lecture and elsewhere.

4. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 856-57 (1992) (discussing *Local Div. 589 v. Massachusetts*, 666 F.2d 618 (1st Cir. 1981)).

have the view that more statutes are mere political deals than Justice Breyer thinks and therefore that fewer statutes are properly subject to purposive interpretation.

In short, differences over statutory interpretation theory are one thing; the practice of statutory interpretation is another.

This Essay proceeds in Part II by examining a recent example of Justice Scalia doing statutory interpretation without theorizing about it. Part III turns to purposive interpretation. I identify some difficulties with the view that no statutes have purposes beyond those directly inscribed in their texts, a view I associate with Judge Frank Easterbrook, and explain why those difficulties do not arise in constitutional interpretation. I then discuss the connection between purposive interpretation and Justice Breyer's account of why legislative history can sometimes inform the inquiry into purposes. A brief Conclusion speculates about the reasons for why Justices Scalia and Breyer may disagree about theory even when they agree in practice.

II. JUSTICE SCALIA INTERPRETS A STATUTE

In 2005, Congress adopted the Bankruptcy Abuse Prevention and Consumer Protection Act.⁵ As the statute's title indicates, it was designed to limit some perceived abuses of bankruptcy while continuing to allow consumers to get out from under persistent debt burdens.⁶ To do so the Act created a "means test."⁷ People who used the bankruptcy laws to relieve themselves of part of the debts had to calculate what they could afford to pay to their creditors.⁸ The test operates by taking the debtor's current monthly income and deducting various amounts.⁹ Those amounts must be "reasonably necessary to be expended" for "maintenance or support."¹⁰ The statute then defines "reasonably necessary to be expended" in a phrase with two components: "[1] the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and [2] the . . . Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides"¹¹ The Standards are tables developed by the Internal Revenue Service. The IRS initially developed the tables so that it could calculate how much taxpayers with overdue taxes could pay.¹² The tables list standardized expense amounts for necessities. They allow a deduction for "transportation expenses," which has two components: "ownership costs" and

5. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005).

6. *See id.*

7. *Id.* at 33-35.

8. *Id.*

9. *Id.*

10. *Id.* at 34.

11. *Id.* at 27-28.

12. *Collection Financial Standards*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/individuals/article/0,,id=96543,00.html> (last visited May 19, 2011).

“operating costs.”¹³ The Standards do not define those terms. But, the IRS had also developed guidelines describing how to use the tables—again, for purposes of calculating payment schedules for overdue taxes.¹⁴ Those guidelines say that “ownership costs” include monthly loan or lease payments on an automobile, but say as well that a taxpayer who has no car payment may not claim an allowance for ownership costs.¹⁵ The 2005 Bankruptcy Act referred expressly to the IRS tables but said nothing about the additional guidelines.¹⁶

The case the Court had before it involved a debtor who owned a car free and clear.¹⁷ In calculating the money he had available to pay his creditors, he included as an ownership cost the amount specified in the Standards.¹⁸ His position was that the statute said that he could deduct “applicable” amounts “specified in [the] Standards.”¹⁹ The question for the Court was whether the specified ownership costs—based on standardized loan payments—were “applicable” to someone who was making no such payments.²⁰

Justice Scalia wrote that the Court’s “job . . . [was] to give the formula Congress adopted its fairest meaning.”²¹ The interpretive problem for the debtor’s position is that, were his interpretation adopted, the word “applicable” would add nothing to the statutory language. Had the statute said “monthly amounts specified” in the Standards, he would have been able to deduct the amount listed as ownership costs. What did “applicable” add? Justice Scalia agreed that it added nothing, but rejected the creditors’ argument that every word in a statute must be given some meaning: “When a thought could have been expressed more concisely, one does not always have to cast about for some additional meaning to the word or phrase that could have been dispensed with,” a proposition he supported with a citation to an opinion by the British House of Lords.²² Extra words can sometimes “add[] nothing but emphasis.”²³

With the “surplusage” argument set aside, Justice Scalia looked to the statute’s structure. A debtor who didn’t own a car might look at the Standards, discover that there was no column listing a zero amount for that situation, and infer that she couldn’t claim any amount for operating costs.²⁴ A debtor who

13. *Local Standards: Transportation*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/businesses/small/article/0,,id=104623,00.html> (last visited May 19, 2011).

14. *Id.*

15. *Id.*

16. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23, 27-28 (2005).

17. *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 721 (2011).

18. *Id.* at 722-23.

19. *Id.* at 731 (Scalia, J., dissenting).

20. *Id.* at 721 (majority opinion). The debtor’s position was not obviously absurd: One might understand the standardized amounts, like ordinary payments on loans, as an admittedly rough measure of a car’s monthly depreciation and, for that reason, an implicit cost of ownership—roughly, the amount the car’s owner should set aside each month to have enough to replace the car when it became unusable.

21. *Id.* at 733 (Scalia, J., dissenting).

22. *Id.* at 731 (citing *Davies v. Powell Duffryn Assoc. Collieries, Ltd.*, [1942] A.C. 601, 607 (H.L.)).

23. *Id.* (citing *Davies*, [1942] A.C. at 607).

24. *Id.*

owned one car would look at the Standards and would see two columns, “One Car” and “Two Cars.”²⁵ She would infer that she *could* claim the listed amount for operating costs.²⁶

Then Justice Scalia turned to the statute’s other provisions. He observed that there was a difference between saying “monthly expenses, if applicable,” and “applicable monthly expenses.”²⁷ The former “would make it clear that amounts specified under those Standards may nonetheless not be applicable, justifying . . . resort to some source other than the Standards themselves to give meaning to the condition.”²⁸ In contrast, “applicable monthly standards” is fairly read to refer to whatever is in the Standards themselves, without reference to something else such as the IRS guidelines. Justice Scalia then observed that another provision in the bankruptcy statute “uses th[e] formulation (‘if applicable’) to limit to actual expenses” other deductions from income.²⁹ Further, other provisions also clearly indicate when the debtor is allowed to deduct “actual” expenses.³⁰

Finally, Justice Scalia adverted to some policy considerations. The creditors argued that Justice Scalia’s interpretation would allow a debtor to treat as unavailable for use to repay the debts an amount the debtor actually had in his pocket.³¹ But, the only way to track actual expenses accurately was to allow deduction of actual expenses.³² Any rule would be inaccurate: Under the creditors’ interpretation, for example, a debtor with only one payment left on a car loan could nonetheless claim the full “operating expense” amount, and a crafty debtor contemplating bankruptcy could buy a clunker “for a song plus a \$10 promissory note payable over several years” and claim that amount.³³ And, Justice Scalia said, Congress had clearly preferred a rule-based approach to the more time-consuming and expensive case-by-case inquiries that an “actual expense” deduction would require.³⁴

Probably the most remarkable thing about Justice Scalia’s opinion is that there is nothing particularly remarkable about it. Or, put another way, if someone handed over the opinion’s text without the line identifying its author and asked, “Who wrote this?,” one could almost as easily answer Justice Breyer as Justice Scalia.³⁵ The opinion’s references to other provisions in the same statute and its attention to the relation between the IRS’s Standards and its guidelines are examples of using statutory structure and context to aid

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 731-32.

31. *Id.* at 732 n.*.

32. *Id.*

33. *Id.* at 732.

34. *Id.*

35. And that’s so, even putting aside the citation to the British House of Lords.

interpretation. Even purposivism makes an appearance, not in terms but in Justice Scalia's observation that using a rule might be better than doing an analysis of debtor expenses in every case and that doing so inevitably produces some odd results.

Practice, then, is one thing, theory another. I next offer some thoughts about the theoretical disagreements—what their sources and implications might be.

III. RESOLVING TEXTUAL UNCERTAINTY

A. Contrasting Constitutional and Statutory Interpretation

Justice Scalia has an integrated approach to interpretation, applicable both to the Constitution and to statutes. Yet, one might think that there are differences between the tasks that ought to matter. For present purposes, his defense of the integrated approach is irrelevant. Accepting his approach to constitutional interpretation, one could still think that something else might be needed in interpreting statutes. Suppose that a judge, employing the resources that Justice Scalia thinks appropriate, concludes that the statutory provision at issue is simply unclear. The judge has to rule for one or the other side. On what basis to make the choice?³⁶

Judge Frank Easterbrook's arguments about statutory interpretation offer one possible basis.³⁷ According to Judge Easterbrook, when a judge remains uncertain about statutory meaning after using a restricted set of tools, the judge should simply put the statute down. The person relying on the statute loses when the statute's meaning is unclear.³⁸ In particular, she cannot win by invoking some ambient "purposes" the statute might have that would support her position.

The idea of putting the statute down requires unpacking. Consider first what it might mean to put the Constitution down: A legislature enacts a statute, which is then challenged on constitutional grounds. The judge examines the Constitution and other relevant sources, and finds that they do not clearly establish the statute's unconstitutionality. The judge then puts the Constitution down, rejects the constitutional challenge, and—importantly for the analysis of statutory interpretation that follows—lets the statute go into effect. We can isolate two features of this scenario: (1) The statute is what we can call the background law—the law that will go into effect if the judge puts the

36. Much of Justice Scalia's writing on interpretation defends the proposition that, in interpreting a legal text, judges should do their best to construe it as creating a rule rather than a standard. That, though, is not going to help in figuring out whether the judge should devise a plaintiff- or defendant-favoring rule.

37. See Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 533-34 (1983).

38. *Id.* at 534. Judge Easterbrook does not specifically define what he means by "relying on the statute," which in some settings might seem to be an artifact of litigation structure. *Id.* at 544. As I discuss in the paragraphs following this one in the text, his implicit definition can be extracted from the implications of his conclusion that the judge must put the statute down. *Id.*

Constitution down; and (2) The statute, the background law, has obvious normative support from the process of democratic enactment.

Now consider what putting the statute down means in the context of statutory interpretation. Suppose Congress has enacted a statute banning the use of lead in consumer products.³⁹ Congress was focused on disclosures about the use of lead paint on children's toys, but its statute clearly sweeps more broadly. How broadly? Must the lead be used in a way that poses a health risk to consumers? Suppose, as I believe I have read, the pressure caps on tire valves are made with lead. Does the new statute prohibit the sale of tires with such caps even though, we can assume, the health risk from those caps is essentially zero?

Again, we have a judge asked to interpret the statute: Does it cover tire-valve caps or doesn't it? The judge consults the relevant sources and is uncertain about the statute's meaning. According to Judge Easterbrook, the judge should then put the statute down, and the party relying on the statute loses. As I understand Judge Easterbrook's position, the regulation then does not apply to tire-valve caps, which can continue to be made with lead. The background law is one of nonregulation. In the context of statutory interpretation, then, putting the statute down has a libertarian flavor, as Judge Easterbrook acknowledges.⁴⁰ Yet, unlike the relatively uncontroversial democratic warrant for a statute that goes into effect when the judge puts the Constitution down, the warrant for this libertarianism when the judge puts a statute down is at least quite controversial.

Even more, putting a *federal* statute down does not trigger a regime of nonregulation. Consider the bankruptcy case.⁴¹ Who is relying on the statute's reference to "applicable Standards"? Plausibly, either side or both. Suppose the judge puts the statute down because its meaning is unclear. What rule does the judge apply? That there simply is nothing the debtor can claim as an allowance? That result would be the same as the one that would occur were the judge to interpret "applicable" to mean "if applicable," but that result would be justified on different grounds. Suppose, though, the Standards' drafters had said to themselves, "Well, some debtors don't own or lease any cars, but they do get around by public transportation, so we'll include a column headed 'Zero' in the 'operating expenses' table and fill it with estimated costs of using public transportation."⁴² Let's assume that the amounts in that column are uniformly lower than those in the rest of the table and that "applicable Standards" remains

39. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008). The hypothetical is based on the Act, but not on that statute's actual provisions.

40. Easterbrook, *supra* note 37, at 549 (Judge Easterbrook defends his approach with reference to "liberal principles," by which he means libertarian presuppositions: "There is still at least a presumption that people's arrangements prevail unless expressly displaced by legal doctrine.").

41. See *supra* notes 17-34.

42. Actually, there is a separate table for the costs of using public transportation. See *Local Standards: Transportation*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/businesses/small/article/0,,id=104623,00.html> (last visited May 19, 2011).

ambiguous in these circumstances.⁴³ Now, what does it mean to put down the statute? Again, that the debtor gets to claim nothing as a transportation expense? Or, that the debtor can claim the lowest amount available to any debtor—the amount in the “Zero” column? What the background rule applicable when the statutory provision we’re trying to interpret is “put down” is, I think, hopelessly unclear.

More broadly, I note the possibility that some other federal regulation might be applicable—in the tire-valve example, some general consumer protection legislation. More interesting, I think, is that the applicable legal regime when a judge puts a federal regulatory statute down is not a regime of “nonregulation.” Rather, it is the complex legal regime of the background common law, or more precisely, the legal regimes of the several states. And, again, the normative warrant for relying on those regimes seems to me complex and unclear. Some states will impose liability for using lead in tire-valve caps; others won’t. Not libertarianism but federalism must be the justification for putting a federal statute down when a judge is uncertain about the statute’s meaning. Federalism has its virtues, of course, but Judge Easterbrook does not defend his approach in those terms, and I think properly so: The approach’s normative attraction diminishes as it becomes clear that it depends on weakening the libertarian presupposition because of the federalist setting within which the approach is located.

Putting the Constitution down in situations of uncertainty may make sense, but the normative justifications for that approach cannot be borrowed, without significant modification and qualification, for statutory interpretation.

B. Identifying Statutory Purposes

Both Justices Scalia and Breyer agree that their differences over statutory interpretation arise only when the text is to some degree uncertain. Had the bankruptcy statute said “actual expenses,” neither would have thought that a debtor could simply make a guess about what her expenses were and claim a deduction from her available monthly income. And, both agree that the techniques for resolving uncertainty include reference to a reasonably large number of sources: the statute’s history,⁴⁴ meaning prior legislation setting the background against which Congress acted; the statute’s structure, meaning how one or another interpretation of the provision in question fits with other provisions whose meaning is uncontested; and even the statute’s objects or purposes.

43. The debtor doesn’t own zero cars, so the amounts in that column wouldn’t seem applicable to him. That leaves the “one” or “two or more” cars columns, which was what generated the need to interpret “applicable Standards” in the actual case.

44. I think it helpful to distinguish, as careful writers do, between a *statute’s* history, defined as I have in the text, and *legislative* history, which I discuss in a bit more detail later in this Comment.

I think that much of the theoretical disagreement between Justices Scalia and Breyer occurs because they have different understandings of what each means by allowing recourse to a statute's "objects" or "purposes." For Justice Scalia, those purposes are evident on the statute's face and certainly are not something the statute's drafters or adopters "had in mind" or their "interior intent," to use formulations that capture Justice Scalia's concerns. Again, for my purposes, the reasons Justice Scalia has for rejecting interior intent don't matter because Justice Breyer doesn't think that statutory interpretation allows recourse to interior intent either.

Here too some important distinctions should be drawn. Much of the force of Justice Scalia's seeming anti-purposivism arises from his understanding of the legislative process. Often, though I doubt for him always (in practice, not in his theoretical expositions), legislation is the product of compromise and deal-making, with the result that no statute has a unitary "purpose" that courts can advance when the statute's terms are unclear. I think it useful to distinguish two versions of this point.

(1) Sometimes the statute is simply a deal: Proponents wanted to push quite far in one direction, opponents resisted, and what resulted was something that has no normative justification other than that it was where the legislative process happened to come to rest with the political forces arrayed as they happened to be. Interpreting an unclear provision to advance the statute's "purpose" would give one or the other side a victory it was unable to achieve in the legislative process, depending entirely on how the judges describe that purpose.

(2) Even if the statute is not a simple deal reflecting only a balance of political forces, every statute advances a complex set of purposes; picking one as "the" purpose to promote in interpreting an ambiguous provision inevitably impairs some of the statute's other purposes.

These arguments are clearly right, at least over some range of problems. But, they have fewer implications than one might think, which I suspect is one reason why the practical differences between Justices Scalia and Breyer are smaller than their theoretical differences.

1. Some Statutes Are Simply Deals

The idea that statutes are deals, the terms of which the court should simply enforce, has been most prominently defended by Judge Posner.⁴⁵ The basic idea is that a statute's terms inscribe the equilibrium between contending interest groups with, importantly, competing ideas about what purposes the statute ought to promote and how far it does so. In the bankruptcy case, for example, the interest groups composed of (and representing) creditors sought to

45. See, e.g., Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 274-75 (1982).

limit the allowances debtors could claim, to maximize the amount available to repay the creditors.⁴⁶ And, obviously, the interest groups composed of and representing debtors sought to make those allowances as large as they could, to leave debtors with as much money as possible to get on with their lives.⁴⁷ The statutory term “applicable Standards” is the verbal formulation identifying where political power shook out.

The idea that statutes are deals is said to rule out a certain kind of purposive interpretation. A judge asked to interpret “applicable Standards” should not say, “The statute’s purpose is to minimize allowances, so I will interpret the term to deny the debtor the claimed allowance for car operating expenses.” Neither should she say, “The statute’s purpose is to give debtors a fresh start, so I will interpret the term to permit the claimed allowance.” Both statements, defenders of the “deal” idea say, would give one or the other side more than it was able to obtain in legislative bargaining.

The difficulty with this version of the “deal” idea should be apparent. The “deal” idea requires that we know what the deal actually was. Until we know that, we can’t know whether a particular interpretation gives one side more than it obtained in legislative bargaining. But, unfortunately, interpretive problems arise only when we don’t know what the deal was.

This skepticism about the “deal” idea must be qualified in at least two ways. Then-Judge Breyer once argued that sometimes the ordinary interpretive tools available to judges allow them to figure out that a particular statutory term really is a deal.⁴⁸ This, he suggested, had two implications. One, unquestionably right, is that statutory deals are arbitrary, in the sense that they have no animating purpose other than to get the legislation adopted. For such provisions, purposivist interpretation is improper because they don’t have purposes in any interesting sense. In addition, Judge Breyer appears to have thought that once a judge saw that a particular provision was a deal, the judge could use ordinary interpretive tools—he focused on legislative history—other than purposivist inquiry to determine what the deal was. I think that suggestion mistaken when, as in the case Judge Breyer discussed, the statutory language was susceptible of reasonable alternative readings. Suppose, for example, we concluded that the “applicable Standards” language was a simple deal. That wouldn’t tell us how to get from “the term reflected the balance of forces in the legislature” to “the operating expense allowance should be denied [or allowed].”

As I have suggested, the “deal” idea seems to rule out openly purposivist interpretation. It does not, however, rule out holdings that give one or the other side “more” than it got in Congress. Justice Scalia’s interpretation of “applicable Standards” is unavoidably pro-debtor. We might say that the

46. See *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 723 (2011).

47. *Id.* at 729.

48. Breyer, *supra* note 4, at 863.

“deal” idea makes disparate treatment of one or the other side impermissible, but it cannot prevent disparate impact. And, at that point we could wonder why a judge should be barred from considering the impact of a holding, not as part of an inquiry into the statute’s purpose but rather as part of an effort to achieve what the judge—not Congress—regards as the best outcome overall. The disparate impact will exist, no matter what, and from a detached observer’s point of view (perhaps the detached observer is an ordinary citizen), letting judges decide what’s the best outcome overall might be the best way to incorporate the disparate impact into our social calculus.⁴⁹

There’s a second qualification of the “deal” idea that requires attention. The bankruptcy statute might be the product of a process like this: Creditors and debtors have engaged in an extended process of bargaining over the statute’s terms. Each side agrees that political power is distributed in a way that makes “no new statute” a politically damaging outcome to both. So, they’ve got to support something that gets through the process of enactment. They’ve narrowed their differences, not in the sense of reaching reasoned agreement about what the statute’s terms mean but in the sense that each acknowledges that the balance of political forces is such that it can’t get much more of what it wants. Some differences persist, but they have to get a statute enacted. They can strike a deal: “Let’s use the term ‘applicable Standards,’ and let the courts figure out what it means.” The deal, that is, is not over the meaning of the statute’s terms but rather delegates interpretive authority to the courts.

Such delegations do not convert judges into free-wheeling legislators. Suppose that the “applicable Standards” provision is best understood as delegating interpretive authority to the courts. A judge could not say, “Whoa, the operating-costs entry in the Standards wildly overestimates the actual operating costs, so I’ll just cut it in half.” Rather, within the narrowed range marked out by statutory terms that all agree are clear—“Standards,” but not “applicable,” in the case at hand—judges are authorized to select the policy that advances overall social good as *they* see it (because the legislature has no view on what policy would do so and has asked the courts to make the choice).

There is no disagreement between Justices Scalia and Breyer over the proposition that sometimes statutes are delegations of this sort.⁵⁰ The tricky question, of course, is how to identify when such a delegation has occurred.⁵¹ As far as I know, the exchanges between Justices Scalia and Breyer on statutory interpretation don’t address that question, although my guess is that Justice

49. After all, under the circumstances there’s no one else left to try to work out what the best social outcome is. (By definition, in a disparate impact situation Congress did not consider the impact.)

50. Justice Scalia’s enthusiasm for the *Chevron* doctrine expresses his judgment that Congress can and often does delegate interpretive authority to *someone*—in the *Chevron* context, to administrative agencies. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984). He cannot, and does not, rule out in principle the possibility of a delegation to the courts.

51. Judge Easterbrook either thinks that as a descriptive matter such delegations are rare, or he thinks that as a normative matter they should be discouraged because he says that such delegations should be clearly stated. See Easterbrook, *supra* note 37, at 549–50.

Scalia thinks that courts should rarely treat statutes as delegations while Justice Breyer has no presumption one way or the other. To the extent that I can generate a reason for that assumed difference, it is something like this: Finding that a statute delegates interpretive authority to the courts relieves some pressure on legislatures to reach agreement on questions of substance, and democratic theory somehow prefers substantive agreements arrived at in the legislature to (democratically chosen) decisions to delegate interpretive authority. A preference against interpreting a statute as a delegation of interpretive authority to the courts is, in a term drawn from administrative law, action-forcing. But, I confess, at present I can't figure out the account of democratic theory from which that action-forcing preference derives. In any event, the preference can't, I think, be justified as descriptively accurate, and so—finally—can't easily be connected to the “statutes are deals” view.

2. But Some Aren't, and What to Do Then: Why the Language Used in Theorizing Causes Problems

The “statutes are deals” view fits comfortably within a paradigm of the legislative process associated with skeptical journalism and academic theories of public choice. Close students of the legislative process, though, know that sometimes statutes aren't deals.⁵² Sometimes they result from genuine deliberation. Such statutes represent legislative efforts to advance the public good within the constraints set by many legislators' wish to retain their seats as long as they can do so without engaging in activities that violate their deep understandings of what their lives ought to be about. (I'll come back to the treacherous word “efforts” shortly.)

Do Justices Scalia and Breyer disagree about how to interpret statutes of this sort? Not really. Justice Scalia sometimes criticizes Justice Breyer and judges like him, who seek to implement a statute's purposes, because they adopt what Justice Scalia believes to be an erroneous understanding of those purposes. He says that they identify a statute's purposes—or its main purpose, or something like that—on too high a level of generality, with the effect of pushing the statute “too far” in the service of that purpose.⁵³ So, for example, a judge might take the bankruptcy statute's “main purpose” to be “make it easier for creditors to get as much repayment as possible.” That would be a mistake because it treats that statute as having only one purpose. Better, Justice Scalia argues, to formulate the statute's purposes more precisely. And, one formulation seems obviously more accurate: “Make it easier for creditors to get

52. In my view, public-choice approaches to the legislative process gained traction only in part because of the (partial) accuracy of their descriptions, but also (and in my view more) because they allowed the sorts of modeling that have become attractive to many political scientists.

53. This criticism is structurally similar to one version of the “statutes are deals” view, where judges are criticized for giving one party “more than” it got in the legislative bargain: “Too far” is the parallel to “more than.” But, at their foundation, the criticisms are different.

as much repayment as possible but without driving debtors into abject poverty.” That formulation is already two-valued. The very existence of expense allowances to debtors shows that it’s a more accurate description of the statute. But, Justice Scalia argues, the statute actually has yet an additional purpose: “Make it easier, etc., without driving, etc., but with an approach that keeps the cost of administering the bankruptcy system low.” That third purpose is revealed by the fact that Congress directed the use of a table rather than a case-by-case determination of actual car-operating expenses. Justice Scalia’s opinion in the bankruptcy case is purposive in just this way, sensitive to the multiple purposes a statute has. Again, there’s no principled difference between Justices Scalia and Breyer. When they disagree, they do so because they disagree about what a statute’s purposes—in the plural—are and how multiple purposes should be accommodated in particular cases. That’s not a disagreement of interpretive method.

So, where does the disagreement come from? Much of it is, I think, about the words used in describing purposivist analysis and so can be called, pejoratively, a merely semantic disagreement as distinct from disagreement over matters of substance. A ground-level version of the disagreement occurs over Hart & Sacks’s classic formulation of purposivism: In interpreting statutory terms that aren’t clear, judges should assume that (or act as if) the legislature that enacted the statute was composed of reasonable people pursuing reasonable goals in a reasonable manner.⁵⁴ The obvious, public-choice inflected response is that such an assumption is patently unrealistic: Legislatures are composed of people who want to get reelected—or, perhaps more generously, composed of people who want to enact public policies they believe to advance the public good within the constraints imposed by elections. Either way, though, it’s silly to impute reasonableness as systematically as the Hart & Sacks formulation does.

As I’ve suggested, this criticism has some bite where, on examining the terms we’re trying to interpret, we conclude that the terms reflect a pure deal (meaning, a simple balance of political power not delegating interpretive authority to the courts). But, I believe, the Hart & Sacks formulation was never supposed to be a realistic description of how legislatures actually operate. It was rather, and consistent with their overall approach, a way of describing what judges should do in a complex institutional system. In some ways, indeed, the Hart & Sacks formulation anticipates and responds to the “put the statute down” idea later offered by Judge Easterbrook. Their analysis takes this form: In cases of statutory ambiguity, we have to decide which institution will get to determine the outcome. We should choose the institution whose decisions are mostly likely to advance social well-being overall. Because the statute is

54. This is a modernized version of HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

ambiguous, we can't say that Congress is that institution (unless we adopt an action-forcing theory whose justification is itself quite unclear). And, by assumption this isn't a *Chevron* situation in which an administrative agency is a plausible candidate for making the decision. The only candidates left standing are judges and whoever has made what I've called the background law. And, finally, judges are more likely than those who made the background law to come up with results that advance social well-being overall.⁵⁵

I'm pretty sure that the public-choice inflected criticism of the Hart & Sacks formulation doesn't offer much purchase on *that* argument. I think, but am less sure, that Justices Scalia and Breyer haven't stated their disagreements in ways that suggest differences between them with respect to it. So, again, we may have a disagreement in theory that has no implications for practice.

I've called the argument over the Hart & Sacks formulation a ground-level disagreement. More subtle are disagreements that arise because of the way we almost inevitably talk about purposivism. It's essentially impossible to do so without using verbs that expressly or implicitly personify the legislature. "What was the problem *Congress was trying* to solve?" (This is the "evil" rule.) "What were *Congress's* purposes in enacting this provision?" "What did *Congress have in mind* when it enacted this provision?" Even a mild formulation, which Justice Scalia sometimes offers, has this difficulty: "What's the object of the statute?" But, of course, words on a piece of paper don't have "objects," the people who write them do. So, even Justice Scalia implicitly personifies the statute: "What were the objects sought by those who enacted the statute?"

These formulations, and many others that I could offer, undoubtedly lend some rhetorical force to Justice Scalia's skeptical references to purposivists' interest in discerning legislators' interior mental states. But, I think, the formulations are merely a way of speaking and do not indicate some deeper commitment to the discovery of mental states at interpretation's foundation.

The language we use to describe purposivism can be misleading if one doesn't understand it correctly. One could take purposivist formulations to refer to mental states, though that would not be the most generous—or accurate—reading of those formulations. That misreading could be bolstered, again mistakenly, by taking Justice Breyer's willingness to refer to what goes by the name of legislative history—especially committee reports and statements made on the House or Senate floor—to show his interest in discerning legislators' mental states. Justice Breyer has been as explicit as I think possible in asserting that legislators' mental states are *not* what he is after when he refers to legislative history. For him, legislative history is part of the institutional method of producing meaning.

55. It's probably worth a note to say that sometimes state judges make the background law as they develop the common law. So, the institutional comparison has to take into account the different institutional characteristics of federal and state courts as well as federalism.

Relying on readers' intuitions up to now, I have not specified what an "institution" is. For purposes of systematic analysis, "Congress" is not a building in Washington, and "courts" are not the buildings scattered throughout the country. Even more, "Congress" is not the simple aggregation of the individuals who have been elected as members of the House of Representatives. Rather, "Congress" is a set of patterns of interactions, understandings, and expectations within some relevant community.⁵⁶ Understanding what "Congress" does—what "Congress" means when it enacts a statute—requires understanding those patterns, understandings, and expectations.⁵⁷

In the present context, the payoff from that way of thinking about institutions lies in its implications for a real disagreement between Justices Scalia and Breyer. As is well-known, Justice Scalia has engaged in a protracted battle against reliance on legislative history in statutory interpretation.⁵⁸ For him, committee reports are drafted by unelected staff members and may have no relation to the views held by the people's representatives; statements made on the floor of the legislature are scripted and may never be heard or read by the vast majority of legislators; and most important, what Congress enacts are the statute's words—not the explanations any individuals offer of those words' meaning.

For Justice Breyer, legislative history is simply part of the accepted process of generating meaning, no different in principle from an institutional practice of generating meaning by looking at a dictionary to check that a rarely used word really does mean what the drafter thinks it means.⁵⁹ Everyone in Congress knows that committee reports are drafted by staffers, that floor statements are scripted, and that interest groups sometimes get members to insert language in those reports or floor statements. Everyone knows as well that these activities produce statutory meaning and not merely because courts will (or will not) use them to resolve ambiguity. They produce meaning because the production of meaning is an institutional process consisting of

56. This is, I think, the standard social-scientific understanding of what an institution is.

57. A person committed to methodological individualism as the principle to guide understanding of society believes that ultimately these patterns, understandings, and expectations have to be disaggregated, locating them in the decisions (and brains) of individuals. For an exploration of methodological individualism and disaggregation, see JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* (1989). The attraction of public-choice approaches to social analysis is that they offer an analytically easy and mathematically tractable way to do the disaggregation; their disadvantage is their descriptive inaccuracy.

58. My view is that he has lost the battle in the Supreme Court, which regularly produces opinions citing the kinds of legislative materials the use of which Justice Scalia thinks improper. I know, though, that some scholars think that the Court's behavior does not yet show that Justice Scalia has lost the battle. See, e.g., James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 *BERKELEY J. EMPL. & LAB. L.* 117, 133-37 (2008) (arguing that the rate at which justices cite legislative history in labor law cases has declined from its peak before Justice Scalia's accession to the bench, but suggesting as well that the rate has increased from its lowest point recently).

59. Cf. *THE PRINCESS BRIDE* (1987) (William Goldman scriptwriter) ("You keep using that word ['inconceivable']. I do not think it means what you think it means.").

exactly the kinds of patterns, understandings, and expectations that Justice Breyer calls—accurately—legislative history.⁶⁰

One final point: The institutional practice of generating meaning in these ways is supported to some degree (I think small, but I could be mistaken) by a tradition—itself a pattern, understanding, or expectation—that courts will refer to legislative history in resolving ambiguity. We should understand Justice Scalia's effort to banish legislative history from the judicial practice of statutory interpretation as an effort to alter that tradition—to change the pattern and expectation. Nothing wrong with that, of course. Traditions are constructed by practice, and practice can change, thereby changing the tradition.⁶¹ In my view, though, the reasons Justice Scalia has offered for changing the tradition are of the wrong sort. He has argued that courts use legislative history in a way that rests on an inaccurate description of the legislative process. I think that Justice Breyer has the better of the arguments because he has a better grasp of what it means to think about institutions. That's not to say that there might not be reasons to change the tradition. I think the best defense of Justice Scalia's effort to do so would go along these lines: Were courts to refrain from referring to legislative history, practices within Congress would change at least a bit. The changes would increase the time it takes to enact a statute, as members would have to replace, to some degree, their reliance on staffers and interest groups with personal attention. That in turn would reduce Congress's output of statutes. And, that is something to be desired if one thinks that less legislation is better than more.⁶²

IV. CONCLUSION

Purposivists are institutionalists, interested in integrating the legal system's institutions—markets, legislatures, executives, administrative

60. For a particularly clear exposition of this point, see Breyer, *supra* note 4, at 859 (describing Congress as a bureaucracy and the legislative process as "an institutional one").

61. Adrian Vermeule, who should know, tells me that from the founding era to the late nineteenth-century judges treated statutory purposes as objective facts to be discovered in the statutes' terms themselves, and that the tradition to which Justice Breyer appeals is characteristic of the mid-to-late twentieth century. So, we know that traditions do change. Justice Breyer might suggest that the tradition of referring to legislative history to discern purposes changed in response to changes within Congress, such as the rise of the legislative staff, the increase in legislative activity making it imperative for individual members to delegate responsibilities to staff, and the like—and, Justice Breyer might suggest, no similar changes within Congress have occurred since the late twentieth century that would support a reversion to the older tradition. (I note that this specific argument does not have any implications for the subordinate argument, that members of Congress rely on the judicial practice of referring to legislative history in developing the practices and understandings within Congress. As I suggest in the text immediately following this note, one could develop a rationale for changing judicial reliance on legislative history so as to induce changes in congressional practice.)

62. Perhaps unsurprisingly, this connects Justice Scalia's challenge to the use of legislative history to Judge Easterbrook's idea about putting the statute down, with its resulting reliance on background common law in many instances and its express invocation of libertarian (Judge Easterbrook calls them liberal) principles. See *supra* text accompanying notes 38-43.

agencies, courts—in ways that allocate decision-making responsibility among those institutions to achieve outcomes that are best for society overall. And, of course, whether Justice Scalia is a purposivist or not (I think that, on the whole, he is), he too is interested in precisely the same question. At this fundamental level, Justices Scalia and Breyer do not disagree. Rather, their disagreement, more evident in theory than in practice, is over the characteristics of—or, more accurately, the distribution of characteristics within—each institution. I'm reasonably sure that Justice Scalia thinks that more statutes are simple deals than Justice Breyer does, and that Justice Breyer has more confidence in the account of the patterns of interactions within Congress than Justice Scalia does. And, Justice Scalia's approach might be defended on libertarian-leaning grounds that Justice Breyer would of course reject.

But, to my mind the differences manifested in the words of the conversation between Justices Scalia and Breyer are not about anything deep in the “theory” of statutory interpretation.⁶³ As Judge Posner said (I hope), “Theory is one thing, practice another.”

63. The deep disagreements are about politics and political theory, not about the way to interpret words (which, as the conversation presents itself, is understood to be something different from politics and political theory).