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Statutory Interpretation, Pragmatism, and Expertise

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I. Introduction

Statutory interpretation scholarship has reached an impressive level of maturity in the four decades or so since it enjoyed a renaissance of interest and serious attention in both the legal literature and in the courts.[1] Assessed from a decent level of generality, we see that approaches that can be broadly described as textualist are in the ascendancy and so-called intentionalist approaches that call for the use of legislative history are steadily in decline. Even beyond the bromide from Justice Elena Kagan that "we are all textualists now,"[2] there clearly is an emphasis in the jurisprudence of interpretation in the current Supreme Court and in the lion's share of lower federal courts on how best to read statutory text. And while perhaps still a majority of legal scholars range from somewhat to deeply skeptical about the

[1] See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes," 65 S. CAL. L. REV. 845 (1992); William Eskridge, "Dynamic Statutory Interpretation;" 135 U. PA. L. REV. 1479 (1986); Easterbrook, "Statutes' Domains"; Posner, "Statutory Interpretation in the Courtroom and the Classroom." Calabresi, A Common Law for the Age of Statutes;

[2] https://lawprofessors.typepad.com/appellate_advocacy/2020/07/were-all-textualists-now.html#:~:text=In%20a%202015%20Justice%20Elena,implementing%20the%20law%20as%20they

textualist approach, it is remarkable the extent to which so much of the modern debate about statutory interpretation takes place in an area in which textualism is clearly the dominant paradigm. This was much less so even two decades ago, to say nothing of earlier generations where interpretive method and theory was vigorously debated.[3]

Statutory context remains relevant in debates about interpretation, as most textualists concede, but some elements of this context, including legislative history, have fallen out of favor. In a series of articles beginning thirty years ago[4], positive political theory (PPT) scholars articulated and pushed the basic point that a full understanding of the meaning of statutes and the best approach to interpreting statutes must recognize explicitly and deliberately the ways in which the legislative process is structured purposively in order to facilitate legislators' particular and general objectives. The argument began with the underpinnings of PPT, a picture of the "industrial organization of Congress," an understanding from modern political economy of the purposes and objectives of regulation and regulatory strategy, a distinctive theory and analysis of relevant political actors and institutions working in a policymaking and policy implementation orbit, and other pertinent analyses of the American political order. A number of

[3] See, e.g., Charles Tiefer, "The Reconceptualization of Legislative History in the Supeme Court," 2000 WISC. L. REV. 205; Frank H. Easterbrook, "Text, History, and Structure in Statutory Interpretation," 17 HARV. J.L. & PUB. POL'Y 61 (1994). William N. Eskridge, Jr., "Legislative History Values," 66 CHI-KENT L. REV. 365 (1990); Daniel A. Farber & Philip P. Frickey, "Legislative Intent and Public Choice," 74 VA. L. REV. 423 (1988).

[4] See McNollgast, "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," 80 GEO. L.J. 705 (1992); John Ferejohn & Barry Weingast, "Limitation of Statutes: Strategic Statutory Interpretation," 80 GEO. L.J. 595 (1992); Ferejohn & Weingast, "A Positive Theory of Statutory Interpretation," 12 INT'L REV. L. & ECON. 263 (1992); Kenneth Shepsle, "Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron, 12 INT'L REV. L. & ECON. 239 (1992); Daniel B. Rodriguez, "Statutory Interpretation and Political Advantage," 12 INT'L REV. L. & ECON. 217 (1992).

influential PPT scholars (warning: this list is incomplete) including, in addition to the three folks making up McNollgast, John Ferejohn, Ken Shepsle, Pablo Spiller, Brian Marks, David Baron, Lewis Kornhauser, and many others focused their skills and attention on issues in public law, bringing into the picture courts and doctrine, including the matter of statutory interpretation. For example, in an issue of the International Review of Law and Economics and the Georgetown Law Journal in 1992, a number of these scholars, including the authors of this essay, wrote about statutory interpretation and its connection to our then-best understandings of PPT. And it was in that volume that Professor Shepsle offered the famous description of Congress as "a they not an it," an observation that, at a basic rhetorical level, captured an important lesson of rational choice theory and its implications for law.

For the next two decades, the PPT paradigm, reflected in the work of the scholars mentioned above and a number of law professors who were influenced powerfully by the PPT "revolution" impacted the thinking about how agencies did and should function in our system of regulatory administration, how we should view the complex idea of judicial independence, what is the best model for understanding the separation of powers, how should important structural language in the U.S. Constitution, such as Article IV, Section 7 be construed, and how regulations and statutes should best be interpreted.

A candid historical assessment of this movement must acknowledge that this paradigm, while influencing scholarship in some distinctive ways, did not affect a major revolution in how legal scholars thought about various aspects of public law, including administrative law, constitutional adjudication, and statutory interpretation. As to the former, the McNollgast analysis of structure and process was met with critiques that this paradigm over-emphasized the role of Congress, under-emphasized the role of the President, had an opaque view of the role of courts, and had no particular normative agenda

(something more problematic for legal scholarship than social science scholarship, to be sure). As to statutory interpretation, the main dividing line seemed to be on the idea that legislative structure and strategy and resulting information yielded by the statute-making process (what we would all recognize as legislative history) is and ought to be meaningful in helping us understand what statutes mean versus the notion emphasized and reiterated by a new generation of statutory interpretation scholars who advocated textualism and criticized the use of legislative history and indeed the very notion that history could be probative on the matter of what Congress (as a "they" not an "it") could have intended.

Writing today, it would be inaccurate in the extreme to say that the PPT paradigm got lost, but it is more accurate to say that its influence has become mooted. A title of a 2017 article by leading statutory interpretation scholar Ryan Doerfler might be indicative of this trend: *"Who Cares How Congress Really Works?"*[5] Among the more prominent critiques of the PPT analysis of statute-making and legislative interpretation has been that this literature depicts a Congress that is unfamiliar and that, further, it would be unrealistic to expert judges and agencies interpreting statutes to embed through approaches from sophisticated models and empirical analyses of how Congress truly works as PPT envisions it. It is the practical critique that this essay focuses upon.

This short essay is not the place to revisit the big debates about the use and utility of legislative history in statutory interpretation, but it is an occasion to make one specific point, one that we hope will be meaningful to the ongoing debates in the literature, and that is this: A main objection to the sustained

[5] 66 DUKE L.J. 979 (2017). By way of a personal anecdote, when one of the authors asked Prof. Doerfler just this past Spring whether legislative history and intentionalist (broadly speaking) approaches had much of a seat at the table in contemporary statutory interpretation scholarship, he was fairly dismissive, offering his view that that this ship had passed and such approaches were interesting more or less only historically.

use of legislative history is that, in practice, it is to hard for judges to use appropriately and too subject to misuse. One quickly recalls Justice Harold Leventhal's wry comment that the use of legislative history is akin to looking over a crowded room and picking out your friends. And so, for Frank Easterbrook, for example, he sees the potential value of legislative history as an academic thought experiment, but is highly doubtful that any sophisticated template for its use – for example, what Rodriguez and Weingast argued for in two lengthy articles from earlier in this century, and presumably other efforts – could be workable in any sensible way. Here we bracket the serious theoretical objections to the use of legislative history, including the enduring debate about whether and to what extent there is a meaningful collective will of Congress, and focus on the critique well-articulated by Easterbrook. Can legislative history be used effectively? Is it worth the trouble?

II. Statutory History and Interpretation: What Matters and Why?

A. What do we Talk about when we Talk about Statutory Interpretation?

The essential battle lines in the modern debate over which approach to statutory interpretation is the right one are formed around four paradigms: 1) **Intentionalism**. The focus here being on what method best ensures that the will and preferences of the enacting Congress were respected;[6] 2) **Purposivism**. Here the idea is statutes have purposes, which may or may not be reflected in specific sources of information or even in the text of the statute, and the task of the judge is to give effect to these purposes in difficult cases; (3) **Textualism**. The talisman is the text and the sole focus of the judge should be this text, albeit with some context (as with interpretive canons) that might help the judge best

[6] See generally Jesse M. Cross, "Disaggregating Legislative Intent," 90 FORDHAM L. REV. 2221 (2022).

read the language;[7] and (4) **Non-interpretivism**. We don't dwell on this much here, but the idea is that there are goals to be achieved in interpreting a statute that have no necessary connection to the will of the framers of the statute; these goals may or may not be reflected squarely in the statute's text.

What has been marginalized to a great extent in this era of textualism's ascendancy and prominence is legislative history, that is, the use of sources that grew out of legislative debates prior to and after enactment to illuminate the intention of the statute's framers and the legislation's meaning. The critique of legislative history by scholars of statutory interpretation, especially those advocating for one or another version of textualism has been withering and influential. One must search hard for serious efforts to advocate for the use of legislative history in statutory interpretation and, even where historical approaches are at front stage, as in the work of an eclectic group of scholars, including Victoria Nourse, Abbe Gluck, Lisa Bressman,[8] and two of the authors of this essay (Rodriguez & Weingast),[9] they are often embedded in the sticky debates about textualism, interpretive canons, and the meta discussion of whether there is a collective intent worthy of discerning.

Despite the continuing use of legislative history in statutory interpretation, certainly in the state courts and also in the federal courts,[10] few scholars have undertaken the make the argument for use of such

[7] See generally William N. Eskridge, Jr., "The New Textualism," 37 UCLA L. REV. 621 (1990).

[8] See VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY (2016); Lisa Schultz Bressman & Abbe R. Gluck, "Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II," 66 STAN. L. REV. 725 (2014).

[9] See Daniel B. Rodriguez & Barry Weingast, "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act," 151 U. PENN. L. REV. 1417 (2003).

[10] See generally, ROBERT KATZMANN, JUDGING STATUTES (2014).

historical sources of evidence in interpretation. Legislative history has been criticized as a method that flows from an intentionalist approach to interpretation and intentionalism has been criticized as unrealistic and even incoherent, given the difficulties in aggregating collective intentions in any coherent format.[11] More recently, Dean John Manning and Ryan Doerfler have developed analytically rich critiques of legislative history, in Manning's case,[12] principally on constitutional legitimacy grounds and, with Doerfler,[13] on bases growing out of the philosophy of language and of agency. We will not cover the critiques in this short essay, but will simply observe that the critiques of legislative history have been enormously influential in supporting the foundational normative claims for textualism as the superior method of statutory interpretation. This is true both in the literature and the jurisprudence of statutory interpretation in the current Supreme Court.

B. Modern Textualism: Ascendant, but Incomplete

Much of the textualism scholarship in what might be called its first wave, from the early 1980's through the early 21st century, was preoccupied with criticizing intentionalist and purposive approaches to interpretation, as well as addressing the more radical argument fashionable at the beginning of this era that faithful agent theories of interpretation are fundamentally flawed.[14] Dean Manning's work, building upon scholarship and judicial opinions of Justice Scalia,[15] his principal mentor, was especially important in encapsulating the full case for the textualism method and the case against principal

[11] See generally JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

[12] See, e.g., John F. Manning, "Inside Congress's Mind," 115 COLUM. L. REV. 1911 (2015); "Textualism and the Equity of the Statute," 101 COLUM. L. REV. 1 (2001).

[13] See Ryan Doerfler, "High Stakes Interpretation"

[14] See Eskridge, "New Textualism," supra.

[15] See Scalia, "The Rule of Law as the Law of Rules," U. CHI. L. REV.

alternatives. While ample room remained for nuanced analyses of interpretation in the "new textualist" tradition, Manning's articles truly set the terms of this debate. Indeed, the connection he drew between textualism in statutory interpretation and the Constitution's separation of powers was a powerful weapon in the attack on intentionalism and purposivism as both rudderless and lawless. For certain judges, including a few Supreme Court justices, a lawyer would take some risk in referring explicitly to legislative history in making her argument before the court.

While textualism became ascendant as we began the new century, a number of difficult issues still needed to be resolved, and indeed were addressed by scholars of statutory interpretation. In its vestigial position, textualism captured what Justice Scalia and others frequently referred to as the "plain meaning" approach to resolving statutory cases. Most cases, it was insisted, are easy, once the judge reads and applies the statute. Ambiguity was rare and where statutory language was indeed ambiguous, we had at the ready the Chevron doctrine which would give agencies wide berth in construing the organic statute. Plain meaning approaches eroded, as did Chevron, as it became more clear to sophisticated scholars and judges that statutory language was not infrequently ambiguous and that some context was essential to resolve these ambiguities. By the time that legal writing expert, Bryan Garner, and Justice Scalia wrote their influential book, ***Reading Law***, in 2012, it was rather well accepted that contextual sources of information – they focused closely on interpretive canons – was necessary to assist judges in interpreting the statutory text to the dispute at hand. The ingenuity of leading textualist scholars was to incorporate these contextual sources into the main paradigm of textualism.

Textualism remains an untidy doctrinal edifice, however, as the second wave of scholarship represented by work over the past two decades has indicated. Ryan Doerfler writing about the Court's approach to textualism in statutory interpretation this year notes: "In recognizing that the meaning of words depended greatly upon the practical setting, modern textualists effectively abandoned the ideal (and caricature) of a 'mechanical' jurisprudence by opening themselves to circumstances in which the meaning of a legal text would be reasonably contestable given the numerous considerations that go into what language means as used."[16] This "late-stage textualism," as Doerfler calls it, endeavors to combat the woodenness that is associated with the "plain meaning" approaches made familiar by Justice Scalia and Thomas and other originalist judges appointed during the Reagan and Bush administration. And yet what exactly are these techniques that combat such woodenness? The most prominent answer is found in the interpretive canons. Increasingly prominent is, again quoting Doerfler, "linguistic pragmatism" or, similarly, the use of corpus linguistics to illuminate meaning.[17]

Once context is viewed as centrally important, as nearly all textualists will now concede, then resort to some pieces of historical evidence seems not only acceptable, but appropriate. What must be resisted, insists textualists, is the use of historical evidence to manufacture ambiguity where it is not there. Interestingly, this is a lesson emphasized by two current Justices, Brett Kavanaugh and Amy Coney Barrett, in articles written before they joined the Court.[18] If the argument comes down to "don't use history to overcome clear text" than there is less to fight about.

[16] See Ryan D. Doerfler, "Late Stage Textualism," 2022 SUP. CT. REV.1, 2.

[17] See Ryan D. Doerfler, "High-Stakes Interpretation," 116 MICH. L. REV. 523 (2018).

[18] See Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. REV. 109 (2010); Brett M. Kavanaugh, Fixing Statutory Interpretation Judging Statutes, 129 HARV. L. REV. 2118 (2016).

III. Interpretation, Information, and Expertise

How do you get to Carnegie Hall?, goes the old joke. Answer: Practice, practice, practice. True in regard to statutory interpretation also. The point here is that statutory interpretation is an analytically difficult, but tractable, enterprise, one that supposes that judges will grapple with statutory language, resorting when appropriate to interpretive canons that are designed to illuminate the meaning of ambiguous text and to give effect to common sense suppositions about the use of language. (The matter of so-called substantive canons, those avowedly designed to implement substantive values, is a different matter and one beyond the scope of this essay).

A. Degrees of Difficulty

Here we address a specific critique by Frank Easterbrook, but it is indicative of a critique common to PPT approaches and that is that it is too theoretically sophisticated and information intensive to be used in any coherent way by judges and other statutory interpreters. Easterbrook, always thoughtful and rigorous, and with vast experience in both thinking about and doing statutory interpretation in his career as an appellate judge, focuses in a 2017 symposium article on the deeply practical question of whether courts could be expected to use the structure of analysis proffered by McNollgast. While generally admiring the project, he is highly skeptical about the practical payoff of the project, writing:

> One of the academy's most persistent illusions is a belief that judges have essentially unlimited time to decide cases and bring to bear universal expertise. Nothing else could support a system that allows judges to design the institutions of government, and to resolve society's most complex moral problems, at the same time as they prescribe the details of automobile door handles. Some political scientists treat judges as automata who vote the platforms of the political parties that appointed them; for these judges, time is irrelevant, and so is McNollgast. But for those scholars who think that briefs,

> argument, and reasoning matter to courts, if only at the margin, the tradition is to assume that judges can devote as much time as is necessary to reach correct decisions and can apply the most sophisticated models drawn from economics, political science, engineering, and medicine. What a bunch of baloney! Judges are lawyers, not scholars; they are trained in making arguments, not in forming and testing hypotheses.[19]

One response, perhaps the less interesting one, is that the principal objective of the McNollgast argument for attending carefully to legislative structure and strategy in assessing the probative value of certain historical sources of evidence over others, is not to provide a template for judges to use in deciding concrete cases. However, let us take more seriously the critique that the utter inscrutability of legislative evidence not only undermines the normative argument for a certain kind of intentionalist quest for better interpretation of statutory meaning, but undergirds the argument for textualism as a superior interpretive method.

First, this is baloney only if one indulges the erroneous assumption by Judge Easterbrook that a judge is expected to apply "the most sophisticated models." Judges in matters of interpretation, as in other decisionmaking contexts, rely on experts; they rely on such experts for the development of models (where such models are necessary, and that is far from "all the time"), the assemblage of relevant data, the analysis of this data and, critically, the translation (typically by lawyers) of all this into information that a judge or even a jury can understand. This is how it is done in antitrust litigation, something that Judge Easterbrook is obviously well familiar with. That only a handful of judges can understand the methods and the empirics – Judge Easterbrook, and his colleague, Judge Posner, being among this handful – is not fatal to the enterprise of learning and translating. Statutory interpretation is a process that invariably relies upon expertise. A textualist using a handy dictionary is relying on the expertise of

[19] Frank H. Easterbrook, "The Absence of Method in Statutory Interpretation," 84 U. CHI. L. REV. 81 (2017).

the individual who, through whatever methods appropriate to the enterprise, developed a coherent and compelling definition of a term or phrase. A more elaborate scheme of textualist methodology, such as corpus linguistics, relies upon fairly sophisticated models that would be hard for all but a few judges to explain cogently. And so the real baloney here is the connection drawn by Easterbrook between a scholarly analysis of certain statutory information, here legislative history, and the abilities of a judge to draw meaningful conclusions with the help of experts.

Second, the claim that an interpreter will usually struggle in disentangling good from bad legislative history is exaggerated, at least as to the main themes of the argument in McNollgast (1992) and Rodriguez and Weingast (2003). Recall that the essential distinction drawn is between legislators who face consequences (such as penalties for lying) for expressing views inconsistent with the pivotal coalition behind the statute's enactment. In the case of the 1964 Civil Rights Act. So, for example, it is entirely cheap talk for Senator Hubert Humphrey to say, after the fact, that he and LBJ had hoodwinked Senator Everett Dirksen by getting him to put forward meaningless amendments. It is another matter entirely for Senator Dirksen and others to speak up on the floor as the final version of the bill was being debated. These are costly signals and therefore more probative. And it would take no special mastermind to understand this distinction and to apply it, so long as the evidence was available, in a relevant case. Indeed, discerning legislative history in this way is much more tractable than the chaos attendant to unraveling legislative history constructed by various legislators, in the absence of a theory of why they were saying what they were saying and to what effect.

Third, and related to this last point, let us think for a moment about how legislative history is used in the real world without the insights and analytical framework yielded by McNollgast (or, for that matter,

other sophisticated scholars writing about legislative history and interpretation). They are left at the mercy of lawyers attaching "excerpts of record" to their briefs, a classic exercise in cherry-picking. What then is a judge to do without any analytic frameworks to help separate and sort out the wheat from the chaff. What Easterbrook and other deep skeptics of legislative history (Manning and Doerfler perhaps most prominently as modern textualist scholars) offer is essentially a false dichotomy: Either fish and fumble your way through documents that make up legislative history without any guidance other than by self-serving lawyers advocating for particular pieces of evidence as more salient in discerning meaning or else abandon the quest entirely, looking to statutory meaning without consideration of context.

The McNollgast argument distilled to its normative essence (and refined through the work of others who have been working broadly within this tradition over the last three decades) is three-fold: 1) An understanding of what statutes mean requires attention to the those who have drafted, revised, and ultimately adopted through their votes final statutory language. This is the very least that is required under a "faithful agent" approach to statutory interpretation; 2) Context matters, and in two fundamental ways: First, in a sophisticated, and theoretically informed, understanding of the structure of the legislative process and the exercise of legislator strategies within a rational choice framework, and, second, in attention to the revealed sources of evidence that is generated through the process leading up to the final vote on enactment; and 3) we can formulate an approach (let us not call it a template) that, preferably with the assistance of experts, can assist judges in separating between meaningful and meaningless legislative history, that is, between costly signals and cheap talk.

B. Discerning Statutory Meaning

The performance of experts in assisting statutory interpretation can be assessed only when we have firmly in mind an idea of what are the objectives of interpretation. Much of the work in the PPT tradition, certainly included the many articles that McCubbins wrote with law colleagues (Rodriguez, especially) and with then-students builds squarely on the principle that the interpreter has fidelity to the will of the enacting legislature. Legislation is understood as a series of communications, first made internally through the enactment process to other legislators (and relevant staff), then to instruments of lawmaking, including administrative agencies and any official charged with implementing statutory policy, and finally to courts tasked with the role in interpreting legislation where the meaning of one or another term or phrase is in dispute.[20] Statutory interpretation is essentially a process of decoding signals; often this will be easy, occasionally it will be difficult.[21] But the main elements of interpretive technique are focused on the decoding of legislative communications, so as to reveal to Congress's instruments what they are to do and what it means to be faithful to their will as democratic agents of we the People.[22]

In the McNollgast framework, the matter is a bit more complicated. In describing the role of legislative bargains and, earlier, the ways in which Congress structures processes in order to realize its objectives, this framework sees members of Congress as having preferences at the moment the statute is enacted –

[20] See, e.g., Mathew McCubbins, Cheryl Boudreau, Arthur Lupia, and Daniel B. Rodriguez, "What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation," 44 SAN DIEGO L. REV. 957 (2007).

[21] See Mathew McCubbins & Daniel B. Rodriguez, "Statutory Meanings: Deriving Interpretive Principles from a Theory of Communication and Legislation," Brooklyn Law Review (symposium issue) (2011).

[22] See MATHEW MCCUBBINS & DANIEL B. RODRIGUEZ, WHAT STATUTES MEAN, CHAP. 9 (manuscript, 2020, on file w/D. Rodriguez).

and so the institution here is what we might call the enacting Congress (or, to be more precise, the enacting coalition, now sometime in the past) and also preferences in the future (call this the current coalition). In their articles on interpretation, McNollgast did not express a clear normative view about whether an interpreter ought to be faithful principally to the enacting coalition or the current coalition. The main point was to note this tension between the enacting and current colation and how statutes are drafted in ways that acknowledge and even accommodate this tension.[23] So far as a normative view of statutory interpretation is concerned, it falls to the interpreter, be it the agency or the court, to determine how to resolve this tension and how best to give effect to the will of Congress.[24]

Practical judgment and mobilized expertise is helpful in interpretation under either of these frameworks, and other frameworks that can broadly be viewed as within the PPT tradition. A judge interpreting a statute should be aided by experts in understanding whether a particular meaning effectively decodes the communication that is reflected in both the text and relevant indicia of meaning, including sources of legislative history and interpretive canons. Likewise, a judge trying to figure out whether a certain interpretation is faithful principally to the will of the enacting Congress, even though the current Congress may have little resemblance to that original group of statutory enactors will use experts to aid their inquiry and will also use experts if they aspire to discern the will of the current Congress and interpret the statute accordingly.

There are many options to consider under this expertise model. Lawyers may call expert witnesses to help advance their arguments. To use such witnesses to make what are purely legal arguments would

[23] See Shepsle on bureaucratic and coalitional drift.

[24] McNollgast cites.

require some adjustments to have expert witnesses are typically used, but it is not impossible, or even implausible, to see how some adjustments in practice and protocol could help align the objectives of interpretation and beneficial technique and method.

Where Easterbrook goes awry is in underestimating the utility of expertise and expert judgment in interpretive contexts. Interpretation can be aided by lawyers adding appropriate legislative history information to the case citations in their briefs or, better yet, furnishing the court with expert reports. Both of these – delegating the work of gathering evidence about the meaning of a statute – have a "least cost avoider" benefit: the entities deciding how much to spend on interpretation are the ones who know best the stakes and so can best balance the costs and benefits. But this must be balanced against "discovery wars" and biasing justice in favor of the bad guys the per capita stakes from stealing via misinterpretation are higher among thieves than victims. In addition to the use of econometrics models in litigation, other examples of the use of expertise in litigation abound (does Product A cause cancer, did a building collapse because of the earthquake or faulty construction). Easterbrook's position is peculiar in the context of negligence litigation: is it really more time-consuming to study legislative history than the causes of cancer? Another mistake is a false generalization from a hard case to the normal case. Rodgast did not pick their example randomly or purposely to present a representative case. Instead, they picked a tough one. (The same was true in picking "prevention of significant deterioration" in the McNollgast article in the Virginia Law Review.) Easterbrook in essence said one should never go on a hike because he just read Hillary's account of climbing Everest and it

seems way too hard.

And so we come to what is the heart of our argument and the flaw in Easterbrook's: The fact that he (and presumably others) do not have the time or energy to do a proper statutory history of a bill, let alone the knowledge about how to do it, does not mean that it could not be done for him by an expert. True, in any given case, the question is whether the value of additional data on the meaning of a statute worth the cost? The source of his errors is not actually doing that analysis. (hint: Bayesian updating may have something to say about all this).

C. Drawing Comparisons

Ultimately, the case for legislative history in statutory interpretation rests on practical judgment. The methods will invariably be imperfect, and Judge Easterbrook is not wrong in highlighting the challenge for ordinary judges in translating sophisticated political science into workable decision rules. But in assessing how practically useful these methods can be, we need to compare it ultimately to other approaches to statutory interpretation. And so we conclude this section by coming back to a core question that is often elided in debates about the use and utility of intentionalist methods of interpretation, whether focused on the use of history, or statutory purpose, or some admixture of techniques, as reflected in classic Legal Process theory and some of the major treatises on interpretation, such as Sutherland. The question is this: How can we be confident that interpretation that excludes historical methods and resolves to answer statutory questions by resort only to the text

(where it has a "plain meaning") or to sources that purport merely to clarify the meaning of language, as with a dictionary?

Dean John Manning's extensive work on statutory interpretation and textualism has been immensely influential over the past quarter century, indeed, he may be credited more than any other single individual, including his mentor, Justice Scalia, in moving the needle such that textualism is far and away the most prominent and impactful theory of statutory interpretation. At the level of method, however, there is much more to say than even Dean Manning has said in his various articles, and thus the scholarship about interpretive method remains robust, even among committed textualists.

Some prominent statutory interpretation scholars have, in the past decade or so, articulated serious critiques from various directions about textualist approaches to interpretation that go so far as to exclude all or almost all contextual evidence, including legislative history. For example, Abbe Gluck and Lisa Bressman have done important empirical work suggesting that public officials engage deeply and broadly with historical materials in their implementation and interpretation of statutes. Victoria Nourse, also from the perspective of someone who has worked in the legislative branch, looks closely at the actual practice of interpretation and finds that the approaches of legislators and others are more nuanced that strict textualism would seem to indicate. Moreover, as William Eskridge and Nourse point out in an important recent article, the courts can and do engage in what they call "textualist gerrymandering," that is, a rather arbitrary picking and choosing among textual sources in order to resolve disputes.[25] The takeaway point of that article (and others in a similar vein) is that there is

[25] William N. Eskridge, Jr. & Victoria F. Nourse, "Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism," 96 N.Y.U. L. REV. 1718 (2021).

nothing totally objective and neutral in textualism. Figuring out which text matters is part of the interpretive enterprise and it can be manipulated in order to accomplish particular aims.

That textualism has its own serious internal difficulties – we might say one or more Achilles' heels – can be seen as numerous scholars have emphasized in the contemporary literature on statutory interpretation.[26] Moreover, some of the criticisms of textualism go to questions of practical judgment and the efficacy of textualist methods. For example, the rise of corpus linguistics as a plausible interpretive approach raises practical considerations. Judges are unlikely to be readily familiar with this approach and the shape of the debate over the utility of these approach – as was recently revealed in the highly unusual case in Florida involving the Center for Disease Control's airline mask mandate – suggests that there are reasons for skepticism about how corpus linguistics can aid in interpretive strategy. And on the matter of expertise in particular, it is interesting that the person who has perhaps most earned the title "founding father" of corpus linguistics, retiring Justice Thomas Lee from the Colorado Supreme Court plans to form a law firm with a practice area devoted specifically to corpus linguistics![27]

IV. Conclusion

This short paper has barely scratched the surface of what is an immense and increasingly complex literature on the aims and objectives of statutory interpretation and the costs and benefits of the use of

[26] See, e.g., Kevin Tobia, et al, "Statutory Interpretation from the Outside," 122 COLUM. L. REV. 213 (2022); Matthew Jennejohn et al, "Hidden Bias in Empirical Textualism," 109 GEO. L.J. 767 (2021); Cary Franklin, "Living Textualism," 2020 SUP. CT. REV. 119.

[27] https://www.reuters.com/legal/government/retiring-utah-top-court-justice-open-law-consulting-firms-2022-06-13/#:~:text=(Reuters)%20%2D%20Utah%20Supreme%20Court,Washington%2C%20D.C.%2C%20and%20Utah.

one or another interpretive techniques. Textualism is very much in ascendancy as an interpretive approach, for various reasons, including the practical one raised by Judge Easterbrook and that is that alternatives to textualism can be very messy and time intensive in their implementation. However difficult is, say, the battle among dictionaries in discerning the meaning of ambiguous statutory language, it would seem to excavating the legislative history of a statute and then assessing the credibility of individual legislators and legislative coalitions as one might assess the credibility of witnesses is a heavy lift. However, we should approach these questions, like so many other questions in statutory interpretation from a pragmatic perspective and ask the question: Will we learn something useful from a deep dive into the statute-making process, a dive aided by experts on the information gleaned and the positive political theory that can help illuminate our perspective on the function and conduct of the legislative process. And even if on balance we expect that judges will not do this heavy lifting in deciding actual cases, an approach to interpretation based upon the insights and analysis of PPT will gave us a good basis to investigate cases already decided and assess better whether this or that decision was congruent with a faithful agent approach to discerning legislative will.

In his important and enduring work on statutory interpretation, Mat McCubbins emphasized two critical points: One was that legislation can be viewed as a source of information and all information, especially complex information, must rely on rules and practices to help decode its meaning and implement its objectives. The other was that this effort was well worth the time and energy devoted to it, as these faithful agent theories of interpretation run in parallel with our commitments to democracy. While he pointed to a large part of the literature that seemed to give very short shrift to the connection between interpretive approaches and democracy, he reminded us in his written work, teaching, and commentary that the highest and best use of our political institutions is to create the conditions in which democracy

would flourish. A more pragmatic approach to learning what happened in the legislature beyond just reading the final test would assist this endeavor.