

Legislative Intentions, Legislative Supremacy, and Legal Positivism

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I. INTRODUCTION

In this Article I will argue that the debate about the reality of legislative intentions and their utility in statutory interpretation is much more important than is generally realized. Its outcome could affect both the constitutional doctrine of legislative supremacy and the philosophy of legal positivism. Briefly stated, my argument will be that, for practical reasons, skepticism about legislative intentions threatens to undermine the doctrine of legislative supremacy. This might not disturb traditional natural lawyers, Dworkinians, or some kinds of legal realists, who reject that doctrine. But it should disturb legal positivists who accept the doctrine.

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Let me explain. For practical reasons, statutory provisions cannot always be interpreted and applied literally. The consequences of doing so would sometimes be so unreasonable or absurd that no legal system could tolerate them. But there are only a few ways of avoiding those consequences. One way is to accept that statutes should be interpreted literally, but deny that they should always be applied accordingly. That is legally possible only if courts have legal authority to override or amend statutes. The problem is that this entails judicial supremacy over statutory law. It is consistent with the traditional natural law claim that judges have authority to invalidate unjust laws, which entails judicial supremacy over statutes. It would also be consistent with an extreme legal realist claim that the judges possess supreme legislative power, which they can use to amend or override statutes. But both claims are inconsistent with constitutional orthodoxy in common law jurisdictions.¹

A second way of avoiding the absurdities of literalism is to deny that statutes should be interpreted literally in the first place—in other words, to hold that their full meanings depend partly on factors other than their literal meanings. If so, then a judge who declines to apply a statute according to its literal meaning may nevertheless be applying it faithfully according to its true meaning, rather than overriding or amending it. Those who prefer this second way of avoiding literalism must make a further choice from one of two general categories of theories. The first category consists of intentionalist theories, which hold that the true meaning of a statute is determined partly by the intentions or purposes of the legislature that enacted it. The second category consists of natural law theories of meaning, such as those of Michael Moore and Ronald Dworkin, which hold that the meaning of a statute is partly a function of moral principles, irrespective of the legislature's intentions or purposes (if it had any).

A possible third category might consist of common law theories, according to which the meaning of a statute is partly a function of common law principles of interpretation. But most common law theories can be placed in one or other of the first two categories—they are either intentionalist theories, insofar as common law principles function as presumptions of the legislature's intentions, or natural law theories, insofar as they are principles of political morality ascertained and applied in Dworkinian fashion.² It might be possible to formulate a

1. See *infra* text accompanying notes 39–47.

2. The work of Trevor Allan exemplifies both possibilities. In his early work, he argued that common law principles of interpretation were consistent with legislative supremacy because they functioned as presumptions of the legislature's intentions. T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 CAMBRIDGE L.J. 111, 114–15 (1985). In his later work, he defends a Dworkinian

nonintentionalist but legal positivist common law theory, holding that common law principles (including principles of interpretation) constitute a body of positive law that has been made and can be changed by the judges. But that would collapse into a form of judicial supremacism. If statutes depend for their meaning on extrinsic legal principles, regardless of the legislature's intentions, and those principles can be made and changed by the judges, then in effect statutes can be changed by the judges regardless of the legislature's intentions.

To sum up, pure literalism, maintaining that statutes should always be understood and applied strictly according to their literal meanings, is not feasible. But the only practical alternatives are judicial supremacism, intentionalism, or a natural law theory of meaning. Because judicial supremacism is constitutionally unacceptable, the real choice is between intentionalist and natural law theories of meaning. Legal positivists, by definition, should prefer intentionalism.

As we will see, natural law theories of meaning turn out also to entail judicial supremacism. Consequently, they too are unacceptable. So the ultimate conclusion of this article is that intentionalism provides the only practical way of reconciling the sensible interpretation and application of statutes with the constitutional doctrine of legislative supremacy. This article could therefore be subtitled, "The Constitutional Function of Legislative Intentions."

I will not undertake here to defend intentionalism against the formidable arguments that have been made against it. My more modest aim is to map out the options, in order to bring what is at stake into sharper relief. But my argument could be used to contribute to a defense of intentionalism based on the practical consequences of rival theories of interpretation.³

position, according to which the deepest principles of the common law are principles of political morality and are used to interpret statutes regardless of the legislature's intentions. See generally T.R.S. ALLAN, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* (1993). A Dworkinian theory can be called either a natural law or a common law theory—the terminology is unimportant.

3. For other contributions to the defense of intentionalism, see generally Jeffrey Goldsworthy, *Marmor on Meaning, Interpretation, and Legislative Intention*, 1 *LEGAL THEORY* 439 (1995) [hereinafter Goldsworthy, *Marmor*], and with respect to constitutional interpretation, see generally Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *FED. L. REV.* 1 (1997) [hereinafter Goldsworthy, *Originalism*] and Jeffrey Goldsworthy, *Interpreting the Constitution in its Second Century*, 24 *MELB. U. L. REV.* 677 (2000).

Nor will I undertake here a defense of legal positivism. But my arguments strongly suggest that its plausibility depends partly on that of intentionalism. Without the support of intentionalism, legal positivism would probably succumb to one of its traditional rivals—either natural law or legal realism. I do not expect this argument to worry natural lawyers, such as Dworkin, Moore, or Heidi Hurd, who for the most part reject intentionalism. Indeed, they would no doubt enthusiastically agree that anyone who rejects intentionalism should also reject legal positivism. But I do expect my argument to worry legal positivists who are skeptical about intentionalism. If I am right, they must give up either their legal positivism, the doctrine of legislative supremacy, or their skepticism about intentionalism.

II. THE INTOLERABLE CONSEQUENCES OF LITERALISM

Here are some examples of actual cases in which interpreting and applying statutory provisions in accordance with their literal meanings would have had intolerable consequences.

(1) The Highway Act 1835 included a long section (s.78) dealing mainly with improper driving of horse-drawn vehicles. In the middle of the section, the improper riding of any horse or beast was prohibited. But the machinery provisions at the end of the section, imposing penalties, referred only to drivers, not riders. When the prohibition of improper riding was inserted in Parliament as an amendment, the consequential need to amend the penalty provision was apparently overlooked. The court decided that a literal construction would lead to an absurd result that Parliament could not have intended—namely, the creation of an offense not subject to any penalty. It adopted a nonliteral construction to give effect to Parliament's apparent intention.⁴

(2) Section 8(1) of the Road Traffic Act 1972 (UK) provided that in certain circumstances any person "driving or attempting to drive" a vehicle could be required to take a breath test. The defendant drove through a red light, stopped, and changed seats with his passenger. He was then asked to take a breath test, although by then he was clearly not "driving or attempting to drive" the vehicle. (Indeed, that might have been true even if he had remained in the driver's seat.) The court held that he was nevertheless required to take the test.⁵

(3) Section 8(1) of the Food and Drugs Act 1955 prohibited the sale of "any food intended for, but unfit for, human consumption." Some

4. *Williams v. Evans*, [1876] 1 Ex. D. 277, 280–81; *see also* F.A.R. BENNION, *STATUTORY INTERPRETATION: A CODE* 299, 679–80 (2d. ed. 1992) (discussing *Williams*).

5. *See* BENNION, *supra* note 4, at 668–69 (discussing *Kaye v. Tyrrell* (1984)).

children asked for lemonade, were given corrosive caustic soda, and drank some of it. Read literally, s.8(1) did not apply—the vendor had not sold the children food unfit for human consumption, because caustic soda is not food. But the apparent purpose of the provision was to protect the public from harmful products being sold *as* food, and it was interpreted accordingly.⁶

(4) Rule 14(2) of the Magistrates' Courts Rules 1968 (UK) states that at the conclusion of the evidence for the complainant, “the defendant may address the court.” It does not provide that the court must listen to the defendant's address. Nevertheless, this is surely implied.⁷

(5) An Alberta bylaw required that “all drug stores shall be closed at 10 p.m. on each and every night of the week.” It would be consistent with a literal interpretation of these words for a drug store to close promptly at 10 p.m., and then reopen a few minutes later. But the Supreme Court of Alberta properly rejected an argument to that effect on the ground that only a lawyer could have suggested it.⁸

(6) Section 16 of the Factories Act 1937 required that dangerous parts of machinery be guarded by fences “while the parts are in motion or use.” A worker was injured while repairing an unfenced machine. To carry out the repairs, he had to turn the machinery by hand, which made it necessary to remove the fence. Because he was injured while the machinery was in motion, the statutory requirement, if read literally, had been infringed. But the court held that this would be absurd, and therefore adopted a more limited construction of the words “in motion.”⁹

(7) Section 24 (1) of the Social Security Act 1975, providing for allowances to be paid to widows, did not contain any express exception in the case of widows who had intentionally killed their husbands. Nevertheless, the court held that it was subject to an implied exception.¹⁰ Note the similarity of this example to the case of *Riggs v. Palmer*, which Dworkin has helped make famous.¹¹ In *Riggs*, a New York court held

6. *Meah v. Roberts*, [1978] 1 All E.R. 97, 98–100, 104–06 (Q.B.); see also BENNION, *supra* note 4, at 611–12 (discussing *Meah*).

7. BENNION, *supra* note 4, at 30.

8. *Rex v. Liggetts-Findlay Drug Stores Ltd.*, [1919] 3 W.W.R. 1025, 1025; see also JOHN BELL & SIR GEORGE ENGLE, STATUTORY INTERPRETATION 67–68 (3d ed. 1995) (discussing *Liggetts-Findlay*).

9. *Richard Thomas & Baldwins Ltd. v. Cummings*, [1955] 1 A.C. 321 (H.L.) (appeal taken from C.A.); see also BENNION, *supra* note 4, at 681–82 (discussing *Cummings*).

10. *Regina v. Chief Nat'l Ins. Comm'r ex parte Connor*, [1981] 1 Q.B. 758, 759–60, 764–65; see also BENNION, *supra* note 4, at 796 (discussing *Connor*).

11. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 23 (1977) [hereinafter DWORKIN,

that a murderer was not entitled to inherit under his victim's will, even though the relevant Statute of Wills contained no express provision to that effect. Because the case has been frequently discussed in the American literature, I will come back to it.

(8) A statute that penalized noncompliance with automatic traffic signals did not include any express exception in cases where the signals had malfunctioned due to mechanical failure. Nevertheless, the court held that such an exception was implicit.¹²

Most of these examples are taken from Francis Bennion's book *Statutory Interpretation*, which is rich in case studies. Many other examples could be added. As Bennion writes, "There are . . . very many cases cited in this book where courts have attached meanings to enactments which by no stretch of the imagination could be called meanings the words are grammatically capable of bearing."¹³ Legal theorists have wrestled with similar examples for centuries—for example, the well-known medieval hypothetical of the doctor charged with "drawing blood in the street," after treating an injured man there. They are far too numerous to be ignored by legal theorists hoping to explicate the nature of statutory meaning and interpretation. In particular, philosophers of language without legal training must beware of abstract reasoning that ignores the exigencies of the law in practice. Some theoretical account, consistent with constitutional principle, must be given of the way in which such cases usually are, and should be, resolved.

III. THE ORTHODOX SOLUTION: LEGISLATIVE INTENTION OR PURPOSE

The orthodox account of the way such cases usually are, and should be, decided is based on the concepts of legislative intention and legislative purpose. I will not attempt a philosophical analysis of these concepts, or the relationship between them. Intuitively, intended meanings constitute one subset of intentions, and purposes another subset. When I say something, I intend what I say to mean something, and I intend my saying it to serve some further purpose. My intended meaning is not the same as my further purpose. Sometimes, because I have made some kind of mistake, my intended meaning does not serve that purpose.

According to the orthodox account, in examples such as those just described, the literal meaning of a provision either does not accurately

RIGHTS]; RONALD DWORKIN, *LAW'S EMPIRE* 15–20 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*].

12. *Turner v. Ciappara* (1969) V.R. 851; *see also* BENNION, *supra* note 4, at 699 (discussing *Turner*).

13. BENNION, *supra* note 4, at 334.

communicate its intended meaning, or does not accurately serve its further purpose, or violates some other important purpose or commitment of the legislature. These problems can arise for a variety of reasons.

- (1) Sometimes a mistake in the use of words has been made—the words used do not accurately express the legislature’s intended meaning. This seems to be true of examples (1) and (2).
- (2) Sometimes the legislature’s intended meaning has been accurately communicated, but because of some other kind of mistake, it fails to serve the legislature’s further purpose. This seems to be true of example (3).
- (3) Sometimes the statute’s words by themselves do not fully express the legislature’s intended meaning, not because of a mistake, but because the intended meaning is obvious to any reasonable person and does not need to be fully expressed. The intended meaning is communicated partly by implication, in addition to the literal meaning of the words. This seems to be true of examples (4) and (5).
- (4) Sometimes an unusual situation has arisen that could not reasonably be expected to have been either foreseen or expressly provided for. As a result, the statutory provision is under- or overinclusive. Even if the statute cannot realistically be regarded as already providing for that situation by implication, the courts may be able to adjust the statute “equitably,” to serve the legislature’s purpose. This is arguably true of example (6).
- (5) Sometimes there is a mixture of problems: although an unusual situation has arisen, it should have been foreseen and expressly excepted from the operation of the statute. Here, too, the courts may be able to adjust the statute equitably to rectify the legislature’s omission. This seems to be true of examples (7) and (8).

Several of these reasons concern inevitable human error. The authors of legal documents never express themselves with full clarity and comprehensiveness. In the case of statutes, at least when it is obvious that a drafting error has been made, and also obvious what the legislature intended to provide, the courts are often prepared to overlook the error and give effect to that intention. The legislature is deemed to have

succeeded in communicating its intention despite its clumsy mode of expression. In these cases, simple common sense is often sufficient evidence of the legislature's intention—a painstaking examination of legislative history is not required. Extreme nonintentionalism, which denies that legislatures *ever* have ascertainable intentions, is implausible partly because it must deny that common sense can play that role. On the other hand, a nonintentionalist who concedes that common sense can sometimes make a legislature's intentions or purposes obvious would surely have to concede that other extrinsic evidence might also be capable of doing so.

But as reasons (3) and (4) indicate, human error is not the only reason for the inadequacy of literal meanings. As I have argued at length elsewhere, the meaning of almost everything we say depends on background assumptions that we take for granted.¹⁴ If they are not taken for granted, almost anything we say is open to being misunderstood in unpredictable and bizarre ways. For example, when I order a hamburger at a fast food store, I take for granted and do not bother to specify that it should not be poisonous or inedible. Moreover, it is impossible to avoid this reliance on background assumptions. Even if in ordering my hamburger I do expressly exclude those misunderstandings, it would not occur to me to rule out delivery of a hamburger encased in lucite plastic, which can be broken only by a jackhammer.¹⁵ And if I did expressly rule that out, innumerable other bizarre misconstructions would be left open. As John Searle has argued, no matter how many of them I expressly exclude, there will be others I cannot anticipate. Among the reasons for this are that, first, many of the crucial background assumptions are “submerged in the unconscious and we don't quite know how to dredge [them] up,”¹⁶ and second, for every assumption spelled out, others would spring up on which the meaning of the expanded utterance would depend.¹⁷ Each assumption depends for its full meaning on others, which together constitute a vast and complex network of beliefs and values that are generally not consciously adverted to, let alone articulated in language. Even if it were possible to make all of this explicit, the result would be so prolix and convoluted that it

14. Jeffrey Goldsworthy, *Implications in Language, Law and the Constitution*, in *FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW: ESSAYS IN HONOR OF PROFESSOR LESLIE ZINES* 150, 158–61 (Geoffrey Lindell ed., 1994) [hereinafter Goldsworthy, *Implications*]. See generally Goldsworthy, *Marmor*, *supra* note 3. See also W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* 244–45, 257–58 (1994).

15. JOHN R. SEARLE, *EXPRESSION AND MEANING* 117, 127 (1979).

16. JOHN R. SEARLE, *INTENTIONALITY* 142 (1983).

17. SEARLE, *supra* note 15, at 126; SEARLE, *supra* note 16, at 148; John R. Searle, *The Background of Meaning*, in *SPEECH ACT THEORY AND PRAGMATICS* 228 (John R. Searle et al. eds., 1980).

would be very difficult to read, let alone to understand. What Martinich writes of conversation is true of communication generally: “the words the participants utter are merely the surface that simultaneously outlines and conceals the underlying substance of communication and meaning.”¹⁸

This background network of assumptions may not be consciously adverted to by either the speaker or the hearer of an utterance. It would therefore be inappropriate to say that speakers intend to communicate them, even indirectly. They form part of the infrastructure that underpins communication, rather than of the content of what is communicated. They are implicit in communications rather than implied by them. But it does not follow that speaker’s intentions are irrelevant. When we say that something is implicit in an utterance in the sense that it is taken for granted, we are saying that the speaker took it for granted. Texts considered as objects completely independent of speakers cannot sensibly be said to take anything for granted.¹⁹ Those who completely reject intentionalism in legal interpretation in effect banish that underlying infrastructure of communication from consideration.

Whether because of human error or the inescapable dependence of all communication on background assumptions, legislators never express their intentions and purposes with total comprehensiveness and exactitude. To restrict statutory meaning to literal meaning would therefore enable judges to frustrate those intentions and purposes. That is why “literalism” has long been a byword for a narrow, formalistic, and obstructive approach to interpretation. It excludes implications, which by definition depend on something beyond the words actually used, and are sometimes indispensable if a statute is to achieve its intended purpose. It enables the proverbial “coach-and-four” to be driven through laws intended to enhance public welfare, in order to protect vested interests. As Bell and Engle insist, “Relatively little of what has to be said in a statute can be said in such a way that it may not be reduced to utter nonsense by a strictly literal and wholly unimaginative construction.”²⁰ For those who like to reduce everything to politics, literalism enables conservative judges to thwart tax laws, labor laws, and other progressive legislation enacted by reformist legislatures. By the same token, of course, it

18. A.P. MARTINICH, COMMUNICATION AND REFERENCE 78 (1984).

19. The background assumptions on which communication depends cannot be reduced to social conventions that are universally applicable and independent of particular contexts. See Goldsworthy, *Marmor*, *supra* note 3, at 461–63.

20. BELL & ENGLE, *supra* note 8, at 68.

enables reformist judges to frustrate laws enacted by conservative legislatures. But judges should not apply principles of interpretation selectively, depending on whether or not they approve of the political complexion of the legislature. Principles of interpretation are bought wholesale, not retail.

For all these reasons, it is often reasonable for a court to depart from a provision's literal meaning on the ground that it is not its true meaning. Its true meaning is, instead, partly a function of its intended meaning, at least insofar as evidence of its intended meaning is readily available to the legislature's intended audience.²¹ Even in the case of unusual and unanticipated situations that fall within the literal meaning of a provision, and with respect to which the legislature had no conscious intention at all, it can make sense to say that it did not intend the provision to apply. That is because one's conscious intentions, as well as one's words, can only be properly understood in the light of background assumptions such as those previously discussed.²² It is noteworthy that Dworkin himself now accepts something like this explanation of the decision in *Riggs*, the case in which a murderer was held not to be entitled to inherit under his victim's will, even though the relevant statute contained no express provision to that effect. In *Law's Empire*, Dworkin rejected what he called the "speaker's meaning" explanation of the decision, based on the idea "that those who adopted the statute did not intend murderers to inherit."²³ But he seems to have changed his mind, because he now says:

I continue to think that the majority reached the right decision, in *Riggs v. Palmer*, in holding that, according to the better interpretive reconstruction, those who created the Statute of Wills did not intend to say something that allowed a murderer to inherit from his victim. . . . It is a perfectly familiar speech practice not to include, even in quite specific instructions, all the qualifications one would accept or insist on: all the qualifications, as one might put it, that "go without saying."²⁴

But I have to concede that in some cases this explanation is strained—although not as strained as some would maintain. It is

21. I have argued elsewhere that the intended audience consists of lawyers, not the general public, because the intended meaning of a statute is sometimes discernible only to those with specialized legal knowledge. Goldsworthy, *Originalism*, *supra* note 3, at 11. Heidi Hurd might object that in the case of "conduct" rules that appear to be addressed to the general public (as opposed to "decision" rules addressed to legal officials), lawyers are merely "eavesdroppers." Heidi M. Hurd, *Sovereignty in Silence*, 99 *YALE L.J.* 945, 979–80 (1990). But a much better analogy is to compare lawyers with translators.

22. For a fuller analysis, see Goldsworthy, *Implications*, *supra* note 14, at 160–61.

23. DWORKIN, *LAW'S EMPIRE*, *supra* note 11, at 352.

24. Ronald Dworkin, *Reflections on Fidelity*, 65 *FORDHAM L. REV.* 1799, 1816 (1997).

strained where the literal meaning does communicate the legislature's intended meaning, but does not serve its intended purpose. In these cases it seems more accurate to admit that the court has departed from the true meaning of the provision, and in effect amended it. But that admission is consistent with constitutional orthodoxy, provided that the intended purpose of the provision is obvious and the court alters its meaning only to ensure that it better serves that purpose. If so, no damage is done either to the principle of legislative supremacy, because the court is guided by the legislature's purpose, or to the rule of law, because that purpose is obvious to reasonable people. The court exercises the kind of equitable judgment described by Aristotle, who argued that when general laws would operate unjustly in unusual situations, they should be corrected according to "what the lawgiver himself would have said if he were present, and what he would have enacted if he had known."²⁵

We can summarize all this by saying that intentionalism is crucial to reconciling the constitutional doctrine of legislative supremacy with the sensible interpretation and application of statutes. This has often been recognized. William Blackstone long ago said that if a statute would otherwise lead to "absurd consequences, manifestly contradictory to common reason . . . the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to . . . *quoad hoc* disregard it." On the other hand, "if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it"²⁶

More recently, Bennion has expressed the same idea:

If the result of a literal construction appears absurd or mischievous, the court must ask itself whether Parliament really meant it. There is a presumption that Parliament does not intend to do anything that will produce an absurd result. If the court thinks that what it considers to be absurd was really and truly contemplated by Parliament, and was deliberately intended, then the court must defer to that.²⁷

25. ARISTOTLE, NICOMACHEAN ETHICS 142 (Martin Ostwald trans., Library of Liberal Arts 1962).

26. 1 WILLIAM BLACKSTONE, COMMENTARIES 91 (spelling modernized).

27. BENNION, *supra* note 4, at 338.

IV. ALTERNATIVE SOLUTIONS

Nonintentionalists often argue either that there are no such things as legislative intentions or purposes, because legislatures simply cannot have them, or that even if in principle there can be such things, they very seldom exist or can be identified. If this were true, the orthodox account of what courts do in these cases would have to be abandoned. If the meaning of a statutory provision cannot be regarded as enriched by evidence of legislative intention or purpose—not even the evidence of common sense—then it must either (a) be confined to the literal meaning(s) of its words, or (b) be enriched by something else, such as moral values. Option (a) is literalism. Option (b) requires some kind of natural law theory of meaning.

A. *Literalism*

Option (a), literalism, entails that statutes will sometimes have meanings that are absurd or extremely unjust. It also entails that the only way a court can avoid applying a provision in accordance with its literal meaning is to either disobey, override, or amend it.

Some legal theorists have suggested that this is, indeed, what the courts should sometimes do. The issue has been discussed in the context of the debate between Hart and Fuller, concerning whether the meaning of a rule depends partly on its purpose. Fuller defended the claim that it does, partly by relying on examples similar to mine, in which literal interpretations lead to unreasonable or absurd results. Some of Hart's defenders have replied that Fuller's point goes to the application of rules, rather than to their meaning. There are different versions of this reply.

Andrei Marmor appears to argue, in effect, that arguments like Fuller's show that judges may sometimes have to disobey the law. He writes that they

confuse[] the question of what *following a rule consists in* (which interested Hart), with that of *whether a rule should be applied in the circumstances*. Even if we concede that judges should always ask themselves the latter question (which is far from clear), it does not follow that rules cannot be understood, and then applied, without reference to their alleged purposes or any other considerations about what the rule is there to settle.

...
... [W]hether the rule *should* be applied (or not) in the circumstances ... is bound to be affected by the moral contents of the particular law and legal system in question.²⁸

28. ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 136–37 (1992).

But this exaggerates and aggravates the problem. It turns a humble problem of statutory interpretation into a challenge to judicial fidelity to law. Judicial disobedience of the law is generally thought to be an extreme remedy, to be reserved for truly extraordinary situations in which a law is so morally outrageous that the reasons why judges should almost always obey the law are outweighed or overridden. Run-of-the-mill cases of statutory interpretation in which a literal reading would have unreasonable consequences are problematic, but must they be treated as posing such a grave moral dilemma? Is there really no way that judges can deal with them except by violating their judicial oaths and disobeying the law? A less spectacular solution would surely be preferable.

Frederick Schauer offers a different version of the same reply, according to which judges have legal authority to decline to apply statutes. According to him, Fuller's argument does not show that the meaning of a rule depends on its purpose. All it shows is that sometimes judges should decline to follow a rule because doing so would be absurd or unjust.²⁹ Moreover, he claims that the Anglo-American legal tradition authorizes judges to do this. For example, he denies that the statutory rules considered in *Riggs* were unclear. This "was not a hard case in the sense of presenting events not covered by existing rules"³⁰—the events in question fell plainly within the scope of the relevant statute.³¹ The problem was that this rule provided an answer that "was morally uncomfortable."³² According to him, it is a hard case only

because the result generated by the most locally applicable rule [the statute] is socially, politically, or morally *hard* to swallow. In those circumstances . . . American practice, and less pervasively English practice, empowers the judge to treat the most locally applicable rule as being other than conclusive, subject to override or revision on the basis of those factors that made the locally easy case hard in the first instance.³³

Schauer differs from Marmor by describing this judicial power to override or revise statutes as a legal rather than an extralegal power, although not necessarily in a legal positivist sense of "legal." In *Riggs*, he writes, the court was able to hold that the statute was overridden by a

29. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 209–10 (1991).

30. *Id.* at 200.

31. *Id.* at 209.

32. *Id.* at 200.

33. *Id.* at 210; on *Riggs*'s case, see *id.* at 189–90, 200, 203.

more fundamental rule, which prohibited people from profiting by their own wrongs.³⁴ In other cases, the courts have overridden positive law in the service of values that are not “positivistically pedigreed.”³⁵ He uses the term “presumptive positivism” to describe a legal system in which judges or other officials have this power. In such a system, rules identified by a pedigree test are presumptively binding, but judges have power to override them if the reasons for doing so are particularly strong.³⁶

In most cases, the result generated by the most locally applicable and pedigreed rule controls. But in every case that rule will be tested against a larger and unpedigreeable set of considerations, and the rule will be set aside when the result it indicates is egregiously at odds with the result that is indicated by this larger and more morally acceptable set of values.³⁷

Schauer’s explanation of the decision in *Riggs* is inconsistent with the explanation given by the court itself. As Jeremy Elkins has pointed out, “[T]he court went out of its way to argue that it was interpreting the Statute of Wills, rather than displacing it.”³⁸ Worse still, Schauer’s explanation of the decision is vulnerable to a fatal constitutional objection. According to the principle of legislative supremacy, courts are legally required to obey any statute that is constitutionally valid. Statutes are not subordinate to judge-made common law principles—if there is any inconsistency between them, the common law principles rather than the statute must give way. This is certainly the position in Britain, whose constitution is based on the doctrine of parliamentary sovereignty.³⁹ And the principle that statutory law is superior to common law is equally applicable in the United States. Of course, American legislatures are not fully sovereign in the same sense in which the British Parliament is because they do not possess legally unlimited legislative authority. But their authority is limited only by their national and state constitutions. The judges have no authority to hold a statute void except on the ground that it violates a constitutional provision. In *Calder v. Bull*, when Justice Chase suggested that American courts might have authority to hold statutes void for violating extraconstitutional principles, Justice Iredell strongly disagreed.⁴⁰ As a leading constitutional law

34. *Id.* at 189.

35. *Id.* at 201.

36. *Id.* at 196–206.

37. *Id.* at 205.

38. Jeremy Elkins, *Frederick Schauer on the Force of Rules*, in *RULES AND REASONING: ESSAYS IN HONOUR OF FRED SCHAUER* 79, 90 (Linda Meyer ed., 1999). Ronald Dworkin agrees with this. See DWORKIN, *LAW’S EMPIRE*, *supra* note 11, at 16.

39. For the position in Britain, see generally JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (1999).

40. *Calder v. Bull*, 3 U.S. (3 Dall.) 385, 398 (1798) (Iredell, J., concurring).

treatise explains, “In form, the Supreme Court has adopted the views of Justice Iredell”⁴¹ “[T]he philosophy that the Justices would overturn acts of other branches only to protect specific constitutional guarantees has been the formal guideline of the Supreme Court at every stage in its history.”⁴²

In his *Commentaries on American Law*, Chancellor Kent wrote, “[T]he principle in the English government, that the parliament is omnipotent, does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government.”⁴³ Roscoe Pound agreed. After summarizing the British doctrine of parliamentary sovereignty, he wrote, “Except as constitutional limitations are infringed, the same doctrine obtains in America.”⁴⁴ Admittedly, some American constitutional guarantees are famously “open ended” and have been interpreted extremely broadly. But that provides no support for the unrelated proposition that the courts may overturn or amend statutes that are inconsistent with ordinary common law principles, such as that people should not profit from their own wrongs. As Kent Greenawalt explains, “[a] constitutional marking of some domains as off limits represents a conscious choice to leave remaining domains to legislative authority.”⁴⁵ That is why, according to Robert Summers:

[American] constitutional law provides that, in matters of valid legislation, the legislature is supreme. That is, the legislature’s meaning is supposed to control, not the substantive political views of the judiciary. This principle of legislative supremacy is expressly or implicitly embedded in the federal and state constitutions.⁴⁶

41. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.1 (3d ed. 1999).

42. *Id.* at § 15.5.

43. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 503 (10th ed. Little, Brown & Co. 1860) (1826); see also THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 87–89 (Little, Brown & Co. 1868) (describing the plenary powers of Congress as bounded only by the Constitution).

44. Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383, 392 (1908).

45. KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION—TWENTY QUESTIONS 23 (1999).

46. Robert S. Summers, *Statutory Interpretation in the United States*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 407, 450 (D. Neil MacCormick & Robert S. Summers eds., 1991).

The principle of legislative supremacy has played a pivotal role in recent American debates about statutory interpretation.⁴⁷ Of course, American courts can use their power to interpret statutes to mitigate harshness and injustice. But that is equally true of British courts. Some people think of newly enacted legislation as being enveloped and enmeshed by common law principles, which the courts use to subdue and domesticate it.⁴⁸ This is consistent with constitutional orthodoxy only up to a point. A statute can legitimately be interpreted as subject to common law principles as long as it is reasonable to presume that Parliament intended, or would have intended, this.⁴⁹ I previously acknowledged that in some cases, courts go so far as to change the meanings of statutory provisions. But I added that this is consistent with constitutional orthodoxy only if it serves the legislature's purposes in ways that would presumably meet with its approval. The courts thereby remain subordinate to the legislature, acting like agents faithfully carrying out the presumed will of their principal, subject to rule of law requirements.⁵⁰

But that way of limiting a power of judicial amendment, and reconciling it with legislative supremacy, is not available to literalists. If there are no such things as legislative intentions or purposes, then nothing other than the judges' own value judgments can identify the need to change the meaning of a statute, or guide and limit the changes made. If the courts have power to amend or even override some statutory provisions, they must be able to do the same to any provision, whenever they deem it desirable, all things considered, to do so. If they have power to override or amend the New York Statute of Wills to give effect to the common law principle that no one should be permitted to profit from a wrong, they must have power to override or amend other statutes to give effect to other common law principles. Their exercise of that power can be guided only by their own value judgments. They

47. See, e.g., William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 Case W. Res. L. Rev. 1129 (1992); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767 (1991).

48. See, e.g., JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 359 (1994).

49. Trevor Allan rightly insisted that this is consistent with legislative supremacy in *Legislative Supremacy and the Rule of Law*, *supra* note 2, at 111, 121–22, 127, 132–33, 140–41, although his views have subsequently changed.

50. Something like this analogy is usefully developed in RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 269–73 (1990). By rule of law requirements, I mean that the will of the legislature must be publicly ascertainable from the words it enacted and understood in the light of contextual evidence that is readily available to its intended audience.

might adopt their own limiting rules, as a matter of common law. For example, they might decide that they should override or amend a statute only if they regard it as absurd or irrational. But that would not overcome the constitutional objection because the judges would remain superior to statutory law. They would remain the arbiters of the extent to which they should exercise their supremacy, with the ability to relax their own limiting rules at any time.

The upshot is that literalism leads either to unreasonable applications of statutes, or to a form of judicial supremacy over statutes that is inconsistent with prevailing constitutional law.

B. Natural Law

Can option (b), natural law, surmount these objections? It is important to note that there are different versions of natural law theories of legislation. Classical natural law as usually understood is concerned with testing human laws for consistency with natural law, and holding invalid those that are not consistent. This is not in itself incompatible with an intentionalist theory of statutory meaning and interpretation. An intentionalist classical natural lawyer would interpret statutes in the light of the legislature's intentions, and then test them for consistency with natural law. Alternatively, a literalist classical natural lawyer would restrict statutory meaning to literal meaning, and hold a statute invalid if, given its literal meaning, it is inconsistent with natural law. If I am right that literal meanings are often absurd or unreasonable, literalist classical natural lawyers would have to invalidate statutes much more frequently than intentionalist ones. But more importantly, classical natural law of either type is hard to distinguish from the theories I have just criticized. It involves judges overriding statutes, and is therefore committed to the same type of unconstitutional judicial supremacy.

There is another type of natural law theory that arguably does not involve judges overriding statutes, and therefore exercising supremacy over the legislature. It denies that when judges refuse to be governed by a statute's literal meaning, they override or invalidate it. It claims, instead, that the judges are ascertaining the statute's real meaning. On this view, a statute's real meaning is a function of some combination of its literal meaning and moral values.⁵¹ These moral values are not used

51. Larry Alexander calls theories of this kind "conflationist." Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in

to override the statute; rather, they are supposedly built into it. I will call this type of theory nonclassical natural law.

I take Ronald Dworkin to have defended something like this kind of nonclassical natural law theory in *Law's Empire*.⁵² In describing *Riggs*, he pointed out that none of the judges denied that if the statute, properly interpreted, gave the inheritance to the murderer, then they were bound to let him have it. "None said that in that case the law must be reformed in the interests of justice." In other words, it was not a case of a statute being partly overridden or invalidated. The judges' disagreement was about "what the statute required when properly read."⁵³ Dworkin attempted to explain how the meaning of a statute can be determined partly by moral values. As I have pointed out, in more recent writings, he offers an intentionalist explanation of the decision in *Riggs*.⁵⁴ But in *Law's Empire*, he rejected that explanation. Heidi Hurd has argued that, even then, Dworkin did not completely reject intentionalism.⁵⁵ But even if that is true, his theory was at least a hybrid one that combined intentionalist and nonclassical natural law elements. He maintained that judges should interpret statutes so as to make them "the best that they can be," consistently with deeper moral principles embedded in the law as a whole.⁵⁶

Others who have defended natural law theories of legislation include Hurd and Michael Moore. I will discuss their theories rather than Dworkin's, because their rejection of intentionalism, unlike his, is undoubtedly comprehensive. In other words, they put forward purer versions of natural law theory. But are their theories examples of classical or nonclassical natural law, as I have defined those terms?

Hurd seems to be a literalist classical natural lawyer. She denies that statutes are communications, which should be understood in the light of the intentions of those who made them. This is because "the legislature lacks the intentions required of a speaker and because citizens and officials lack the beliefs required of an audience."⁵⁷ She claims that statutes can therefore only have sentence meanings (that is, literal meanings)

LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 387, 393–402 (Andrei Marmor ed., 1995).

52. DWORKIN, *LAW'S EMPIRE*, *supra* note 11.

53. *Id.* at 16.

54. *See supra* text accompanying note 24.

55. Hurd, *supra* note 21, at 992–94.

56. Dworkin's then-theory is explained in Jeffrey Goldsworthy, *Dworkin as an Originalist*, 17 *CONST. COMMENT.* 49, 56–64 (2000).

57. Hurd, *supra* note 21, at 990. It is pertinent to note that many of Hurd's arguments, to the effect that legislation does not satisfy Paul Grice's criteria for communication, are undermined by Grice's own modification of those criteria to fit examples exactly like those she discusses. *See* PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 112–16 (1989). I will not pursue the matter here.

and not speaker's meanings, and should be understood accordingly. Legislative intentions cannot be authoritative because they do not exist.⁵⁸ Only texts can be authoritative.⁵⁹ Therefore, she says that statutes are "like the often-hypothesized novel typed by random chance by the thirteen-thousandth monkey chained to a typewriter: meaningful . . . despite not having been produced as a communication by anyone for anyone."⁶⁰ This is a refreshingly candid admission of the implications of her approach. But it is not immediately clear how this satisfies her goal of constructing a natural law theory of legislation, in which statutory law is a function of moral correctness rather than pure fact.⁶¹ After all, sentence meanings are fixed by conventions, which are social facts. Where does moral correctness come into the picture?

Hurd attempts to show that even if statutory meaning is restricted to literal meaning, statutes can still play a useful role as "theoretical authorities." They can be regarded as "signs"—as evidence—of moral truths. The legislature cannot be regarded as intending to communicate those moral truths because it is incapable of having any intentions. Instead, the fact that legislation has been enacted gives us good reasons to regard what it expressly provides as evidence of our moral obligations. An analogy of my own might help. The fact that most human beings believe that murder is immoral might be regarded as good evidence that murder really is immoral, because it is unlikely that most human beings could be wrong about such a thing. Similarly, Hurd seems to argue, the mere fact that a majority of legislators has voted in favor of a statute gives us a good reason to regard what it says as evidence of our moral obligations. This is because legislators usually have appropriate motivations and knowledge, and they follow procedures that justify confidence in their enactments.⁶²

On this view, statutes do not themselves give us reasons for action. Instead, they are evidence of "antecedently existing reasons for action generated by antecedently existing moral facts."⁶³ It follows that the authority of statutes is strictly limited. "To the extent that the legislature mistakenly describes or distorts the optimal state of affairs or its

58. But note the signs of backtracking in Heidi M. Hurd, *Interpreting Authorities*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY*, *supra* note 51, 405, 425–26.

59. *Id.* at 425.

60. Hurd, *supra* note 21, at 966.

61. *Id.* at 991.

62. *Id.* at 1010–15.

63. *Id.* at 1009.

attendant obligations, the legislature will fail to have (theoretical) authority for us.”⁶⁴ Furthermore, “the utterances of the legislature do not comprise the content of the law.”⁶⁵ They are merely defeasible evidence of what we are obligated to do.

It is not the case, therefore, that in failing to comply with a legislative description of appropriate action the citizen necessarily violates the law. For the legislature might be wrong about the optimal legal state of affairs and wrong thereby about the appropriate action to take in a given situation⁶⁶

An individual’s different conclusions about her obligations “are sometimes more accurate statements of the (statutory) law than are the conclusions reached by the legislature.”⁶⁷ If so, the citizen’s “failure to comply with the utterances of the legislature is not a failure to comply with the law.”⁶⁸ Not every erroneous statute can be disobeyed; otherwise, none would be authoritative. But Hurd leaves to another occasion the problem of estimating just how erroneous a statute must be to forfeit its status as law.⁶⁹

Presumably, then, Hurd would explain the decision in *Riggs* as an example of a court deciding that a statute erred (by failing to prohibit a murderer from inheriting under his victim’s will), and setting aside the statute in favor of its own, more accurate, judgment about the parties’ moral obligations. Presumably, this would also be her explanation of all decisions of a similar kind, in which courts decline to apply statutes according to their literal meanings. If so, her approach is that of a literalist classical natural lawyer. The meaning of a statute is determined by its literal (or sentence) meanings, but it may be overridden if those meanings are inconsistent with the moral values that constitute the true law.

But at the very end of “Sovereignty in Silence,” Hurd makes a claim that casts doubt on this interpretation of her theory. In a very brief discussion of statutory interpretation, she writes:

[A] non-communicative model of legislation would call upon courts to interpret a statute by seeking to discover and to achieve the optimal state of affairs of which the statute is a natural sign. This is no more than a long-winded way of saying the familiar: that courts should interpret statutes in light of the purposes that they may best be made to serve.⁷⁰

64. *Id.* at 1010.

65. *Id.* at 1023.

66. *Id.*

67. *Id.* at 1024.

68. *Id.*

69. *Id.* at 1026.

70. *Id.* at 1028.

One of the strengths of her theory, she adds, is that it can justify the popular method of “purposive interpretation,” which calls for the interpretation of statutes according to the functions they are designed to serve.⁷¹

Now, this claim is difficult to reconcile with the argument that precedes it, which at the very least suggests that the meaning of a statute is fixed by its literal (sentence) meanings.⁷² When Hurd refers to the purpose or function that a statute is designed to serve, she cannot mean some purpose or function that the legislature or legislators had in mind. That would be inconsistent with her denial of the possibility of legislative intentions. She must mean what Moore means, in a passage she cites, when he writes of legislative purposes. Moore argues that determining the purpose or function of a statute requires recourse to “real values:” it involves “constructing the morally best purpose for a statute, and construing it by reference to that purpose.”⁷³ There is, in fact, no real alternative because the legislature did not have any intention that is both useful and discoverable.⁷⁴ “To use purpose at all (as a judge must do to save any interpretation from the silliness of literalism), necessitates the construction of a theory of a good society and the search for purposes that contribute to that.”⁷⁵ “Purpose” means not “intent” but “function”—the function a statute serves in a just society.⁷⁶

The problem for Hurd, if she were to adopt Moore’s conception of purpose, is that statutes would then be unable to serve as evidence of the existence of moral values external to them. According to Moore, moral values help to determine the content of the statute. But that requires that the moral values be known independently of it. They are evidence of what the statute requires, rather than the statute being evidence of what they require. This is inconsistent with Hurd’s theory of the authority, and indeed of the whole rationale, of statutory law. As she explains it,

If legal texts are to assist us in acquiring subjective moral beliefs that better cohere with objective moral maxims, we cannot interpret legal texts so that they simply mirror our own subjective moral beliefs. . . . Institutionally created laws and principles should thus be thought to have an autonomy all their own.⁷⁷

71. *Id.*

72. *See id.* at 966.

73. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 354 (1985).

74. *Id.* at 386.

75. *Id.*; *see also* Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 263–65 (1980).

76. Moore, *supra* note 73, at 397.

77. Hurd, *supra* note 58, at 431.

Turning to Moore's self-styled "natural law theory of interpretation," the method by which it deploys moral values and whether it is subject to any limits are somewhat unclear. Moore agrees that literalism is untenable because literal meanings are sometimes absurd or unreasonable. He agrees that to avoid such problems, statutes must be interpreted in the light of their purposes. But as we have seen, he denies that these can be purposes of the legislature that enacted the statutes. They must be purposes that the judges think the statutes ought morally to serve, not those that any number of legislators may have had in mind. Moore's approach is somewhat reminiscent of Dworkin's in that the judges should strive to make statutes "the best that they can be" by attributing purposes to them that satisfy dimensions of both "fit" and "morality." The judge must attempt to find the morally best purposes that "fit" the statute, in the sense that a rational legislature could have enacted it in order to pursue those purposes.⁷⁸ But the "fit" requirement is flexible—if the judge is unable to "fit" a morally compelling purpose onto the literal meaning of a statute's words, he can stretch or even overrule that meaning in order to achieve his objective. In deciding what a word in a statute means, a court "ought to balance off its linguistic intuitions against its ethical intuitions about what, in rules of this sort, the word *ought to mean*."⁷⁹

His [the judge's] linguistic intuitions provide him with provisional interpretations of the nature of the speech act about which he is endeavoring to discover some purpose. The less satisfactory he finds the purpose of an act under its provisional interpretations, the broader he should be willing to stretch his linguistic intuitions about those interpretations in order to "discover" purposes he likes better. In this way he trades off his two sets of intuitions against each other; he uses a less ordinary interpretation of a term to further a more morally justifiable purpose.

There may be no set of acceptable purposes for a particular statute that a judge could find intelligibly promoted by it unless he greatly stretches his linguistic intuitions. Only then does he become self-conscious of his necessarily creative role.⁸⁰

Riggs can again be used as an example.⁸¹ When the Statute of Wills is subjected to Moore's "purposive interpretation," moral values are supposedly used not to override it, but to help determine its meaning. They do so by qualifying or modifying its literal meaning to produce a result consistent with the purposes that the judges believe it morally ought to serve. Thus, despite its literal meaning, it is interpreted as not allowing murderers to inherit under their victims' wills.

78. Moore, *supra* note 75, at 259–60, 293–94.

79. *Id.* at 278.

80. *Id.* at 294; *see also* Moore, *supra* note 73, at 385.

81. *Riggs* is discussed in Moore, *supra* note 75, at 277–78.

But if this kind of interpretation is permissible, are there any limits to the extent to which the meaning of the actual words of a statute can be bent, stretched, or overridden? According to the orthodox justification of nonliteral interpretation, the scope for modifying literal meanings is limited by the presumed intentions and purposes of the legislature. But Moore's purposive interpretation is not subject to any such limit. Does his argument permit a court to decide that a statute morally ought to serve some valuable purpose, and then "interpret" it so that it does, no matter what it actually says? On this point, his position is not entirely clear.

Moore sometimes suggests that there are no limits to the ability of this kind of "creative interpretation" to achieve just results. He says that there is no case "in which the linguistic intuitions are so strong that the ethical intuitions might not be determinative the other way."⁸² This suggests that there is no case in which the language of the statute is so intractable that it cannot be interpreted to make it consistent with a morally compelling purpose. In other words, the "dimension of fit" never poses an insurmountable obstacle to a resolution that is satisfactory according to the "dimension of morality." "If the strain on meaning is harsh enough, a judge may 'overrule' the ordinary meaning by acknowledging that this is a term of art in the law, guided by the law's special purposes and not by ordinary meaning."⁸³

On the other hand, Moore elsewhere argues that there are limits. He writes that the ordinary meaning of a statute must not be overridden except to further a moral purpose that is sufficiently pressing to outweigh the "rule of law" values that support adherence to literal meanings.⁸⁴ The judge must weigh the rule of law values against the moral values that would be promoted by overriding those meanings. It would seem to follow that the literal meanings might sometimes prevail, even if they have unjust consequences. This is confirmed by Moore's repeated claims that, in very extreme cases, a judge might have to overrule a statute's purpose as well as its words in order to prevent injustice or absurdity. The judge must always ask a final, "safety-valve" question of justice.⁸⁵ This would be unnecessary if judges could always override literal meanings in order to interpret statutes consistently with whatever purpose or purposes they ought morally to serve.

82. *Id.* at 278.

83. Moore, *supra* note 73, at 385.

84. *Id.* at 321, 385; *see also id.* at 313–20 for a description of the rule of law virtues.

85. *Id.* at 386–87.

Moore's overall position, then, seems to combine a nonclassical natural law theory of interpretation with a classical natural law theory of invalidation, to which a judge can fall back as a last resort in order to achieve justice. Faced with a statute whose literal interpretation and application would be unjust, a judge should first strive for a more acceptable interpretation by modifying its literal meaning in the light of moral values. Only if the rule of law values make its literal meaning intractable, must the judge consider whether its application would be so unjust that it should, in effect, be invalidated.

If I am right that classical natural law, as usually understood, is committed to judicial supremacy over statutory law, then Moore's theory involves judicial supremacy at least as a last resort. But even his nonclassical natural law theory of interpretation involves a considerable degree of *de facto* judicial supremacy. Admittedly, he concedes that adherence to literal meanings is supported by "rule of law values." But the judges have power to weigh those essentially procedural values against substantive moral values. Among the rule of law values that support adherence to literal meanings is "the principle of democracy"—the principle that "[b]ecause legislatures represent the majority's wishes better than courts do, democracies' legislatures should have their wishes carried out by a judge even if that judge disagrees with the wisdom of such wishes."⁸⁶ This is what I have called the principle of legislative supremacy. The difference between constitutional orthodoxy and Moore's position is therefore clear. According to Moore, the principle of legislative supremacy is merely one of a number of principles that judges are entitled to override if they believe that other, substantive moral values are of greater weight. The degree of deference to be accorded the legislature is ultimately a matter for them, and no one else, to decide. Their decisions will inevitably depend on the weight they attribute to the substantive moral values they would prefer the legislature's enactments to serve.

It should also be noted that insofar as the judges' interpretations depend on rule of law values, they depend on citizens' expectations, which it is the primary function of the rule of law to protect. But in a kind of feedback loop, those expectations must depend partly on the judges' judgments. If citizens expected statutes to be interpreted according to their literal meanings, then it would be *prima facie* unfair to upset that expectation. But if citizens knew that judges, in interpreting statutes, may subordinate their literal meanings to moral values, the citizens would be less likely to expect statutes to be interpreted according to their literal meanings. Judges, in turn, would then have less reason to defer to literal meanings, and greater scope for creativity. And there is no good

86. *Id.* at 315.

reason for citizens not to know what, according to Moore, is the judges' proper role in this respect.

The upshot is this: Moore's classical natural law theory of invalidation does not seem qualitatively different from his nonclassical natural law theory of interpretation. Indeed, the former is a seamless extension of the latter. Before the judges are compelled to invalidate a statute, in order to comply with overriding moral values, they have considerable latitude to determine its meaning. Determining its meaning involves subordinating the words chosen by the legislature to moral values selected by the judges. The practical effect is that the legislature is no longer the sole author of the statute it enacts. No matter what it provides, the content of its statute will be determined partly by values read into it by the judges. The judges are elevated to the status of coauthors of every statute that comes before them for interpretation.

I am not sure that Moore would deny this. He acknowledges that the judges' role is creative. They help to construct statutory meanings, rather than merely to discover preexisting meanings that exist independently of their own endeavours.⁸⁷ That may be why he proposes a natural law theory of interpretation, rather than of meaning, and defines "interpretation" to include decisions about the applications of statutes, as well as decisions about the preexisting meanings of their words.⁸⁸ It is partly because he rejects any distinction between interpretation and application that, as I have written, there is no qualitative difference between his theory of interpretation, and his theory of invalidation. The difference is one of degree rather than kind. Interpretation is a phase on a continuum that ends with invalidation. Or to put it the other way around, invalidation is interpretation, as Moore defines it, pushed to the limit. In both cases, the legislature's contribution—the words it enacted—are subordinated to values chosen by the judges. During the interpretation phase, the judges attempt to preserve some continuing efficacy for the words; at the invalidation phase, they give up the attempt altogether. At the interpretation phase, there is at the very least a joint supremacy of the judiciary and the legislature acting as, in effect, coauthors. At the invalidation phase, the judiciary comes out on top.

87. Moore himself puts the word "discover" in scare quotes and refers to the judges' "necessarily creative role." See Moore, *supra* note 75, at 294 and *supra* text accompanying note 80.

88. Moore, *supra* note 73, at 284 n.14.

It is hard to imagine a natural law theory of interpretation that would not dilute or dispense with legislative supremacy. That would be the effect of any theory limiting the legislature's contribution to the words it enacted, and authorizing the judges to interpret the words nonliterally, in order to serve moral values they deem important. This is made explicitly clear in Trevor Allan's recent work on statutory interpretation, which is essentially Dworkinian. Allan writes that the judicial practice of interpreting statutes restrictively, in order to protect important common law principles, is "radically inconsistent with a notion of unlimited legislative supremacy" and tantamount to the partial invalidation of statutory provisions.⁸⁹ Even if it makes sense to claim that the judges are discovering the statute's "true meaning," rather than changing it, it cannot be denied that the legislature itself is no longer the principal arbiter of that meaning. Its role is so diminished that talk of supremacy no longer seems warranted.

V. CONCLUSION

It is possible to reduce the preceding analysis to a few simple, if somewhat rough, propositions. It seems undeniable that statutes should not always be interpreted and applied literally. If so, their literal meanings must sometimes be modified or overridden for the sake of other values, intentions, or purposes. If these are the actual or presumed values, intentions, or purposes of the legislature, then legislative supremacy over statutes is preserved. The judicial role is that of an agent striving to interpret and apply statutes equitably, so as better to serve the legislature's values, intentions, and purposes. If, instead, the judiciary can change or override the literal meanings of statutes to make them consistent with its own values, intentions, or purposes, then it has effective supremacy over statutes. Judicial supremacy can be described in natural law terms, which depict the judges as discovering and enforcing the "true law"—either what the statutes "really mean," or some "higher law" that is superior to them. Or it can be described in legal realist terms, which depict the judges as exercising supreme legislative power according to political rather than legal criteria. Perhaps these different descriptions do not in the end signify any practical differences. Either way, the judicial power described is inconsistent with orthodox constitutional law in common law jurisdictions, including that of the United States. The important point is that legal positivists—and for that matter anyone else—who would prefer to steer clear of judicial supremacy over statutory law, should try to steer clear of skepticism about the existence and utility of legislative intentions and purposes.

89. Allan, *supra* note 2, at 17.