# Against Interpretation

MIRANDA OSHIGE MCGOWAN*

It is a truth universally acknowledged that a judge should interpret statutes, not rewrite or impose her own preferred meaning upon them. As with most universally acknowledged truths, we all merrily embrace it on a theoretical level, but we bash swords when time comes to apply it. Judges, lawyers, and scholars have argued for ages about what methods of statutory or constitutional interpretation *find* the text's meaning (and therefore interpret) rather than impose or create meaning (rewrite). We show no signs of stopping. The stakes of these arguments could not be higher: nothing less than judicial and legal legitimacy seem at risk, for the rule of law requires that laws, not persons, decide cases. Judicial decisions that do more than interpret statutes and constitutions are branded lawless. Judges tempted from the task of interpretation usurp the role of the legislature—the law's equivalent of crossing the beams:[1] "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[2]

What do we do when we interpret texts, and how do we know when we are doing something else? Steven Knapp, Walter Benn Michaels,[3] and Stanley Fish[4] contend that a text means exactly what its author

* Professor of Law, University of San Diego. Many thanks to Larry Alexander and the other members of the Institute for Law and Philosophy for organizing and hosting an extraordinary roundtable on the question of legal interpretation.

1. GHOSTBUSTERS (Columbia Pictures 1984).

2. THE FEDERALIST NO. 78 (Alexander Hamilton) (quoting 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS bk. XI, ch. 6, at 152 (Thomas Nugent trans., Colonial Press rev. ed. 1900) (1752)).

3. Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982).

4. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH (AND IT'S A GOOD THING, TOO) 182 (1994) ("There is only one style of interpretation—the intentional style . . . .").

intended it to mean. Interpreting a text—*any* text—requires no more and no less than recovering that meaning. If true, this claim (known as Intentionalism) could have profound consequences for law and legal interpretation. Once combined with the rule of law, Intentionalism seems to imply that judges who wish to interpret law should construe and apply statues to accord with the intent of the legislature. Intentionalism also seems to imply that judges who construe statutes some other way behave lawlessly.

This essay argues that Intentionalism's definition of interpretation entails nothing about the legitimate scope of the judicial role and commits a judge to no particular method of textual construction. My argument follows in three parts. *First*, I will set the stage by explaining Intentionalism in greater detail and exploring how Intentionalism challenges lawyers' views of interpretation. *Second*, I will discuss the role interpretation plays in legal decisionmaking. Though we often say that judges should "interpret" the law, I will argue that deciding a case under law *necessarily* includes noninterpretive tasks. Even when it appears that a legal decision entirely depends on a question of statutory meaning, interpretation alone cannot resolve or decide cases.

*Third*, I will argue that judges do not act illegitimately when they do something that isn't strictly "interpretation." I will explain that arguments about whether one method of statutory construction "interprets" or "rewrites" statutes has clouded and confused the nature of the judicial task. We have wrongly shoehorned essential tasks of judicial decisionmaking into the category of interpretation. We have done this, in part, because we mistakenly believe that judges only act legitimately when they interpret texts. This confusion is unnecessary because the fact that such tasks are not interpretive renders them no less legitimate. Indeed, the rule of law itself requires judges to do more than merely interpret laws.

My conclusion that Intentionalism contains no prescriptions for legal decisionmakers does not mean that Intentionalism brings nothing to law. Quite the opposite is the case. Intentionalism reveals why debates about how judges ought properly to interpret texts have proven so intractable. Intentionalism exposes that the debates about what interpretation is and is not are, in actuality, arguments about the task of judicial decisionmaking. These debates are intractable, and ultimately insoluble, because the fact that our system requires unaccountable persons to make binding legal decisions will forever remain in tension with our commitment to democracy and the rule of law. Discussing these worries under the guise of arguments about which methods produce a text's real meaning, however, creates distracting, and ultimately meaningless, sideshows.

## I.

Steven Knapp and Walter Benn Michaels first argued in *Against Theory*[5] that "what is intended and what is meant" by a text "are identical."[6] In other words, a text's meaning is no more and no less than what the author intended it to mean. The entire task of textual *interpretation* therefore entails recovering what the author intended to communicate. All theories of interpretation are ultimately empty and counterproductive: theories are only meaningful if there is "a choice between alternative methods of interpreting";[7] but there is no choice if the "only plausible object of interpretation is the authors' intended meaning."[8]

Applied to legal texts, Dean Stanley Fish has concluded that "[t]here is and can be no . . . distinction" between "statutory or constitutional interpretation that is faithful to the clear meaning of a text and statutory interpretation that 'goes outside the text.'"[9] There is no such distinction because "[t]he act of construing an utterance is inseparable from the act of assigning or imputing intention . . . . Imagining a purposive agent who is responsible for a set of sounds or inscriptions is not an act auxiliary to, or distinct from . . . interpretation; it *is* interpretation."[10]

On Intentionalism's account, interpreting the meaning of a *particular* text requires determining the intentions of the author who produced that text. Construing a text's meaning with regard to an ordinary English speaker, or with regard to some other imagined or constructive speaker, does not generate an interpretation of the meaning of *that* text. Instead, it produces a meaning of the text that reflects the characteristics of the imagined speaker. The meaning generated by such an exercise literally *re-authors* the text.

Thus stated, Intentionalism challenges lawyers' traditional concepts of interpretation. If Intentionalism is true, as I will assume in this paper, we only *interpret* texts when we are recovering the author's intended meaning. But lawyers and legal scholars commonly use the word

5. Knapp & Michaels, *supra* note 3, at 723.
6. *Id*. at 729.
7. *Id.* at 730.
8. Steven Knapp & Walter Benn Michaels, *Intention, Identity, and the Constitution: A Response to David Hoy*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 187, 187 (Gregory Leyh ed., 1992).
9. Stanley Fish, *What is Legal Interpretation* 1 (April 2, 2004) (unpublished manuscript, on file with the author).
10. *Id.*

interpretation (as in "statutory interpretation" or "constitutional interpretation") to include more than that. Legal interpretation encompasses a wide variety of techniques for ascertaining a text's meaning. We can interpret the text of a statute to accord with the ordinary meaning of its words, in light of the statute's evident purpose, by deferring to an administrative agency's interpretation (if the statute's text does not rule it out), or by rewriting the statute to avoid an absurd result. We often refer to each of these activities as "interpretation" (though we bicker unceasingly about which methods really *interpret* texts and which *rewrite* them).

Current fashions in legal interpretation, like New Textualism, dynamic statutory interpretation, and practical reason, put these extra-intentional tactics at the forefront. New Textualism insists that statutory texts themselves have objective and determinate meanings.[11] The intent of the legislature is irrelevant because the statutory text alone possesses legal authority.[12] Intentionalism apparently has nothing in common with New Textualism. Meaning according to Intentionalism is inherently *subjective; it is* the meaning that the author intended (though once an author has formulated an intention and produced a text, the text's meaning has status as a fact that could be objectively known).

Intentionalism also stands at odds with Professor Bill Eskridge's dynamic statutory interpretation. Professor Eskridge draws on the hermeneutic view that interpretation is a creative and synthetic act: a reader produces a meaning from a text by considering the words of the text, the current context in which the question of meaning arises (that is, the problem created by the facts of a dispute and the consequences that an interpretation might have in this case and in future disputes), and the context in which the text was initially written (legislative intent might be one piece of this puzzle).[13] The interpretive process hermeneutics describes is descriptive, not normative. Professor Eskridge, though, puts a normative

---

11. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997) ("Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."); *cf. id.* at 29 ("the objective indication of the words . . . is what constitutes the law").

12. *Id.* at 29 ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."); *see also id.* at 17 ("It is the *law* that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us."); *see also id.* at 22 ("The text is the law, and it is the text that must be observed.").

13. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 60–64 (1994) (explaining that hermeneutics suggests that statutory interpretation is dynamic in three ways: "the horizon of the text changes over time as the text is interpreted," "the horizon of the interpreter changes over time as new interpreters replace old ones," and "the interaction between text and interpreter changes as the statute is applied to new factual contexts").

gloss on hermeneutics—if an interpreter cannot help but update a statute, she might as well make it a good and useful one for our present purposes.[14] Intentionalists might grant that dynamic methods could produce normatively attractive results, but Intentionalists deny that dynamism's methods have anything to do with "interpretation."

Practical reason has a lot in common with Professor Eskridge's dynamic statutory interpretation,[15] and it grants the hermeneutical insight that meaning is produced through an interpreter's reflection on text and context.[16] (The commonalities between the two are no accident, as Professor Eskridge grounds his dynamism in practical reason.)[17] Practical reason, however, values legal stability and tradition somewhat more highly; its adherents argue that judges' commitment to the craft of legal decisionmaking and to incremental change will appropriately curb the excesses of judicial discretion.[18] Practical reason rejects formalism because it is skeptical that formalism can deliver on its promises. People do not actually construe statutes according to the rules of formal, deductive logic, and so formalism cannot curb judicial discretion. Moreover, formalism does not always produce optimal decisions.[19] According to practical reason, everything that could inform the best

14. *See id.* at 64 (arguing that the hermeneutic model "deepens our pragmatic understanding of statutory interpretation" because it exposes the fact that a text cannot be understood outside of some particular factual application—statutory interpretation "is the work of *application*") (quotation and citation omitted).

15. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323–24 (1989) (drawing on the hermeneutical insights of Hans-Georg Gadamer that "[i]nterpretation . . . is the search for common ground between interpreter and text" and arguing also that interpretation must take into account "'evolutive' arguments that stress the change in circumstances between enactment and decision"); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 537–38 (1992) (identifying Karl Llewellyn as a forerunner of the current practical reason movement and citing the current movement's advocates).

16. *See* Eskridge & Frickey, *supra* note 15, at 323–24, 346–47.

17. *See* ESKRIDGE, *supra* note 13, at 55 (explaining how practical reason underpins his dynamic approach to statutory interpretation and describing how "human decision making" reflects the pragmatic idea that a decisionmaker's intellectual framework "consists of a 'web of beliefs,' interconnected but different understandings and values").

18. *See* Farber, *supra* note 15, at 538–39 (describing practical reason and quoting Llewellyn as saying that it is the "business of the courts to use the precedents constantly to make the law always a *little* better, to correct old mistakes, to recorrect mistaken or ill-advised attempts at correction—but always within limits severely set not only by the precedents, but equally by the traditions of right conduct in judicial office").

19. *See* SCALIA, *supra* note 11, at 20 ("Congress can enact foolish statutes as well as wise ones, and it not for courts to decide which is which and rewrite the former.").

result in this case and in future cases should be deployed—legislative intent, the actions of agencies and their glosses on the statute, precedent, the evolution of similar areas of law, etcetera[20]—in order to craft decisions and rules that fit better with existing values. Judges must consciously weigh competing values and should be aware of (and humble about) their creative role in construing statutes and deciding cases.[21] And they should approach the task of statutory construction with a helpful attitude, as judges solve real people's problems and craft rules that will guide their future actions.

If Intentionalism is right that none of these methodologies are "interpretive," does that fact mean that judges who use them are lawless? Must lawful judges confine themselves to determining what the author of a statute or a constitution intended the text to mean and construing the statute accordingly?

Before turning to these questions, let me clarify this essay's terminology. To stave off unnecessary confusion, I will be using the word "interpretation" in the Intentionalist sense to refer to the process of recovering an author's intended meaning, unless I am describing how the legal community talks about the judicial task. When I refer to other methodologies that the legal community commonly refers to as "methods of interpretation," I will refer to them as methods of "statutory construction." It will soon become clear that this concession to Intentionalist terminology cedes no substantive ground.

## II.

Let me begin with my first question: if we accept Intentionalism's account of interpretation, must we conclude that judges act legitimately only when they construe legal texts to accord with the authoring body's intent? Do judges act illegitimately if they, for example, construe texts to accord with the ordinary sense of the text's words or to be consistent with how those same words or phrases have been used in other statutes?

The answer is no. We often speak of judges "interpreting statutes" and "interpreting the Constitution"[22] as though the act of interpretation or statutory construction determined the case. To decide a case, however, a judge must do more than recover the intent of the authors of some legal text. Interpretation, so defined, is only one part of the complex task of

20. *See* Eskridge & Frickey, *supra* note 15, at 346–48.
21. *Id.* at 348.
22. Here, I use the word interpret in its broader, colloquial sense.

judicial decision making.[23] The same is true for statutory construction more broadly conceived.[24] Deciding what a statute *means* rarely resolves legal disputes. Because judges invariably do more than interpret texts when they decide cases, the fact that they do more is no criticism of any particular decision; it could only be a criticism of judging as a mode of decisionmaking. Judges do not act illegitimately when they engage in extra-intentional decisionmaking because they have no other choice; the legitimacy of their extra-intentional decisionmaking is entailed in the choice to have judges decide.

So, how do judges decide cases under statutes? My goal here is to suggest some of the various ways that legal decisionmaking must depart from the task of statutory interpretation, that is, it must depart from the task of recovering the intent of the author of a statute. The following is by no means an exhaustive account, for a complete account of the process of legal decisionmaking may well be impossible (and at the least, it is beyond *my* abilities).

Perhaps the simplest way to demonstrate that judges must do more than interpret or construe statutes to decide a case is to offer a few examples. I draw my examples from Title VII, because the basic concepts of law are familiar to most. I will begin with *City of Los Angeles Department of Water and Power v. Manhart.*[25] For this example, I will stipulate the legislative intent. I do this for two reasons. *First,* I want to reveal the aspects of a legal decision that cannot be interpretive in the limited, Intentionalist sense of that word. *Second,* I want to reveal

23. *Cf.* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 382 (1960) ("[T]he court's work is not to *find* . . . . It is to *do,* responsibly, fittingly, intelligently, with and within the given frame.").

24. Llewellyn contended that the task of statutory interpretation is "to quarry out of a legislative text the best sense which the text permits." *Id.* at 381. This observation is more complex than it may first appear, as it is clear that Llewellyn used the term "sense" to refer to far more than a text's literal meaning. "Sense" for Llewellyn included a judge's duty to exercise "situation-sense"—to decide a case under statutory law so that it cohered with precedent, legislative policy and purpose, and what Llewellyn called "the nature and spirit of the inherited rule-machinery." *See id.* at 377–82. I take Llewellyn's reference to the "nature and spirit of the inherited rule-machinery" to mean the values embodied by the rule of law and to a judge's duty to consider whether the rules used to decide today's case will be workable ones for the future. Once a judge has quarried the best sense of a statute, Llewellyn said that "a flock of questions start to home." *Id.* at 381. The key word in that sentence is "start." "Start" implies that once the statute's meaning has been "quarried," the case and its questions have not necessarily been decided. The following sections of this article "quarry" what else a judge has to do. *See infra* II.A–C.

25. 435 U.S. 702 (1978).

the aspects of a legal decision that must extend beyond questions of *statutory* construction, such as discovering the ordinary meaning of the words in the text (New Textualism) or construing the statute according to its plain meaning. It is my contention that statutory interpretation in the Intentionalist sense and statutory construction in the broader sense rarely provide adequate grounds for a legal decision.

### *A. Factual Interpretation and Future Rule Coherence*

The *Manhart* Court evaluated the legality of the Los Angeles Water and Power Department's employee pension plan. The Water Department required higher employee pension contributions from women than men because women, on average, live longer than men.[26] The Water Department reasoned that if men and women retire at the same age and draw equal pensions, women would, on average, draw pensions for a longer period of time than men.[27] On average, women would thus collect more money than men. To equalize pension payouts with employee contributions, the Water Department required women to contribute more per pay period to the pension fund than men. A class of women plaintiffs sued, claiming that the pension's funding scheme discriminated against them because of their sex in violation of Title VII.

Forty years after Title VII's passage, judges continue to debate what "discriminate against any individual . . . because of" race or sex means.[28]

---

26. *Id.* at 704.

27. *Id.* at 705.

28. *See, e.g.*, Desert Palace, Inc. v. Costa, 538 U.S. 959 (2003) (resolving a split among circuits on the question of whether plaintiffs in "mixed motives" cases had to produce "direct evidence" of discrimination to prevail by holding that plaintiffs did not); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (holding that under certain circumstances, male plaintiff's harassment by other men could state a claim for discrimination under Title VII, and resolving a split among circuits, which had variously held that same sex harassment was *never* actionable, was only actionable if the perpetrator was gay, or was actionable if members of one sex were treated worse than another); DeClue v. Central Ill. Light Co., 223 F.3d 434 (7th Cir. 2000) (holding that outright refusal to provide women employees with restroom facilities did not create a hostile work environment for women); *id.* at 437 (Rovner, J., dissenting) (contending that employer's refusal to provide restroom facilities could amount to discriminatory harassment); Maitland v. Univ. of Minn., 155 F.3d 1013 (8th Cir. 1998) (holding that there was an issue of material fact whether the University's pay raises to women professors, which had been instituted in conjunction with a court-approved consent decree to end the women professors' sex discrimination lawsuit against the University, constituted sex discrimination against male professors). Recall, as well, the flap during the late 1990s about Hooters's policy of hiring only women as food servers. Many criticized the EEOC for filing a complaint charging that Hooters's policy constituted unlawful sex discrimination. *See* Kirstin Downey Grimsley, *Gingrich Backs Major Budget Hike for EEOC; Speaker Urges Funds Be Used to Probe, Mediate Current Worker-Initiated Complaints*, WASH. POST, Mar. 5, 1998, at A19. The EEOC ultimately dropped its complaint in response to political pressure. Hooters had run an ad campaign

The debate often involves two senses of the term discriminate.[29] On one side is the sense of discriminating against a person in a manner that subordinates that individual on the basis of her race or gender. Race-based affirmative action treats white persons and Black persons differently, but it does not discriminate against whites in the subordinating sense of the word discrimination. On the other side is a broader definition of discriminate: treating persons of different races or sexes differently because of their race or sex. A person need not bear ill will toward a group to discriminate against a group's members, so long as the person intentionally treats one group's members differently than another. Affirmative action does discriminate against whites under this definition.

In the context of sex discrimination, the meaning of discriminate is even murkier because of the perverse way sex became one of the categories protected by the Civil Rights Act.[30] For the moment, however, put that aspect of the legislative history to one side. Assume that Congress

---

featuring "a burly Hooter Boy in a blond wig, a stuffed T-shirt and orange shorts" and the slogan 'Come on Washington, Get a Grip.'" Ralph R. Reiland, *The long arm of the (C)law, Hooters and the Bureaucrats*, WASH. TIMES, Oct. 15, 1997, at A18. An EEOC spokesman explained, "Congress was deluged with 'Get a Grip' Hooters' frisbees and postcards . . . and Congress controls the agency's purse strings." *Id.*

29. For some reason, rarely, if ever, do judges consider whether "discriminate against" means or implies something different than "discriminate."

30. When Title VII was first introduced in the House, it did not prohibit sex discrimination. The Kennedy Administration and the Democratic and Republican leaders in Congress envisioned the Civil Rights Act of 1964 as mainly addressing race discrimination, and the bill was discussed and debated in those terms. Southern Democrats opposed to Title VII introduced an amendment adding "sex" to the list of prohibited categories ("race, color, national origin, religion, and sex"). Southern Democrats hoped that outlawing sex discrimination would kill the bill by making it too strong for opponents of race discrimination to stomach. Liberal Democratic representatives and a bipartisan coalition of five women representatives joined with Southern Democrats to pass the amendment, while some of Title VII's sponsors opposed it. CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 114–18 (1985). Title VII ultimately passed the House and Senate with "sex" as a protected category, and Southern Democrats who voted for the amendment voted against the final bill. Other than the debate over the addition of "sex," there was little discussion about what exactly it meant to "discriminate against" a person because of his sex. Because "sex" was added as an amendment, the House Report said nothing about sex discrimination. The Senate issued no committee report because the Civil Rights Act bypassed the committees and went straight to the floor for debate. *See* WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 15–16 (3d ed. 2001) (describing how the Civil Rights bill bypassed the Senate Judiciary Committee). The Senate debate glossed over the issue of sex, because the Act's sponsors and President Johnson focused on the issue of race discrimination. Divining Congress's and the President's intent regarding Title VII's prohibition on sex discrimination from this history is not an easy task.

intended discriminate in the broader sense—disparate treatment because of an individual's protected class. So, if the Water Department's pension program treats women differently than men, it violates Title VII, even if the desire to subordinate women or stereotypes about women did not motivate the Water Department. Does knowing what Congress intended the statute to mean determine a court's ruling that the Department's pension scheme violates Title VII? Not necessarily.

Indeed, knowing Congress's intent doesn't help the judge in *Manhart* at all because deciding whether the pension plan treats men and women differently is itself a hard question. On one view of the facts, the pension's funding scheme treated women and men *equally*. Employees contributed to the pension scheme based on average life expectancy, which was largely a function of an individual's sex. Under such a scheme, some *individual* women would draw less money out of the pension system because they would die earlier than the average life expectancy for women. The same was true for some individual men, too, because some would die before the average life expectancy for men would predict.[31]

On the other hand, if women and men contribute equal amounts per paycheck to the pension fund based on a gender-blended life expectancy, more than half of the women retirees would draw pensions beyond that average age, while fewer than half of the men would. In this light, a funding scheme that asked men and women to contribute equally discriminates against men. The pension plan might violate Title VII, but a judge would have to dismiss the case because women plaintiffs would not have standing to complain about injuries to men.

On a different view of the facts, however, the pension's funding scheme treated *individual* women unequally in comparison with individual men. If we think of pensions as being a guarantee of a set payment per month after retirement until death, women paid more for that benefit than men and took home less money per paycheck than men. Though this is probably nonsensical from an economic perspective, employees may well have thought of pensions in this way. Employees paying into a *pension* system want a guaranteed monthly income of $X until death for the simple reason that no one knows when she will die. Pensions aren't gamed—people don't live longer just to beat the system.[32] The question

31. Indeed, if the Water Department bases employee contributions on median, not mean, life expectancy, then half of all women and half of all men collect less than the actuarial data had predicted, and half of men and women would collect more. No individual can claim discrimination because of sex—whether that person dies before or after the median life expectancy determines whether pension draws exceed pension contributions.

32. This is with the possible exception of my Uncle Walter, who said that he was determined to live to 105 in order to draw more Social Security than he'd paid into it. (I'm not sure whether he noticed—or cared—that his ambition was in tension with his communist sympathies.)

an employee will ask is, therefore, "How much will it cost to guarantee an income of $X per month?"

An example about pension vesting best illustrates the pension funding scheme's unequal effect on women. Assume that the Water Department required employees to work for the department and contribute to the pension fund for two years before they vested in the plan. If a man and a woman contribute to the pension plan for a year, and then leave their jobs, the woman employee will have contributed more to the plan than the man, just because she was a woman. If a judge thinks that this is the best vantage point from which to view the facts, then the Water Department has treated women differently than men.

Whichever way a judge chooses to view these facts, she is not interpreting or construing the statute; [33] she is figuring out what the facts mean. Problems of factual interpretation arise frequently in cases. A judge in *Manhart* might choose between the two accounts of the facts by thinking about the next case that might arise and by brainstorming about other situations in which women as a group tend to have some characteristic that men do not have, and vice versa. For example, as a group, women visit the doctor's office far more often than men do;[34] this

33. It is at this point that an Intentionalist would try to fight my hypothetical, which stipulated that the only intent Congress expressed about the meaning of discrimination was that discrimination meant "disparate treatment," regardless whether it had the effect of subordinating women. If we abandon the terms of the hypothetical, it is certainly possible that Congress (or some part of Congress, depending on who was deemed to be the author of Title VII) thought that Title VII's prohibition on discrimination would or would not have been violated if employers used sex based actuarial tables. Congress probably did not form intent on such a specific question as the use of actuarial data. More likely, Congress worried about the use of stereotypes, which is similar to actuarial data in the sense that both are generalizations about women. Stereotyping is somewhat different, though, because we often think of stereotyping as having a subordinating cast to it. In contrast, actuarial data, particularly data about life spans, is wholly descriptive. If so, a judge still faces a similar factual question as the one posed in the text above—whether using actuarial tables is a kind of stereotyping that is prohibited by Title VII.

34. *See* Donald K. Cherry & David A. Woodwell, *National Ambulatory Medical Care Survey: 2000 Summary*, 328 ADVANCE DATA FROM VITAL & HEALTH STATISTICS, NO. 12, tbl.3 (Dept. of Health & Human Services 2002), *available at* http://www.cdc.gov/nchs/data/ad/ad328.pdf. Women between the ages of 15 and 24 are about twice as likely as men the same age to visit the doctor in a given year; women pay 232 visits to the doctor per 100 persons; men pay 118 visits per 100 persons. Women ages 25 to 44 are also nearly twice as likely as men to visit the doctor, paying 313 visits a year per 100 persons, while men see a doctor 164 times per 100 persons. Women between the ages of 45 and 64 are over 25% more likely than men to pay a visit to the doctor; women in that age group see a doctor at a rate of 411 visits per 100 compared to 301 visits per 100 persons.

is true even when pregnancy-related visits are ignored.[35] If health insurance is more expensive for women, could employers, consistent with Title VII, require women to contribute more to their health care premiums than men? Women in their twenties and thirties are also more likely than men to stop working for a while to stay home with children.[36] Employers who devote resources to training their workforces effectively spend more money training young women than men because they are less likely to recoup the costs of training young women. Would Title VII permit employers to pay young women as a group less than they pay young men?

In more general terms, the judge would decide whether the Water Department violated Title VII by considering the possible rules or principles that could be used to decide *Manhart* (for example, employers may not base employment policies on any generalizations about gender, or employers may make decisions based on true generalizations about gender, if the generalizations are either neutral or positive) and assessing how the different rules would affect other analogous fact situations. Some of the hypothetical fact situations the judge has imagined might or might not be similar to the core problem that Congress actually intended to solve (for example, paying young women less than men because one expects them to quit work to have children). If so, that fact might influence the way she sees *Manhart*'s facts, but it is entirely possible that the hypothetical fact situations will be quite different than what Congress considered.

Our system of precedent means that judges also have to consider the effect that the current decision will have on future cases.[37] One rule or principle might also be easier than others to apply consistently in future

35. Pregnancy cannot explain why women between the ages of 45 and 64 visit the doctor more often than men of the same age. *Id.*

36. According to current population survey data, about 87% of women and about 91% of men aged 25 to 34 who did not have minor children worked. Among people with minor children, over 96% of men worked, while only 70% of women did. The younger the children are, the greater the difference between men and women's labor force participation. More than 97% of men 25 to 34 who had children under the age of 3 worked; only 63% of women in that age group with children under 3 did. In other words, men with very young children were slightly *more* likely to work than men with older children and men with no minor children, while women with very young children were far less likely to work than women with older children or women with no minor children. *See* Marisa DiNatale & Stephanie Boraas, *The Labor Force Experience of Women from "Generation X"*, 2002 MONTHLY LAB. REV. 3, 4 tbl.1, 9 (2002), www.bls.gov/opub/mlr/2002/03/art1full.pdf (reporting that the data "suggest[ ] that raising children continues to have a greater impact on the working lives of mothers than on those of fathers").

37. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572–73 (1987) (arguing that "equally[,] . . . precedent looks forward . . . , asking us to view today's decision as a precedent for tomorrow's decisionmakers").

cases; the difficulty or ease with which a rule or principle can be applied in the future often, and appropriately, affects how cases are decided. For example, the rule that employers can use neutral or positive generalizations about gender might be hard to apply. Is the generalization that women leave the workforce to have children a negative or neutral one? What about the generalization that women tend to be more nurturing than men? The fact that women live longer than men carries no moral freight, but most other generalizations about the differences between women and men are more ambiguous. A rule that turns on a generalization's positive or negative implications could produce very different results in different hands and would be a reason to reject basing a decision on such a rule.

Judges may also consider whether a rule or principle would be likely to generate results in future cases that are inconsistent with the meaning of the statute. For example, whether deciding that the pension plan treated men and women equally would imply that denying women between the ages of twenty-five and thirty-four places in management training programs would not violate Title VII because so many women in that age group drop out of the work force for some significant period to raise children.[38] Quite obviously, authorial intent and statutory meaning matter in determining whether some future result would be inconsistent with the statute's meaning. But neither statutory meaning nor authorial intent is decisive—especially if the principle generated to decide the current case could be limited to avoid contradictory future results.

In our hypothetical, the judge will only face a question of statutory interpretation or construction head-on if she decides that the pension plan actually treats women and men differently. If she does, the question she will face is this: Women and men are treated differently, but are they treated differently in a way that matters under the statute? In other words, are they discriminated against? Is *different* treatment enough or must that different treatment also *subordinate* women? The pension plan treats men and women differently, our judge has decided, but it does not reflect negatively on women or reflect stereotypes about women's subordinate status to men. At this point, we bring out our familiar toolkits of statutory construction. An Intentionalist might decide that Congress's intent decided the matter: Congress, in our hypothetical, intended "discriminate against" to include all disparate treatment on the

38. I mean to imply nothing other than women are still more likely than men to shoulder the responsibility for caring for young children. *See supra* note 36.

basis of some protected class, whether it was subordinating or not. Even an Intentionalist, however, might not consult the congressional history to find out what the intent was. (More on this in a moment.)

As we have seen, the judge in our hypothetical had to decide many other *noninterpretive* issues before she ever got to the issue of statutory interpretation or construction. The fact is the meaning of the statute doesn't always decide cases. In some statutory cases like *Manhart*, *factual* interpretation lies at the root of the decision. Our hypothetical also revealed that future cases also influence the outcome of current cases in two ways. *First*, from a rule of law perspective, judges care whether the rule or principle used to decide the present case could be applied consistently to future cases. *Second*, judges also consider whether a rule or principle will produce results consistent with the statute's principles in future, analogous cases.

### *B. Coherence with Past Decisions*

Courts rarely write opinions on a blank slate. Some other court has usually decided a case under the statute, and that decision will influence the judge's interpretation or construction of the statute's meaning in this case.[39] Obviously, stare decisis applies if a higher court issued a prior decision on similar facts and construed the same statutory provision. But even if an earlier case doesn't control the current case, it might still influence a judge's conclusions about the statute's meaning, especially if the prior case has taken the statute in a particular policy direction.[40] The rule of law recommends consistency among decisions—it is fairer to treat like cases alike,[41] consistent decisions send clearer signals to those who have to live under the law, [42] and statutes are more likely to channel behavior if a statute has consistently been construed to attain similar policy ends.[43]

---

39. *Cf.* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950) ("If a statute is to be merged into a going system of law, . . . the court must do the merging . . . .").

40. *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 698 (1995) (holding that a broader, more protective construction of the Endangered Species Act was justified in light of *TVA v. Hill's* holding and its observation that the Endangered Species Act was "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation").

41. Schauer, *Precedent*, *supra* note 37, at 595–96.

42. Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1611 (2004) ("[S]tare decisis is said to promote stability and predictability in the law."); Schauer, *supra* note 37, at 589.

43. *Cf.* LON L. FULLER, THE MORALITY OF LAW 91 (rev. ed. 1964) ("If the legislative draftsman is to discharge his responsibilities[, he] must be able to anticipate rational and relatively stable modes of interpretation.").

*United Steelworkers of America v. Weber*[44] illustrates the push and pull of precedent on judicial decisionmaking.[45] Brian Weber, a white steelworker, sued the United Steelworkers union and Kaiser Steel. He argued that the union's and Kaiser's race-based affirmative action plan for placement in a craft workers' apprenticeship program violated Title VII. Kaiser and the union created this program voluntarily. They reserved half of the places in the apprenticeship program for African Americans, and they filled the other half according to the applicant's seniority, without regard to race. The Court took *Weber* to decide if Title VII forbade private employers and unions from adopting voluntary, race-based affirmative action programs designed to benefit Black persons.

A judge might decide the case by focusing on the phrase "discriminate against" and asking what Congress meant by that phrase. Did Congress intend "discriminate against" to mean discrimination that causes or reinforces the racial or gender subordination of that individual, or did Congress think that treating persons of different races or sexes differently because of their race or sex was discrimination, regardless of the benign or malignant motivations of the employer. If Congress intended the former, then affirmative action plans to benefit African Americans probably are not "discrimination against" whites, as USW and Kaiser did not limit whites' entry into the apprenticeship program because they thought poorly of whites as a group or thought whites were generally unqualified for the positions. If Congress intended the latter, then the affirmative action plan did discriminate against Brian Weber: USW's and Kaiser's good or ill will toward whites is utterly irrelevant so long as they did treat Brian Weber differently because he was white.

The available evidence does not clearly resolve whether Congress intended the words "discriminate against" to prohibit only race-based decisionmaking that subordinated members of a disfavored group or to prohibit *all* uses of race, "benign" uses included. Some statements in the legislative history point one way;[46] others point in the opposite direction.[47]

---

44. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

45. My analysis of *Weber* draws shamelessly on conversations with Phil Frickey and Bill Eskridge.

46. *See Weber*, 443 U.S. at 202–07 (reviewing the legislative history that suggested that Title VII permitted private employers' voluntary affirmative action programs).

47. *See id.* at 230–52 (Rehnquist, J., dissenting) (reviewing the legislative history that suggested that Title VII prohibited private employers' voluntary affirmative action programs).

The lack of clarity on such an important point may be explained by the times. In 1964, the prototype case of discrimination was whites' ill treatment of Blacks, and the concept of affirmative action was yet to be invented. Congress may never have imagined that these two conceptions of discrimination could ever contradict each other.

Two things *are* clear about Congress's intent. First, Congress passed Title VII and the Civil Rights Act primarily to improve the economic and social position of African Americans.[48] Second, no one discussed voluntary, race-based affirmative action plans to benefit African Americans,[49] probably because they seemed improbable in 1964 (though Congress had approved benefits for former slaves in the Freedmen's Act a century before). The legislative history suggests, in short, that Congress did not have a well-formed intent about race-based affirmative action plans (I will discuss the implications of inconclusive intent below).

Whatever Congress intended discriminate to mean, two cases decided before *Weber* would necessarily shape the Court's decision: *McDonald v. Santa Fe Trail* [50] and *Griggs v. Duke Power Company*.[51] *McDonald* held that white employees could sue under Title VII for race discrimination, and that foreclosed the possibility that the Court could decide *Weber* by concluding that Congress intended Title VII primarily for the benefit and protection of African Americans, not whites.[52] Overruling *McDonald* wasn't in the cards, either; nor would it have been, even if some piece of evidence had come to light demonstrating that improving African Americans' economic and employment prospects—regardless of harm to whites—was Congress's central and overriding concern.[53] Overruling *McDonald* would have meant that some white plaintiffs' suits would win and others would lose simply because some plaintiffs received final judgment before the case was overruled while others received judgment after. Inevitably some cases will be overruled. Some plaintiffs will lose and others will win just because of the timing of their suits. But the rule

48. *See id.* at 202–05 (summarizing legislative history—including President Kennedy's message to Congress when he initially introduced the Civil Rights Act—regarding the central importance of integrating Blacks and improving their economic opportunities).

49. Some members of Congress did worry that Title VII would require employers to racially balance their workforce and force them to hire a certain number of people because of their race. It is clear from the text and history of Title VII that it does not. *See id.* at 232–34 & n.13 (quoting Representative Lindsay for the proposition that Title VII "does not . . . force acceptance of people in . . . jobs . . . because they are Negro"). The crux of this worry—that the *government* would force employers to adopt race based quotas—does not address whether employers on their own initiative may adopt voluntary race based affirmative action programs.

50. 427 U.S. 273 (1976).

51. 401 U.S. 424 (1971).

52. McDonald v. Santa Fe Trail, 427 U.S. 273, 278–79 (1976).

53. To my knowledge no such evidence exists.

of law's command to treat similarly situated plaintiffs similarly means that courts hesitate to overrule cases just because they were "wrongly" decided.

*Griggs* held that employers violated Title VII if they used facially neutral requirements or tests that disproportionately excluded African Americans from consideration for jobs or promotions, unless those tests or requirements were demonstrably job related.[54] Kaiser and USW had instituted the affirmative plan because Kaiser's skilled craft workers were nearly all white.[55] Kaiser had required that craft workers have at least five years of industrial experience.[56] Kaiser and the union knew this requirement was vulnerable under *Griggs* because it screened out disproportionately more African Americans than it did whites (largely because of widespread discrimination against Black workers prior to Title VII). If they had been sued under *Griggs* before they had enacted this plan, the companies could have been ordered to pay backpay and frontpay to a class of African American employees. Under *Griggs*, a court would also probably order them to undertake remedial measures to put African Americans into craftwork jobs. Kaiser and the union thought that the affirmative action plan might prevent such a lawsuit and correct some of the effects of their past discriminatory practices.

With *Griggs* lurking in the background, the Court had to decide whether Title VII prohibited employers from using race-based affirmative action to rectify past, discriminatory practices against Black persons. If Kaiser and the union had lost a disparate impact suit under *Griggs,* a court unquestionably could have ordered Kaiser and USW to adopt a race-conscious plan very similar to the one that they created voluntarily. Furthermore, a ruling that Title VII barred employers from adopting voluntary race-based affirmative action programs could trap employers between plaintiffs—with disparate impact suits to the left and affirmative action suits to the right. After *McDonald* and *Griggs*, the Court faced a slightly different question than "What did Congress mean by the word 'discriminate?'" Instead, this interpretive question confronted the Court: As between giving private businesses discretion to adopt voluntary measures to bring themselves into compliance with the law

54. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

55. Justice Blackmun's concurrence reports that only 2% of craft workers were Black. *Weber*, 443 U.S. at 210 (Blackmun, J., concurring).

56. The opinion doesn't specify the type of prior industrial work. *Id.* at 210 (Blackmun, J., concurring).

and the rights of whites to colorblind treatment by employers, which would Congress prefer?

For purposes of this essay, the upshot of *Weber* is this: Against the backdrop of the rule of law and regardless the enacting body's intent, statutory construction and legal decisionmaking is inevitably dynamic.[57] In effect, stare decisis and the rule of law mean that precedents are post enactment factual developments that a court must weigh when deciding a case, just as it would weigh other factual developments. Stare decisis does not mean that courts must always follow precedents, but it does mean that courts will weigh whether the benefits of deciding an issue anew outweigh costs of overruling an earlier case—costs to legal coherence, predictability, and to the principle of treating like cases alike. Judges rarely overrule cases just because an earlier case misinterpreted or misconstrued the law,[58] and in the statutory context, the presumption against doing so is especially strong.[59]

### *C. And now, a word from Homer Simpson: "Doh!" Statutes and literature are different*

Precedent and stare decisis uncover a fundamental difference between literature and law. Literature, not law, first provoked Intentionalism. Statutes and literature do different things, which means that what we can permissibly do with each is different as well. Simply put (and, I hope, not *too* simply put), authors write books, plays, and poems to communicate ideas and emotions and to tell stories to other people. Literary interpreters search for the story the author told or the idea she communicated. Intentionalism's account of literary interpretation thus describes what the essential object of literary interpretation *must* be—the meaning the author intended. Intentionalism, thus, makes claims about truth—what the meaning of a text *is*. Precedent and stare decisis fit poorly within the realm of literary interpretation. If literary interpretation seeks a text's *true* meaning, the fact that others have concluded that a literary work means one thing would not necessarily change another interpreter's conclusion that the text means something else.

---

57. From a rule of law perspective, this conclusion is a bit ironic.

58. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (explaining that "when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case") (plurality opinion).

59. *See* Flood v. Kuhn, 407 U.S. 258, 283–84 (1972) (expressing reluctance to overturn an earlier Court interpretation of the antitrust law, which created an exemption for baseball, because "Congress, by its positive inaction, has allowed those decisions to stand for so long").

Not so with statutes. Legislatures write statutes to encourage or discourage behavior or to provide methods for solving a problem. Literary texts *can* be didactic and recommend certain courses of action, too, but they don't have to be. Statutes, in contrast, *have got to be* purposive to be laws. Statutes don't tell stories or float ideas. A judge who has the tools to discover a statute's "true" meaning can, consistent with the rule of law, construe the law in a different way. The rule of law embodies a number of different values—disinterested decisionmaking, consistency, fairness, predictability, deference to democratically accountable lawmakers, and the list goes on.[60] Legislative supremacy is but one aspect of the rule of law, albeit an extremely important one.

Indeed, one can even argue that a judge can be more faithful to the idea of legislative supremacy by ignoring evidence of the authors' intent—that is the upshot of New Textualism. Justice Scalia, for example, argues that evidence of legislative intent—legislative history, press accounts, and the like—are apt to send conflicting and ambiguous signals to later decisionmakers.[61] Judges who try to find the intent of the legislature are likely to be led down a garden path by strategic legislators or staffers who have packed the history of a bill with evidence of their preferred construction of a bill.[62] And even if Justice Scalia overstates the inaccuracy of the legislative record, a judge might still avoid dipping into it. The history of a single bill can fill several bookshelves in a library. The sheer volume of paper makes it difficult to master the entire record. Making it a practice to consult the legislative record could even imperil the rule of law and democracy. Widespread reliance on legislative history could encourage sneaky, strategic staffers to surreptitiously slip their spin on the statute's meaning into the legislative history. Such legislative history might not reflect the deal struck in Congress on the statute's meaning. The sheer mass of legislative history also facilitates

60. John Rawls, for example, thought that the principles of "ought implies can," similar treatment of similar cases, "no crime without . . . law," and institutions for ascertaining truth and for the regular and correct enforcement of laws were necessary to maximize individual liberty under a system of law. JOHN RAWLS, A THEORY OF JUSTICE 236–37, 239 (1971). Lon Fuller argued that morality required that humans be treated as rational agents under law. This moral requirement required that laws be general, public, generally prospective, and comprehensible. Laws should not require contradictory duties, duties that cannot be performed, or duties that change frequently. Officials also must agree to be bound by the laws. FULLER, *supra* note 43, at 39 n.70.

61. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 35–36 (1997).

62. *Id.* at 34.

the strategic and selective use of the materials by a judge. In *Weber,* Justice Brennan and Justice Rehnquist each cite only those bits of the legislative history that support their positions, as though they were advocates, not judges. *Schwegmann Brothers v. Calvert Distillers Corp.* provides a less controversial example than *Weber* of how indeterminate and malleable the legislative record can be.[63]

Let's return to the *Manhart* example. I ended that section with the rather cryptic suggestion that an Intentionalist judge might not even consult the legislative history and, thus, would not know anything about what Congress had actually thought about what "discriminate against" meant. Can it be that Intentionalists truly would ignore legislative history? Isn't Intentionalism all about finding what the legislature intended?

Yes, but a thoroughgoing Intentionalist could still insist that judges should not consult legislative history in search of what the legislature intended, even if exceedingly clear evidence of congressional intent exists in a particular case.[64] She could give several different reasons for her injunction. She could argue that consulting the legislative history in order to shed light on Congress's intent creates an additional interpretive problem—not only must a judge try to figure out what Congress meant in the statute, but also what the authors of committee reports intended them to mean, what individual congressmen and senators meant by their statements in the record, and whether Congress intended for us to consult those materials. She might point out a further difficulty with using these materials: lots of different members of Congress speak, but not all of them speak as authors; a judge must decide whose statements count as evidence of authorial intent and whose do not. Even when these authors are located, their statements are themselves "texts" that must be interpreted, and our interpretation of them may also require judgment calls about what counts as evidence of that particular person's intent. An Intentionalist may think that the average judge lacks either the acumen or the resources to engage these historical questions well or wisely. An Intentionalist might also agree with Justice Scalia that the practice of consulting legislative history encourages the strategic, surreptitious shaping of the legislative record to favor a particular gloss on the statute,

63. *Compare Schwegmann*, 341 U.S. 384, 388–95 (1951) (opinion by Justice Douglas reviewing the legislative history that suggests that the Sherman Act and the Miller-Tydings Act did not permit liquor distributors to enter into minimum resale price agreements with liquor retailers) *with id.* at 398–411 (concluding that the legislative history supports permitting such agreements) (Frankfurter, J., dissenting).

64. Knapp and Michaels suggest much of this when they observe that "recognizing that interpretation is always historical gives no help in deciding what counts as the best historical evidence, [and] it also gives no help in deciding between competing interpretations of any text. Intentionalism . . . is therefore methodologically useless." Knapp & Michaels, *supra* note 8, at 196.

rendering those materials unreliable indicia of intent. She also may believe that, as a general matter, legislative history is relatively unhelpful and forays into it rarely illuminate the issue of intent, such that the payoff from getting it "right" in the few cases where helpful legislative history exists pales in comparison to the effort wasted in the vast run of cases.[65]

The foregoing presumes that Congress *had* an intention that a judge could follow. Congress, however, may not have agreed on the statute's meaning. When two (or more) authors write something together, they, too, can disagree about the text's meaning. Even a single author can be undecided about what her text means. What is an interpreter to do when many different individual authors write and vote for statutes (or write stories), but each intends the statute (or story) to mean something different? To take Title VII again, some members might have intended Title VII to require colorblind treatment by employers; others may have intended Title VII only to prohibit discrimination motivated by animus towards a group or discrimination that subordinates a group.

Disagreement has different consequences for law than for literature. Dual, inconsistent intents create no real problem for a literary interpreter. A literary text can have a coherent meaning even if its author intended it to mean two (or more) inconsistent things. We can conclude—to no ill effect, except perhaps some aesthetic dissatisfaction—that an author intended two (or more) inconsistent meanings. Concluding that an author intended two different things can satisfactorily resolve some literary puzzles—such as, why Merton refuses Milly's bequest in *The Wings of the Dove* and ends his affair with Kate,[66] or whether there are really ghosts in *The Turn of the Screw*.[67] Perhaps Merton loves Kate but believes that he polluted their love by manipulating Milly and that it can only be redeemed by refusing the bequest; maybe he truly loves Milly, not Kate, and doesn't want to sully Milly's memory by using her money to marry Kate. James could have quite coherently intended that Merton loves both Kate *and* Milly and that the ghosts both are real *and* are a

65. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing that the Supreme Court maximizes compliance with the rule of law, ironically, by making rules for lower courts to apply; lower courts, in his opinion, can apply rules far more consistently than standards, which might more accurately capture a statute's meaning, across a range of similar cases).

66. HENRY JAMES, THE WINGS OF THE DOVE 397–407 (J. Donald Crowley & Richard A. Hocks, eds., W.W. Norton & Co. 2d ed. 2003) (1902).

67. *See generally* HENRY JAMES, THE TURN OF THE SCREW (Deborah Esch & Jonathan Warren, eds., W.W. Norton & Co. 2d ed. 1999) (1898).

figment of the governess's imagination. The idea that an author intended inconsistent meanings may even make literature more lifelike. Real life lacks an omniscient narrator who knows the future as well as the past, and people often do things for incomplete or inconsistent reasons without being aware that they are doing so. We can even re-describe an author's inconsistent intentions as a single intent: the author intended the text to have multiple meanings.

Statutes, however, cannot be coherent texts if they mean two different things. Nor can judges decide that a statute means two contradictory things, even if it happens to be true. Statutes are supposed to resolve disputes among people and to regulate conduct. This assertion does not deny that, as a matter of fact, authors of statutory texts can have inconsistent intentions. Some have speculated that statutes are purposefully written ambiguously because the authors do have inconsistent intentions and were either unaware of this fact because of the textual ambiguity or chose to paper them over with the ambiguous language.[68] But a judge must decide a case. If some of the statute's authors intended the statute to mean one thing and others something else, the judge will have to disregard at least one of the authors' intentions.

## IV.

If everyone in the legal community agreed today what "interpreting a statute" means, nothing would change. If we all became card-carrying Intentionalists, we would still rail about lawless judges and wring our hands about judicial discretion, and we would argue just as loudly if we all hopped on Justice Scalia's New Textualist VW Bus. That's not just because we are lawyers and like to argue.

Determinate textual meaning may not determine legal decisions. Cases are conflicts. What a statute means as a matter of interpretation or construction need not be the same as what the statute means to, or in terms of, a conflict. Certainty regarding an author's meaning will influence a decision, but it does not necessarily entail a decision. Deciding a case entails far too many other types of decisions besides the applicable law's meaning for that to be the case. Knowing a statute's meaning to a certainty might influence some of those other decisions, but it would not resolve them. Judges must still make judgments and judgment calls about what happened before the parties came to court, what will happen once a judgment is rendered, and what tradeoffs different decisions and

68. ESKRIDGE ET AL., *supra* note 30, at 57 tbls.1–2 (suggesting that public choice theory implies that when legislation creates distributed benefits and concentrated costs, statutes will often be drafted ambiguously and left to an administrative agency to implement).

methodologies entail. This list does not begin to exhaust the decisions a judge must make.

Why, then, do we argue most loudly about the boundaries of *interpretation*? Why do we seem to assume that if we just figured out what interpretation is we will release the tension between individual decisionmaking and the rule of law? Perhaps we shoehorn the many decisions a judge must make to decide a case into the term "interpretation" because of the mantra that legislatures make laws and judges interpret them. Roscoe Pound put it this way: we call judicial decisionmaking "interpretation" because "the dogma of separation of powers . . . refers lawmaking exclusively to the legislature and would limit the courts to interpretation and application."[69] Sweeping the entire panoply of decisions that judges must make under the rug of interpretation gives us, at least, the illusion that judges in our system conform to that dogma.

Perhaps, too, it is comforting to mistake part of the problem for the whole problem. Considering the problem of interpretation to be coterminous with the problem of judging lends the enterprise of judging some apparent legitimacy. Viewing judging as limited to the task of interpretation casts judges as conduits who transmit the law rather than as sources of the law who necessarily possess the discretion to make it. Interpretation may be the noble lie that we tell to those who must live by the decision.

Whatever the reason, this tendency is unfortunate and unnecessary. Unfortunate, because it obscures what judges actually do when they decide cases. Unnecessary, because judges can, consistent with the concepts of legislative supremacy and the rule of law, do things besides interpret laws. Indeed, they must. It strikes me, therefore, that the problem is not with judges and what they do and do not do. Rather, the problem lies with the dogma to which Pound referred and the false and inaccurate boundaries it built. The Constitution stuck us with judges who make judgments, not with conduits for the voice of the statute, and lived law would require judges (or persons very much like them) even if it had not. We should get over it.

69. Roscoe Pound, *The Theory of Judicial Decision: A Theory of Judicial Decision for Today*, 36 HARV. L REV. 940, 946 (1922–23).