

## CONVERSATION

*Part Two of the Symposium consisted of a discussion among the four panelists with Professor Richard B. Stewart as moderator.*

WILLIAM N. ESKRIDGE, JR.: Beth, you said in your comments that teaching legislation is difficult because you teach so many different statutes, and none of us really knows that many different areas in depth. Chai, you said that you can teach the method without knowing about the substance of the statute. I want to press Beth's point and dissent from Chai's.

In any statutory case worth exploring in some depth, there is a complicated interpenetration of methodology and substance. I am using "substance" in the sense of a statute's policy arguments, efficiency arguments, fairness arguments, moral arguments—whatever kind of substance may be relevant.

For example, many statutory provisions themselves are terms of art with specialized meanings whose nuances one can't fully understand unless one knows something about the substantive area. Other provisions use what I call "normative words." For example, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>1</sup> the spotted owl habitat case, the key statutory language was "to take,"<sup>2</sup> which is imbued with common law and even constitutional connotations relevant to the statutory issue of whether the Endangered Species Act authorized the Department of Interior to bar private actions harming the critical habitat of an endangered species. In *United Steelworkers v. Weber*,<sup>3</sup> the Title VII affirmative action case, the main word being interpreted was "discriminate,"<sup>4</sup> which is a deeply normative word imbued with contested constitutional as well as moral and psychological connotations. How can you teach *Griggs v. Duke Power Co.*<sup>5</sup> or *Weber* or any of the other leading Title VII cases without having a thick discussion of the normativity of the word "discriminate"? Even at the level of individual words, I should resist the pro-

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1. 515 U.S. 687 (1995).
  2. *See id.* at 704–05.
  3. 443 U.S. 193 (1979).
  4. *See id.* at 200–02.
  5. 401 U.S. 424 (1971).

position that dealing with statutes is just a matter of craft, dictionary fetishism, and pure methodology. I should insist that it's an intrinsically normative enterprise as well, and that part of teaching a statutory interpretation case is understanding something about the normative considerations and debates that surround battles over the words.

In addition, legislation teaching as well as scholarship should be informed by certain "field norms." For example, a lot of us, including myself and Beth Garrett, teach civil procedure. When teaching the rules of civil procedure and the procedure statutes, a professor must consider field norms related to due process concepts of fairness, the separation of powers and federal jurisdiction, and issues of territoriality and the fairness of grabby jurisdiction. These are substantive norms that are relevant in the interpretation of federal statutes, state and federal rules of civil procedure, personal jurisdiction laws, and other statutes regulating procedure. Some of the cases we teach in a legislation class are based on criminal statutes, and one of the things a professor certainly tells students is that the rule of lenity is important and actually affects the results in some cases. The rule of lenity states that ambiguous criminal statutes should be interpreted to the benefit of a criminal defendant. What does that mean, and where does it come from? Well, it is imbedded in a rich normative history of notice and fairness, of regulating police discretion, of separation of powers: Who gets to define morally culpable conduct? Should we put that burden on the legislature?

My final point about the relationship between substance and method comes from Aristotle's concept that a statute has no meaning in the abstract, but that meaning adheres to a statute only when it is applied to concrete circumstances. This is what we do as lawyers and as law professors. We apply statutes to concrete cases, whether a case is adjudicated by an agency or a court, or whether a case is merely a hypothetical. When statutory language is being applied to specific facts, a lawyer can win or lose cases by showing that your interpretation makes more substantive sense. Again the criteria can be various. It can be fairness criteria. It can be moral criteria. It can be efficiency criteria. It can be institutional criteria so substance may be also institutional substance.

Substance and craft are like two parts of a pair of scissors:<sup>6</sup> Neither operates without the other. They're both part of the statutory interpretation enterprise. I think this idea presents challenges for all of

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6. I am stealing this metaphor from Lon Fuller. L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 452 (1934).

us. One way to tackle this challenge is through case studies. With case studies, there is a greater opportunity for substantive discussion, so students can understand the ways that norms influence statutory applications and the ways that they do not.

My pitch is for substantivity. All interesting statutory interpretation is very deeply normative on many levels. This is probably even more typical of the Yale Law School than Richard's anecdote about the D.C. Circuit clerk.

ELIZABETH GARRETT: I do have a reaction. I teach many courses on procedure: civil procedure, administrative law (which is, by and large, a procedure course) and legislative process. In those courses, I strive for a balance. Bill is right that, at a certain level, interpretation depends on the substance of the particular statute being interpreted. However, an understanding of the particular context is just one of many factors that affects the interpretive endeavor; interpretation also requires a comprehensive knowledge of U.S. statutory law because an interpreter must have a sense of the larger context in which the particular law fits. In other words, substantivity is a complex objective because there are layers upon layers of statutory law and context to consider. Procedure teachers often have to rely on cases that exemplify specific points without spending a lot of time on substantivity. Take, for example, civil procedure, which Bill identified as a course with deep norms. Bill alluded to the personal jurisdiction cases; when one teaches those cases, both professor and students invariably address the history of personal jurisdiction and the historical and social context of the cases. That's not the case when one teaches, for example, motions to dismiss, summary judgment, or preliminary relief. Context is important in those cases, but to a lesser extent than in the personal jurisdiction cases, at least for classroom purposes; in teaching such issues, one might study an antitrust case one day, a civil rights case the next day, and a torts case the next day. That's the balance I am speaking of.

One way to strike the right balance between a survey of procedure and the need for deep substantivity is to spend a relatively large amount of class time on case studies. In my administrative law class, for example, I use a case study of the National Highway Traffic Safety Administration's (NHTSA) passive restraints standard for automobiles. The rescission of that regulation was at issue in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm*

*Mutual Automobile Insurance Co.*<sup>7</sup> We begin with a speech by President Johnson on the problem of highway safety and some of the initial congressional hearings. We study both the legislation that created NHTSA and legislation that was passed as a reaction to specific regulations. We look at all of the regulations and the Reagan administration's rescission of the passive restraints rule, which led to the *State Farm* case. We use a case study prepared by the Kennedy School at Harvard to get a sense of the politics and regulatory decision making. By the time we get to the *State Farm* opinions, the students have a deep understanding of how the case was the product of different institutions, politics, expertise, and history. We even study the regulatory response following *State Farm* and the airbag controversies that have arisen in the last few years.

Finally, a concern with context might lead a professor teaching a first-year course like that at N.Y.U. to discuss institutional competence extensively. If statutory interpretation relies on a deep knowledge of substance, wouldn't it be better for agencies to be the primary interpreters of statutes rather than courts? Thus, the challenge that Bill mentioned can lead to intense discussions about the right way to apply and design these procedures, and it leads me to a deep suspicion of courts and a preference for agencies as statutory interpreters.

CHAI RACHEL FELDBLUM: Yes, I actually think Bill's comments raise a number of questions and define a number of issues. First, in terms of teaching the moves within a case, it is certainly better if the professor has some knowledge of the substantive area because then he or she can bring a different level of understanding to the case. I hope nothing I've said has suggested that I think a professor can teach the rules of statutory interpretation without having any understanding of the substance of the relevant statute. If so, I appreciate Bill for giving me the chance to clarify that.

For example, with my legislation materials, I know the moves I want to teach, and I can find at least ten cases in every substantive area that use a given move. Over time, I try to find cases that best fit the moves I want to teach in substantive areas with which I'm comfortable. I'm limited with *Chevron*;<sup>8</sup> I have to teach *Chevron*, but I don't do environmental law and the "bubble" concept still confuses me every time!

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7. 463 U.S. 29 (1983).

8. 467 U.S. 837 (1984).

In the casebook that I hope to author sometime in the future with Tim Westmoreland I want to include sections on particular moves accompanied by a number of cases so that a professor can assign whichever case is most closely related to the professor's substantive area of expertise. It will be like picking from a menu. You know a field has arrived when there is a multitude of casebooks available, and I hope this casebook will add to the many good ones that are already out there.

Second, I do think that the other way to address the issue Bill raised—and this is something I've been thinking about since teaching disability law—is to teach legislation using only one substantive area of law, for example, the Americans with Disabilities Act (ADA). In my legislation class, I already include a lot of materials on disability law, but I'd like to consider what a syllabus focused on one substantive area would actually look like. My only fear is that it will be harder to stay focused on the moves if students get caught up in the substance of the law itself. In other words, I would not want to teach that class as a “disability law class” because there are lots of important disability law cases that I wouldn't include because they don't illustrate a particular statutory interpretation move. I'm struggling with this question, but I think that it's an interesting one.

During the break, a student made a really interesting point about how many courses—such as tax law or securities law—are based on statutes, but are taught by professors who are interested in teaching the bottom line result rather than illustrating the moves a court makes to get a certain result. It would be nice if professors would weave together the moves and the substance, although we might have to send some professors to a remedial legislation class. That might be difficult. (*Laughter.*)

My last point is in response to Richard's comment about integrating case studies into the lawyering program. In my legislation class, I have between seventy-five and eighty students. Though the class is large, it doesn't prevent doing that sort of training. I do what David Shapiro did in his federal courts class when I took it—he went row by row, so though there was no real panel system, students generally knew when they would be called on. That's how I teach my class. I go row by row, and it's entirely Socratic: What's the first move the court made? Next person, what's the second move? The other students basically observe their classmates unpacking the case. I usually get around the class three times in a semester, even with a class of eighty, because it moves very quickly.

What I can't do in a class of eighty is to give my students an understanding of what it means to have a client and to be really involved in the policy. The clinic has twelve students, and I have two teaching fellows who each supervise six students. It is incredibly labor and time intensive, and that's why I rotate out of the clinic every fourth semester. In a class of eighty, you can definitely teach the skills stuff, though the students may not get the sense of having a client in the same way.

RICHARD B. STEWART: How long do you spend on the moves? I guess the next step is to name the moves and patent or copyright them.

FELDBLUM: I haven't copyrighted them yet, but I have named some of the moves.

The class is broken into three parts. The first half of the class is the moves—legal process, textualism, riffs. Then I teach four case study classes, which is fairly superficial and cannot substitute for working on the issues in real time and in real life, as we do in the clinic. Finally, I put the moves into play. I break the class of eighty into groups of five. Each group has an exercise, and when they're done, they report back to the class. There are definitely ways that you can teach these issues in a large class. Of course, then there were eighty exams; that doesn't change.

ESKRIDGE: There is another model for doing the exercise even with eighty students. I had 180 at Yale last semester, and I worked several detailed case studies into the course, which was otherwise quite unmanageable. One case study involved *United States Steelworkers v. Weber*,<sup>9</sup> of course. The first day of class, I gave my students the statute as it existed in 1979, when the Court ruled on the Title VII voluntary affirmative action issue. The debate amongst the Justices in *Weber* is superficial as regards the statutory language, so I tell the students to study the statute, and to come up with arguments and a position based on the statutory text alone. Sometimes I ask them to explain in writing how they would vote based on the statutory text and why. I read everyone's answer, tabulate them, and prepare a handout reporting the tabulations and interesting analytic themes that emerged from their answers. This way, I can see how every single student is processing a fairly complicated statute—not as complicated

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9. 443 U.S. 193 (1979).

as some of the environmental statutes, perhaps, but pretty complicated nonetheless.

Later in the term, I use *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>10</sup> where there is an excellent textual discussion amongst the Justices.<sup>11</sup> Again, I give the students a slightly edited copy of the statute, in this case the Endangered Species Act.<sup>12</sup> I instruct them to study it and evaluate the Justices' arguments based on their own understanding of the text, the whole text, and nothing but the text. When students just read *Sweet Home* without any context, it's very hard to assimilate all the textual and structural arguments. But if students themselves start with the statute rather than with the judicial opinion, almost every one of them will be engaged, at both the practical and theoretical levels, with the unique features of statutory interpretation.

Spending a few days with the background of a statute is perhaps the most useful technique. This is what Phil Frickey, Beth Garrett, and I do with the Civil Rights Act of 1964<sup>13</sup> in our casebook,<sup>14</sup> which students find useful. Mikva and Lane do that with the Voting Rights Act,<sup>15</sup> which is excellent because the casebook authors actually reproduce many of the congressional documents.<sup>16</sup>

FELDBLUM: Let me add one more thing. I don't know if Bill knows this but one of the things I am most grateful to him for is his legislation syllabus, which he shared with me when I first taught legislation. One class session listed on that syllabus didn't meet; instead students handed in a memo. I love that idea! I didn't want to do the memo on the same topic that Bill had; instead, I had a research assistant summarize the cases on the D.C. Court of Appeals docket, and I picked three interesting cases. I got the briefs from those three cases and every student had to choose one case, read the briefs from both

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10. 515 U.S. 687 (1995).

11. *Id.* at 696–704 (Stevens, J.), 709–11 (O'Connor, J., concurring), 717–25 (Scalia, J., dissenting).

12. 16 U.S.C. §§ 1531–44 (1994).

13. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

14. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 2–47 (3d ed. 2001).

15. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

16. ABNER J. MIKVA & ERIC LANE, *AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS* 101–41 (1997).

sides, and attend the oral argument. Finally, they wrote memos describing the moves that the lawyers for each side made.

One of the cases that I picked was *National Rifle Ass'n of America, Inc. v. Reno*,<sup>17</sup> which addressed what it means to immediately destroy records.<sup>18</sup> Most of my students chose that case. Apparently at the oral argument—I couldn't have asked for a better argument—one judge was a pure textualist who kept pushing the government lawyer on text. I eventually used the actual opinion issued in the case in a later class.

SETH GASSMAN: This question is for the entire panel: what do you do in terms of teaching bad legislation? I know one thing that's frustrating for law students is when you sense that a legislature meant one thing but just didn't structure legislation well. I wonder how you convey to students not only that these things happen, but also how best to deal with such legislation, and what you can do with bad legislation.

RICHARD A. BRIFFAULT: Seth, what do you mean by bad legislation? Because, as Tolstoy said about unhappy families,<sup>19</sup> there are many ways in which legislation could be considered "bad." I can think of at least four. First, a law is bad if one doesn't like its contents—whatever the law requires, permits, or prohibits. Second, the law can be bad if it is drafted in a confusing manner so that one cannot tell what key provisions mean. Third, a law may contain inconsistent or contradictory provisions, so that one provision requires a particular action while another provision precludes that action. Such a law may not be confusing since one can tell what the provisions mean, but it provides internally inconsistent directions. Fourth, a law can be bad if it is plainly unconstitutional.

GASSMAN: I guess I'm less concerned with the plainly unconstitutional result, and I'm more concerned with statutes that are internally inconsistent and statutes that make it difficult to parse the different elements.

BRIFFAULT: Well, I can think of two statutes that are either arguably internally inconsistent or just hard to parse. To me, they are

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17. 216 F.3d 122 (D.C. Cir. 2000).

18. *Id.* at 127–30.

19. COUNT LEV. N. TOLSTÓY, ANNA KARÉNIN, VOL. 1, at 3 (Leo Wiener trans., Dana Estes & Co. 1904) ("All happy families resemble each other; every unhappy family is unhappy in its own way.")

both good examples of how difficult it is to make legislation, that is, to assemble majorities, find compromise language, and resolve substantively or technically difficult problems.

The first is the 1982 amendment to section two of the Voting Rights Act, where Congress reacted to a Supreme Court decision making it more difficult for plaintiffs to raise minority vote dilution claims by adding language to the statute making it easier to bring such claims.<sup>20</sup> The difficulty is that Congress did not clearly articulate a definition of minority vote dilution, probably because Congress was not sure how it wanted to define vote dilution. Congress clearly wanted to repudiate the Supreme Court's "intent" test, under which certain voting arrangements could be invalidated only if the plaintiffs could prove that the arrangement had been adopted for racially invidious purposes. The intent test was problematic for a variety of reasons, including the lack of evidence about voting arrangements that had been adopted decades earlier, and the sense that discriminatory intent is not really significant if an arrangement effectively prevents minority voters from electing candidates of their choice.

In response, Congress adopted the so-called "totality of the circumstances" or "effects" test, but beyond repudiating the intent requirement, what does that mean? What did Congress really want? That was tied up with the uncertainty of the concept of vote dilution, which assumes that minority voting power was being "diluted" below a certain level. But what is the voting power of "undiluted" minority votes? Does this mean that minority candidates should win elections in proportion to minority population in a given jurisdiction? Congress rejected such an interpretation, adding a proviso expressly repudiating a racially proportionate representation standard.<sup>21</sup> On the other hand, the lack of minority success in elections is surely evidence that an at-large election scheme is burdening minority voters—or diluting minority votes—and so Congress expressly provided that a lack of electoral success among candidates supported by minority voters should be a factor in determining whether a voting arrangement is dilutive. A law that requires consideration of minority electoral success but rejects a proportionality standard may not be literally contradictory, but certainly has a distinct Janus-like quality of looking in two opposite directions simultaneously. Even so, I think the tension in the statute is not primarily a failure of the legislative process, but rather is a reflection of the underlying difficulties of defining vote dilution and of as-

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20. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134 (1982).

21. *Id.*

sembling a majority in two houses of Congress and gaining presidential approval. The tensions in section two cannot be understood without understanding the history of the statute and why vote dilution is such a difficult problem. As a result, when I teach this, I spend less time analyzing how courts should interpret the statute, and more time considering the difficult nature of the issue that gave rise to the political demand for a statute. As Bill's indicated, a statute like this is best discussed with considerable attention to context.

The other statute is the Bipartisan Campaign Reform Act of 2002<sup>22</sup> (BCRA), often known as the McCain-Feingold law or the Shays-Meehan law. This incredibly intricate statute attempts to regulate the complex political phenomena known as soft money and issue advocacy. For me, however, one provision of this statute—the so-called Levin Amendment—stands out for its intricacy and difficulty. The statute bars national and state parties from taking so-called “soft money”—that is, money that does not comply with the requirements and prohibitions of the Federal Election Campaign Act—for certain election-related purposes,<sup>23</sup> but contains an exception permitting certain types of soft money, up to certain amounts, to be used for certain purposes, particularly voter registration and get-out-the-vote drives.<sup>24</sup> Politically, there was a reason for this. Although the development of soft money permits the injection of huge individual, corporate, and labor donations into federal election campaigns—dramatically above the limits nominally imposed by federal law—some of that money has been used for politically desirable purposes, particularly voter registration and mobilization. Some members of Congress feared that the elimination of soft money would dry up funding for party programs that helped bring voters to the polls. This was of particular concern for African-American and Latino Democrats in Congress. Indeed, one of the difficulties the BCRA's sponsors faced was a surprising resistance to soft money caps among minority Democrats in the House because of their concern about the role soft money plays in voter registration and voter mobilization. So, Congress crafted the intricate rules of the Levin Amendment to allow some soft money donations for those limited purposes.

This provision is just extremely difficult to read. It is about three hundred words, with a host of exemptions and exceptions from the exemptions, and a lot of semi-colons. It requires a great deal of craft

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22. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 28 U.S.C., and 47 U.S.C.).

23. 2 U.S.C. 441i.

24. 2 U.S.C. 441i(b)(2).

and lawyerly skills to figure out what it says. But even if it's parsed correctly, unless one knows a lot about campaign finance law and practices, it's difficult to have an understanding of what it means, what it is intended to accomplish, or why it is there. Once again, an understanding of context is crucial to understanding a statute, but that understanding cannot be obtained by a close reading of the text alone. Rather, as Chai indicated, one needs to understand both the politics and the policy behind the statute.

I think Bill asked a very important question that is underscored by these complex statutes: how can we possibly teach legislation as a separate course given how much a statute's words, concepts, and structure reflect a particular context? Certainly there are standard moves in the interpretation of legislation, and commonalities in reading legislation that link securities regulation, taxation, environmental regulation, and campaign finance. But it is a challenge, I think, to be able to deal with these difficult and complex statutes without knowing the history, policy, and politics behind a particular law.

STEWART: One way that I have recently addressed this in class is by looking at *Chevron*,<sup>25</sup> where the statute uses traditional tools but does not lead to a clear result. What is the role of a court and an agency in resolving that? Why does it not lead to a clear result? Is it an unanticipated problem, something that came up that was not anticipated? Was it just the deal that was struck to get the statute passed? Or were there just competing normative principles and goals at stake that are in some tension, like the voting with minority representation? Does the explanation have a bearing on what should be the role of the court versus the agency? In a totally skeptical way, *Chevron* tries to say it really doesn't matter. It equals delegation but I don't think the courts follow that, sort of tease it out. But then how do you know it was the type of failure to clearly resolve the problem? Was it unanticipated, or was it something that was anticipated but they couldn't get agreement? And how could you find out? And if you found out, would it make a difference?

GARRETT: I thought it was interesting that you asked, "What should *you* do with a piece of bad legislation?" Who is the "you" in that sentence? The "you" might be a court, or the "you" might be an agency. If the "you" is a court, what does a court do with such legislation? Is it supposed to discipline Congress? Punish it for having failed to draft and pass better legislation? This is part of the justifica-

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25. 467 U.S. 837 (1984).

tion for textualism—that it disciplines Congress and improves the legislative process. Or consider work by David Shapiro that advocates coherence norms in statutory interpretation:<sup>26</sup> should courts use canons of coherence in order to improve upon the congressional product? If the “you” is a court, is the judge supposed to figure out what went wrong in drafting legislation that is the product of an interest group deal, determine what the original deal was, and interpret the statute to enforce only the deal that was actually made?<sup>27</sup> Or is the judge supposed to figure out, in a legal process sort of way,<sup>28</sup> what a reasonable legislature would have done in this instance? Do agencies do something different if they are the “you”?

In my law and politics class, I ask a third question that focuses on Congress as the “you.” What should Congress do about the phenomenon of bad legislation, whatever one means by “bad” legislation? Congress has the ability to adopt new structures and procedures to improve its own process. That is part of the due process of lawmaking analysis I discussed in my remarks. Do we have “bad” legislation because Congress legislates increasingly through omnibus legislation? If so, we need to diagnose the cause of omnibus legislation. Is omnibus lawmaking necessarily a bad thing? Are there positive aspects to omnibus legislation that should be retained by the reform? At the state level, many constitutions include single subject rules that discourage omnibus legislation.<sup>29</sup> Should the federal government consider similar reforms? And in what form should such a reform be adopted—as a constitutional amendment or an internal rule? Many courses fail to ask students what Congress can and should do, if anything, to solve the pathologies of the legislative and deliberative processes.

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26. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

27. Compare Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (advocating that courts should enforce interest group bargain), with Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (arguing that courts should interpret statutes in public-regarding ways, thereby undoing or extending bargain). See also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991) (critiquing theories of interpretation designed to ameliorate “bad” effects of interest group activity).

28. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994).

29. Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 103, 114 (2001).

FELDBLUM: What I love about the answers to these questions is that this is interpretation happening right before our eyes. What does the word “you” mean? I understood “you” as referring to the professor—how does a professor teach a “bad” piece of legislation? Is “bad” defined as an internally inconsistent statute or one that is just difficult to parse? Different interpretations certainly result in other interesting answers, but I want to echo and add to Richard Stewart’s response.

I think that a professor’s job is to help explicate why statutes end up the way that they do. Based on my twenty years working in Washington, I doubt that there is any law that isn’t “poorly drafted” in some way, unless the law is incredibly non-controversial and simple. The bottom line is that any controversial or complex statute is going to be “poorly drafted” in some way, because there necessarily has been a difficult political process that has led to the statute’s enactment.

About six months ago, a prominent member of the federal judiciary called the Americans with Disabilities Act a poorly drafted law; this judge suggested that perhaps the lawyers just hadn’t spent enough time on the statute. Of course, a lot of lawyers, including myself, spent a lot of time drafting the ADA, but the fact is that there were political reasons why the bill had to be written the way it was. Sometimes that results in a very confusing piece of text.

I always tell my students not to write text that is ambiguous if there is clear agreement among the parties. Of course, if there’s not agreement among the parties, it may be that the only way to get the bill enacted is to shade the provisions one way or another, hence creating an ambiguous piece of text. That may be what a lawyer has to do to get a bill enacted.

It is very interesting that the textualists really do believe that Congress should just “get its act together” and “do it better.” I’m sympathetic to that feeling, especially when things are written ambiguously when they don’t need to be, but the fact is that sometimes it’s impossible to be perfectly clear and also to get a piece of legislation passed. It’s part of our job as professors to explicate that.

ESKRIDGE: I interpreted your question yet a fifth way, and that is, I didn’t focus on the “you.” I assumed, as did Chai, that you were talking to us. I focused instead on what you meant by a “bad” statute. Here’s a traditional methodology that statutory interpretation teachers have been employing for at least a century: we get a lot of mileage out of cases based on statutes that, if applied literally, would have results that are unpalatable for some reason—a constitutional reason, a policy

reason, or a moral reason. Traditionally, that's been taught as a tension between the plain meaning rule and the various exceptions to the plain meaning rule—the “absurd result” exception that textualists tend to adopt, or the “follow the purpose of the law” approach that legal process people prefer.

All of us teach the *Church of the Holy Trinity* case.<sup>30</sup> An 1885 immigration statute made it a crime to transport into the United States an “alien” for “labor or service of any kind.”<sup>31</sup> The issue in *Holy Trinity* was whether the statute barred a church from bringing a pastor from England into the United States.<sup>32</sup> Applying the apparent plain meaning, students tend to feel that the pastor is included in the statute's prohibition, but want an escape hatch because that result seems so inequitable.

It is interesting that both conservative “strict constructionists” and liberal “purposivists” run into this problem, though generally not in the same cases. For every case like *Weber*,<sup>33</sup> where liberals bend statutory language to advance anti-discrimination and other progressive norms, conservatives do just as much bending to respect norms they prefer in other cases. An almost antic example of this phenomenon was the Court's recent decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*<sup>34</sup> The Food and Drug Administration's (FDA) authorizing statute allows it to regulate “drugs,” broadly defined in the statute to include body- or mind-altering products such as nicotine.<sup>35</sup> Yet five conservative Justices construed the law to bar FDA regulation of tobacco products on the ground that Congress implicitly preempted the FDA's authority in other statutes, even though the other statutes say nothing prohibitive about FDA jurisdiction. Hence, the Court engaged in page after page of review of arcane legislative history to show that Congress had relied on FDA assurances that it could not regulate tobacco products. Arch-textualists Scalia and Thomas joined the majority's legislative history fest without a constitutional whimper. On the other hand, writing for the contextual Justices, Breyer lambastes the majority for slighting the plain meaning of the text. It's a very amusing exchange. The conservative Justices actually have an excellent substantive point—Congress presumably did not give the FDA a carte blanche to upset long-

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30. 143 U.S. 457 (1892).

31. *See id.* at 458.

32. *Id.* at 457–58.

33. 443 U.S. 193 (1979).

34. 529 U.S. 120 (2000).

35. Food, Drug, and Cosmetic Act, 21 U.S.C. § 321 (g)–(h) (2000).

established regulatory practice—but one at odds with their stance in cases where they noisily insist on following statutory plain meanings.

STEWART: There's a great case coming along about the Clean Air Act and carbon dioxide as a pollutant: does the EPA have to set standards for carbon dioxide emissions?

BRIFFAULT: Does that cover personal emissions as well? (*Laughter.*)

ESKRIDGE: I think it's great to have law school humor. We often make fun of the Justices, and we make fun of Congress. That's great law school humor, because you don't want to make fun of your colleagues, you don't want to make fun of your students, and you don't want your students to make fun of you. But we shouldn't take the Court-bashing and especially the Congress-bashing too far. One thing that both students and professors need to avoid is thinking of Congress as a bunch of idiots who need to be exposed and disciplined by smart judges and law professors. This is what Hart and Sacks called the "flagellant theory" of statutory interpretation.<sup>36</sup> The flagellant theory posits that judges should not clean up messes left by legislators and, instead, should expose those messes; you can just hear flagellants yelling at Congress, "Bad dog! Bad! Bad!" While this may be fun, it is deeply disrespectful, not only to our democratic institutions, but also to the thousands of serious, public-spirited people who put together complicated statutory products despite enormous uncertainty regarding the nature of the problems they are tackling and the efficacy of their proposed solutions, and intense political pressure to compromise, make words less precise, and even introduce contradictions into statutes so legislatures can achieve the supermajorities usually required for enactment.

That's another reason why an understanding of political theory and the political context is very important. By taking the legislative process seriously, students get a sense of the seriousness of the enterprise and how, in a complicated world of uncertainty and lack of foreknowledge, even the smartest and most public-spirited people can come up with products that may seem poorly drafted when cases reach the federal appellate courts. Statutes only get to that level when the hidden bombs have exploded ten or twelve years after enactment.

A deeper, multifaceted, and even sympathetic understanding of the legislative process is one of the great things that the introductory

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36. HART & SACKS, *supra* note 28, at 91–92.

course at N.Y.U. and some of these upper-level legislation courses can instill. I think it is about good citizenship, not just about being a successful lawyer. All sorts of important people from Rudy Giuliani on down are graduates of N.Y.U. and other fancy law schools. It seems to me that it would be good for the leaders of tomorrow to learn more about the legislative process today.

FELDBLUM: There are two comments I want to add. First, on the flagellant theory or “bad dog” approach: when I started teaching legislation and reading the cases on textualism, I had a vision of a fourth grade teacher—not that fourth grade teachers are still like this, of course—snapping a ruler, saying, “Now do it better! Write it more clearly!” That attitude does not evince an understanding of the complexities of passing legislation. It’s just as Bill said—these things blow up ten years down the line. I was once involved with a disability case before the Supreme Court, and Justice Breyer said from the bench that the entire ADA seemed “metaphysical.” My reaction to the Justice’s understandable frustration was to explain why the law was drafted the way it was, but that’s difficult because judges have to deal with what’s on paper before them.

My second comment is that we do not have the type of understanding, communication, and respect between the legislature and the courts that I think we should have. I was one of the principal lawyers drafting the ADA and there were rules about statutory interpretation that I had no clue about. There was no course on legislation at Harvard when I was there and there still isn’t—I just checked a few months ago.

When I first taught legislation at Georgetown two things struck me. First was everything I should have known but didn’t. Second was the complete lack of understanding between the branches. The most exciting piece of scholarship I have read in the past year has been a chapter from Robin West’s book. The chapter is called “Rethinking the Rule of Law,” and it’s a fascinating analysis of how the rule of law has come to mean objective rules that courts apply.<sup>37</sup> The entire debate over the past fifty years has been whether courts can objectively do that; the critical legal studies folks say that courts can’t and others argue that courts can. By contrast, West asks why we are so court-centric in this way, and why we don’t come up with substantive rules of conduct for legislatures. That would mean investing more responsibility and more respect in legislatures, assuming legisla-

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37. ROBIN WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF THE LAW* (2003).

tures change their ways. Right now, I think legislatures often operate in ways that undermine respect for them, but I think there are things that legislatures can and should do differently that could change that.

STEWART: I would like to throw in something we haven't talked about and maybe this is for the twenty-first century. In the next years from now, we will look at comparative legislation because obviously, as Richard has indicated, things are often quite different at the state and local level but a lot of this is relevant to Congress. If you go to a parliamentary system, in the U.K., where the majority party controls the government and the legislature, things are very different.

Under Mrs. Thatcher, one of the prime objectives in legislation was to make them judge-proof against the judges, so there would not be gaps, inconsistencies, ambiguities, and to possibly avoid, because those judges might get in, and decide things. She didn't trust the judges. So that is a different universe. Still another different universe I have recently been involved in is some of the development of legislation in the European Union on environmental liability, like the Superfund statute, although it is different because it is much broader. There, you have a system where you have two legislative bodies, the council, which is the representative of the 15 member states, and you have the parliament, which is elected by the people of Europe on a country by country basis, which has, I don't know, 500-some members. Then, you have the commission, which is sort of the executive body, but it is the sole body that can propose legislation, but both the council and the parliament have a major role in the legislation. That is even a more amazing system than ours. When we talk about the legislature, often, we have, you know, sort of a model like the Congress in mind, and there are many different models, and I think Richard has already noted that.

APRIL LAMBERT: Hi, my name is April Lambert. As a board member on the *Journal of Legislation and Public Policy*, I participate in the process of choosing articles for publication. The vast majority of the articles we receive take a particular substantive area or a particular piece of legislation, critique it, and suggest ways it should be different. A very small minority of the articles we get take a more institutional or theoretical look at legislation in some way. I am surprised by how few articles actually do that. Would it be useful for those of you teaching in this area to have a wider academic sphere to draw from the more conceptual ideas of legislation? Are there spe-

cific areas that could be developed academically to assist in your teaching and classwork?

ESKRIDGE: I have some opinions on it that might be idiosyncratic, so please just take them for what they are worth. I do think there are too many articles out there right now. Everybody wants to write general theories of statutory interpretation. And unfortunately, when you write these articles, you have to talk about everybody else's theories. (*Laughter.*) I get drafts that are hundreds of pages long and containing intelligent discussions of all the theories, but basically just boil down Hart and Sacks. At the end of the day, these authors are adding a bit more to Hart and Sacks, but are not sufficiently original to justify a hundred pages of a law review.

I think that the most useful articles that are coming out in the field of legislation fall in the following areas. First, to advert to a hobby horse that I have already trotted out for you, let me put in a final plug for field studies. Think theoretically about how the various debates in statutory interpretation apply to your particular field, or think about specific norms that should be applied to the bankruptcy area, or the tax area, or the criminal law area. Larry Solan's work over at Brooklyn has been just spectacular in the criminal law area.<sup>38</sup> Bob Rasmussen,<sup>39</sup> Doug Baird,<sup>40</sup> and Eric Brunstad<sup>41</sup> have written wonderfully theoretical articles that explore in depth how bankruptcy statutes ought to be applied.

A second kind of article that we need more of is the kind that Beth was referring to: we need more systematic and theoretical thinking about the legislative process. Much of this type of work is done by political scientists, but lawyers like Beth Garrett who worked in the congressional budget process are now combining their practical knowledge with sophisticated theory. For example, there is now a literature on "omnibus legislation," these megastatutes that Congress now produces with regularity.<sup>42</sup>

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38. See, e.g., Lawrence M. Solan, *Jurors as Statutory Interpreters*, 78 CHI.-KENT L. REV. 1281 (2003); Lawrence M. Solan, *Why Laws Work Pretty Well, but Not Great: Words and Rules in Legal Interpretation*, 26 LAW & SOC. INQUIRY 243 (2001).

39. See, e.g., Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993).

40. See, e.g., Douglas G. Baird & Robert K. Rasmussen, *Boyd's Legacy and Blackstone's Ghost*, 1999 SUP. CT. REV. 393.

41. See, e.g., G. Eric Brunstad, Jr. & Mike Sigal, *Competitive Choice Theory and the Unresolved Doctrines of Classification and Unfair Discrimination in Business Reorganizations Under the Bankruptcy Code*, 55 BUS. LAW. 1 (1999).

42. See, e.g., Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*,

A third kind of literature that I think is particularly useful, again for academic types, would be literature thinking comparatively, as Richard Stewart was suggesting. For example, Bruce Ackerman wrote a characteristically iconoclastic and creative article on separation of powers.<sup>43</sup> The article imagines an odd menagerie of new governmental departments or branches, but its central insight is excellent: why should the U.S. believe that we got it right when we devised our increasingly-idiosyncratic system of separate powers at the national level? He then thinks about separation of powers by looking at other systems, and the article brims with insight. This kind of thinking should be deployed in the statutory interpretation literature. What effect would certain structural changes such as the advent of the modern administrative state have on the theory and practice of statutory interpretation? It would be particularly useful if law professors could interest political scientists into being coauthors. John Ferejohn, who visits at N.Y.U. Law School from Stanford's Hoover Institute every autumn, exemplifies this kind of productive coauthoring.

Fourth, direct democracy is a very under-theorized area of legislation. N.Y.U. did a spectacular symposium several years ago on direct democracy.<sup>44</sup> We need more of that.

Fifth, the area of state and local government is under-theorized. Richard Briffault,<sup>45</sup> Clayton Gillette,<sup>46</sup> and a few others have done path-finding work, but there is very little scholarship considering how important the topic is. As Richard says, the state and local level is really where most of the law is made. There is a lot of interesting theory that makes this area exciting, such as Paul Peterson's book on federalism,<sup>47</sup> Sheryll Cashin's article considering how state politics function to lock in wealthy enclaves,<sup>48</sup> and the many articles on the race-to-the-bottom including important work by Dean Revesz.<sup>49</sup>

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ISSUES IN LEGAL SCHOLARSHIP (2002), at <http://www.bepress.com/ils/iss3/art1> (on file with the *New York University Journal of Legislation and Public Policy*).

43. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

44. Symposium, *The Legitimacy of Direct Democracy: Ballot Initiatives and the Law*, 1996 ANN. SURV. AM. L. 373, reprinted in 1 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (1997).

45. See, e.g., Richard Briffault, *Our Localism* (pts. 1 & 2), 90 COLUM. L. REV. 1, 346 (1990).

46. See, e.g., Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625 (1994).

47. PAUL E. PETERSON, *THE PRICE OF FEDERALISM* (1995).

48. Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552 (1999).

49. See, e.g., Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997); Richard L.

Finally, I would like to see a lot more abstract political theory in some of the law reviews. The kind of theory exemplified by John Ferejohn,<sup>50</sup> Robert Dahl,<sup>51</sup> and other political theorists.

FELDBLUM: Robin West's piece on Hobbes and Paine is fantastic.<sup>52</sup>

ESKRIDGE: Robin West is exactly the kind of law professor whom you should want to publish, regardless of what she is writing about, because everything she says is brilliant. There are a number of political scientists writing very interesting things about classic political theory. Some of them have law school appointments. The law schools are now courting Michael Doyle, who is great.<sup>53</sup>

STEWART: I just want to pose to my colleagues a couple of questions that are sort of on the back of my mind. One thing I learned when I was in the government, and anyone who has worked in the substantive policy areas knows this, is that if I had a statute like the Clean Air Act<sup>54</sup>, there would be a person in the general counsel's office of the EPA who had probably been there at least ten years, who knew every bit of the legislative history, every proposed regulation, every regulation, every guidance, every proposed amendment of the statute, the complete history, and often knew what the right answer was, and what the underlying understandings are, where there was not a common understanding and where there was. And the brunt of my problem is that courts and especially our Supreme Court often do not do a serious job of analyzing the legislative, and some might say administrative history, of anything, and they want to resolve it and they pick and choose, and that's really bad. I once worked on a case about the allocation of the upper Missouri River rights; there was a history over thirty years and there was a right answer for anybody that delved into it correctly, but the court got it wrong because nobody, no law clerks were trained to do it and that may be a problem. None of the justices is particularly interested, although maybe Steven Breyer would dig into it. But I think that may be a strong argument for more

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Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

50. See, e.g., John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992).

51. See, e.g., ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

52. WEST, *supra* note 37.

53. See, e.g., MICHAEL W. DOYLE, *WAYS OF WAR AND PEACE: REALISM, LIBERALISM, AND SOCIALISM* (1997).

54. Ch. 360, 69 Stat. 322 (codified as amended in scattered sections of 42 U.S.C.).

textualism and not much legislative history—not necessarily for Scalia’s reasons but from the institutional interests and competence of our courts is abysmal in this area.

FELDBLUM: That’s very interesting because one of the things that I have been thinking about a lot about—and I can’t wait to read Beth’s new piece on *Chevron*<sup>55</sup>—is whether *Chevron* delegation is good or bad. Dick just articulated a strong argument for why *Chevron* deference should exist. If an agency issues a regulation, as long as it’s a reasonable interpretation of the statute, the court should defer to that regulation. What some textualists have been doing recently when they don’t want to defer is to find that there is no ambiguity in a statute so that they get to decide themselves.

Take the Welfare Reform Act of 1996.<sup>56</sup> Our client, Catholic Charities, thought the whole bill was a bad idea. But there was no stopping the bill, and so instead, we tried to make two changes to the text. We got one very important provision that our client wanted. After the statute was passed, we had several years of a Republican Congress and a Democratic administration. During that time, the clinic worked with agencies so that various words or phrases in the Welfare Reform Act would be interpreted through regulations in ways that were favorable for our client’s constituents. The motto of the clinic is that we are changing the world, one word at a time.

At one point, I met with a number of lawyers from the Justice Department and made my pitch that a particular word should be interpreted in a certain way. I didn’t argue that Congress necessarily intended that interpretation; instead, I argued that the interpretation was certainly a reasonable one that would get *Chevron* deference. Nina Pillard, a colleague of mine at Georgetown who was then working in the Office of Legal Counsel at the Justice Department challenged me and argued that perhaps *Chevron* deference conceptually presupposes that agencies will try to determine Congress’ intent in good faith. I responded that this was a fascinating intellectual point, and a great idea for a law review article, but that in this context she was an attorney with a client—the President—and that her interpretation should advance the interest of that client.

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55. Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. (forthcoming 2003) (on file with the *New York University Journal of Legislation and Public Policy*).

56. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7 U.S.C., 8 U.S.C., 21 U.S.C., 25 U.S.C., and 42 U.S.C.).

STEWART: At least that the people at EPA—at least the lawyers at EPA—understand the context, the background, the nuance.

FELDBLUM: Right, but one of the problems is that we develop a standard that then has to apply to a range of cases, which is sometimes legitimate, and sometimes not legitimate. Then it becomes very difficult.

STEWART: Well, that is the problem with *Chevron*.

ESKRIDGE: I have another idea of the type of article you should be looking for, for your journal. Very often, attorneys do objective, nonpartisan, but comprehensive legislative histories of statutes. The histories are very important, especially if they are published in a law review. As Richard points out, some of these legislative histories are really quite voluminous. How about publishing some of these legislative histories in your law review? You could have a website where the supporting documentation can be found. It would be a public service to do this for the Americans with Disabilities Act, for example.

STEWART: Yeah, maybe one every year or two every year.

ESKRIDGE: It could be a student project, like what Georgetown does with Criminal Procedure each year.

STEWART: The big law firms will do this for major practice areas. They'll put together the whole thing, and then they'll keep it in an electronic file, all the memos that have been generated, or all the briefs that are relevant to that.

FELDBLUM: But then that stays within the firm. This is brilliant if it really can be connected to the website, because a lot of those Supreme Court clerks are more than willing to work until one or two in the morning.

STEWART: But there would be more than a collection; there would be a guide.

FELDBLUM: Exactly—there'd be a guide.

ESKRIDGE: I have another idea. This is inspired by John Sexton and Ricky Revesz, who say that N.Y.U. is now the world's first Global Law School. N.Y.U. is a very well-run school, and it might be

able to pull off an organizationally difficult task that my home law school probably could not.

STEWART: Based on your experience as deputy dean?

ESKRIDGE: Yes, as deputy dean, I was both victim and participant in Yale's bemused, lost-in-its-own-world approach to administration. But N.Y.U. is becoming a charge-ahead-through-all-obstacles juggernaut; it's aggressive and entrepreneurial in ways that other law schools are not. Why not become a clearinghouse for compiled legislative histories of major federal legislation? Your journal could publish some of them, with supporting documents on a website, but others could be added to a mega-website available to everyone. Some of the more important ones actually could be published as books, maybe with accompanying CD disks that would have the supporting documentation on the CD disk, and intellectual pocket at the end of the book. But the book itself would be a conceptual history that maybe addresses some of the issues and helps the reader understand the analytical structure of the statute, its history, and its future. So this is a project larger than your journal but which your journal could be sort of the lynchpin. Ultimately, this could be like an "N.Y.U.: Center of the Universe" kind of project.

GARRETT: But it's not clear that it would actually be a good thing.

ESKRIDGE: Oh. Well, there is that. But who knows?

GARRETT: Let me go back to the topic that began this discussion: the question of whether courts can competently use legislative history. Part of the reason that courts may not be able to competently handle legislative history as a guide to meaning is that it's hard to compile and to find. If that's the problem, then judges will do a better job using it if it is available to judges and provided in an accessible format.

But the problem is larger than availability, and it's a problem I've been struggling with. I am uncomfortable with textualism, and I think of myself as a pragmatic interpreter<sup>57</sup> who works to interpret statutes both to implement Congressional intent and to improve policy gener-

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57. For Eskridge and Frickey's view of pragmatic interpretation, see, for example, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

ally. But I remain concerned with the judicial use of legislative history. My concern is two-fold. One concern is the cocktail party phenomenon: there is so much legislative history out there that when a judge wants to reach result X, she can look through the legislative history available to her and pull out only the material that leads to result X. In fairness, legislative history often leads in one direction and is not infinitely manipulable, but in hard cases, it may be possible for a willful judge to come to the cocktail party of legislative history, look across the crowd, and pick out her friends.

Second, I worry that well-intentioned judges trying their best will still get the answer wrong, and by that I mean that judges will not interpret a statute in a way that is consistent with what most lawmakers thought they were doing when they enacted the bill. Take the opinions that we have in the casebook in the *Montana Wilderness* cases,<sup>58</sup> where Judge Norris is trying to get the answer right; he's trying to figure out whether a provision—

ESKRIDGE: Judge Norris was a bit of a liberal activist. He was determined not to decide that case contrary to environmental concerns.

GARRETT: In fairness to Judge Norris, if you read the opinion, he really seems to be trying to use the legislative history fairly and intelligently.

STEWART: He's very skillful in writing opinions.

GARRETT: Yes, I guess so. It looks to me that he is trying to use the legislative history in as sophisticated a manner as he can. He uses the canons concerning subsequent legislative history. He does all the sorts of things that Bill and Phil Frickey advocate in materials providing a hierarchy of legislative history. Norris is doing what Bill suggests, although he may be following the hierarchy for instrumental reasons. Whatever the reason, he clearly gets the legislative history wrong. As I go back and reread the legislative history, he doesn't seem to understand the unorthodox process that led to the enactment of this particular bill—there was no conference report, and wily congressional players in the House got their own views of the legislation into the law, even though the Senate had prevailed on those matters in conference. As we note in the casebook, some of the best legislative history—a “Dear Colleague” letter—was not available to the judge and probably would not have been used, pursuant to Bill's hierarchy,

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58. ESKRIDGE, FRICKEY, & GARRETT, *supra* note 14, at 1003–20.

even if it had been accessible. Perhaps Norris was acting willfully, or perhaps he made the mistakes he did because he's not sophisticated enough to understand the import of the material.

ESKRIDGE: Oh, Beth, I assure you, he understood the stuff.

GARRETT: Whatever Norris's underlying motivation, I think well-intentioned judges who lack a sophisticated knowledge of the legislative process can still get the answer wrong because the process is so complicated and difficult. That will be true even if histories were compiled on a website. I worry more and more that judges can't be trusted to use legislative history well. By contrast, I think agencies can do quite well using legislative history. That sort of institutional analysis leads one to a superficially weird result in which one institution uses certain methods of statutory interpretation and another institution uses different methods. We ought to think about the consequences of different institutions using different interpretive approaches, especially when one institution—the courts—is allowed to second-guess the other—the agencies.

Let me add one other thing, which responds to one of Dick's observations. Part of the problem with judicial interpretation of statutes and the use of legislative history is that many, if not most, judges have an elitist view of the political process, a process they find distasteful, chaotic, and uncivilized.<sup>59</sup> These judges may not care if there's a guy in the EPA who knows the right answer, because he's not one of them. Perhaps courses like N.Y.U.'s can help to improve democratic governance generally. Such courses might be a way to combat elitism in law schools: the court-centric belief that only judges and courts get it right. We have to have more respect, not just for the congressional process, as Bill argued, but also for the citizens who do legislating through direct democracy.

And I want to point out that when you say that one of your concerns about *Chevron*<sup>60</sup> is that agencies aren't apolitical, my response is: That's right, and that's good. Politics aren't a bad thing. Moreover, political considerations are legitimate considerations in statutory

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59. See Richard H. Pildes, *Constitutionalizing Democratic Politics*, in *A BADLY FLAWED ELECTION: DEBATING Bush v. Gore*, the Supreme Court, and American Democracy 155 (Ronald Dworkin ed., 2002) (discussing this judicial culture in context of various political process cases); Elizabeth Garrett, *The Impact of Bush v. Gore on Future Democratic Politics*, in *THE FUTURE OF AMERICAN DEMOCRATIC POLITICS: PRINCIPLES AND PRACTICES* 141, 146–47 (Gerald M. Pomper & Marc D. Weiner eds., 2003) (making point in context of *Bush v. Gore*).

60. 467 U.S. 837 (1984).

interpretation, at least when interpretation is done by agencies. One of the important accomplishments of courses dealing with law and the regulatory state and law and the political process is that they can increase the respect for institutions other than the courts, and in particular, increase respect for politics. "Politics" is not a dirty word. It's part of what happens in a democracy, and we ought to be proud of it.

BRIFFAULT: I agree with that. I would like to add one more thing concerning the inescapably political nature of some of these decisions. This relates to Bill's earlier comment about the normative nature of these decisions. Much like we discussed what makes legislation "bad," I would like everyone here to consider what they mean by "right." Everyone here has referred to a court getting a statutory question "right" or "wrong." I wonder how we can all be so confident, apart from when we have clients, that there are right answers. Most of these are hard cases, especially if they're getting to the level of the Supreme Court. In nearly all of these cases, it is highly unlikely that the brief written for the "wrong" side would violate Rule 11. So I think we might want to worry less about whether the courts get it right or wrong, and just analyze how they do it.

I'm drawn to Chai's approach to teaching legislation as teaching certain legislative and interpretive techniques, as well as to Beth's comment about the need to take the legislative process seriously. I don't know whether, in the long run, agencies get these questions "right" more often, whether Congress gets it "right" more often, whether the President gets it "right" more often, or whether the courts do. I have no idea, because I think that in each case the "right" answer is deeply contestable. I know what I think the right answer is in individual cases, but I don't think that I am or should be the standard. To be sure, I am interested in getting a sense of what would be a sensible policy in any given area, and also what would be a sensible relationship among the branches. But in teaching my students, I would probably give greater priority to providing them with an analytical sense of how the process works and some respect for the difficulty of the process.

It is on this question of respect where I think the Court can be most faulted. It's not so much their rapping the legislature on the nose with the newspaper and berating them for "peeing in the office again." Rather, I'm concerned about their lack of recognition of how difficult the process of getting legislation enacted can be, and, thus, their lack of respect for the laws that do get passed. Congress certainly passes bad laws, but some understanding of the difficulty of reaching internal

agreement within the committees, on the floor, within the chambers, between the chambers, and then with the President, or over his veto, leads me to have at least a modicum of respect for any law that has run this gauntlet, even if it is a bad one. The inescapable difficulty of getting all this done must be kept in mind.

ESKRIDGE: In the spirit of Briffaultian skepticism, I think we only have one disagreement on today's panel. Beth Garrett says that she doesn't think she can rely on the judges to get the legislative history right. I don't think you can rely on the judges to get the *text* right. That's my problem. And one of the things that is good about legislative history is that it serves a hermeneutical value: it helps third parties such as lawyers and judges understand a statute from the legislators' point of view. Judges who refuse to use legislative history are displaying an attitude of arrogance. Even the softer critique of legislative history offered by Adrian Vermeule<sup>61</sup> falls athwart the hermeneutical objection (but does not evidence the arrogance I find troubling elsewhere).

Without reading the legislative history, a judge is a stranger to most of these statutes, particularly the kinds that Richard and I mentioned where it's difficult simply to understand what's going on. Most deeply, the interpreter's project is to understand the legislature's project from the point of view of the legislature. And indeed the legislature's project has probably been influenced by various groups and political party platforms. By reading the legislative history, one better understands what this project is all about. How did the legislature use terminology? What was their purpose? What deals were struck to get the bill enacted?

I don't think one does a better job by ignoring that data. When I was in private practice, it was very hard to understand some of these statutes without reading the committee reports. They at least provided normative, linguistic and even the structural context. After reading the committee report and understanding the structure, one can dig back into the statute and read it much more intelligently. I'm a big fan of using legislative history to better understand a project that is not ours, but there are also professional and maybe even citizenship interests in knowing more so that we can reach some sort of answer.

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61. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 *STAN. L. REV.* 1833 (1998).

GARRETT: Peter Strauss has called legislative history “political history.”<sup>62</sup> I like that term because it suggests that the reason one uses legislative history—whether the interpreter is a judge or an agency interpreter—is to get a sense of the context, the mischief being targeted, the statutory purpose, and what’s really going on in society and the political branches. And I haven’t reached the conclusion, Bill, that judicial interpreters should not be allowed to use legislative history, but I’m wrestling with this issue from an institutional competence perspective.

ESKRIDGE: Why not wrestle with the over-reading we all do for statutory text? For an example of great wrestling technique but perhaps overzealous statutory interpretation, read the Scalia dissenting opinion in *Johnson v. Transportation Agency*.<sup>63</sup> There, he castigates Justices who do not adhere to his definition of “discriminate,” but doesn’t provide a single reason why his definition of “discriminate” is the legitimate one. Read his decision in *BFP v. Resolution Trust Corp.*<sup>64</sup>, a bankruptcy case, where he interprets “reasonably equivalent value” to mean any value that a foreclosure sale reaps you.<sup>65</sup> Read his non-dissenting opinion in the FDA tobacco case.<sup>66</sup>

GARRETT: I understand that, Bill, but I think what you’re complaining about is judicial arrogance, and judicial arrogance can be a problem whether judges use legislative history or not.

FELDBLUM: I want to make a comment on this. I know we’re running out of time, but let me emphasize my agreement with what Richard said about respect. It’s not so clear what the right answer is, but each branch could be better educated about how the others work. This is what I was saying about the utility of Robin West’s piece, which emphasizes the potential importance and integrity of the legislative branch. Also, consistent with Robin’s chapter, I think “political” is a very positive word. That’s why I do the work that I do.

I also have a brief comment about legislative history. I agree with Bill that when a text is not clear on its face, it is very useful to look at the political history. In *Holy Trinity*, a classic legal process

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62. Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998).

63. 480 U.S. 616 (1987).

64. 511 U.S. 531 (1994).

65. *Id.* at 545–46.

66. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

case, the Supreme Court focused on the mischief Congress was trying to remedy. I think the Court was correct in this approach and that using legislative history in that context was appropriate. But I think Justice Scalia and others have done something good by making Congress realize that it cannot say one thing in a statute and say something else in the legislative history, and then expect the courts to fix it. By the same token, Congress can't say something ambiguously in a statute, and expect courts to use the legislative history to resolve the ambiguity. I have personally seen that change on Capitol Hill over the last ten years, and that's a good thing. I think that there is a benefit to this rigor, when rigor can in fact be achieved.

Finally, to wrap up in terms of a particular issue, I probably have every piece of primary material connected to the development and passage of the Americans With Disabilities Act—about twenty boxes worth of materials. Among the books that I have always wanted to write is one on the making of the ADA. Perhaps what I should do instead is donate those materials to the N.Y.U. Journal of Legislation and Public Policy to put on the web and increase everyone's knowledge about the legislative history of the ADA.

STEWART: Unfortunately we are out of time for today. Thanks to all of those participating in our discussion.

