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UPDATING STATUTORY INTERPRETATION

*T. Alexander Aleinikoff**

Exactly one year after Appomattox and less than five months after ratification of the Thirteenth Amendment, Congress enacted the Civil Rights Act of 1866. A century later, in *Jones v. Alfred H. Mayer Co.*,¹ the Supreme Court held that section 1982² — which it traced to section 1 of the 1866 Act — protected blacks against discrimination in the sale of private property. In 1976, in *Runyon v. McCrary*,³ the Court considered whether section 1981's⁴ guarantee of equal rights "to make and enforce contracts" also applied to acts of private discrimination. At issue in *Runyon* were private schools that denied admission to blacks. Over a powerful dissent, a majority of the Court concluded that section 1981 derived from the same section of the 1866 Act as section 1982; thus *Jones* controlled, and section 1981 was construed to apply to private discrimination. *Runyon* represented an important victory in the continuing struggle against segregated schools, and it has had a significant impact in other areas of private discrimination as well.

Last Term the Supreme Court, *sua sponte*, ordered reargument in *Patterson v. McLean Credit Union*, a case alleging discrimination in a private employment relationship. The Court requested the parties to brief and argue "[w]hether or not the interpretation of 42 U.S.C. section 1981 adopted by this Court in *Runyon v. McCrary*, . . . should be reconsidered."⁵ *Patterson* is a case of singular importance, not only for its potential impact on civil rights law, but also because of the significant issues it raises for theories of statutory interpretation.

Some of those theoretical issues are adumbrated in Justice Stevens' separate opinion in *Runyon*. Unlike the majority, Stevens expressed his "firm" conviction "that *Jones* [had been] wrongly decided."⁶ "There is no doubt in my mind," he boldly declared, "that [*Jones*]"

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1. 392 U.S. 409 (1968).

2. 42 U.S.C. § 1982 (1982).

3. 427 U.S. 160 (1976).

4. 42 U.S.C. § 1981 (1982).

5. 108 S. Ct. 1419, 1420 (1988).

6. 427 U.S. at 190.

construction of the statute would have amazed the legislators who voted for it.”⁷ Yet Stevens joined the Court’s opinion. He noted that *Jones* had become a well-established precedent, consistently reaffirmed by the Court in the intervening years; and none of the reasons for overturning precedent appeared compelling. It was particularly important to Stevens that, whether or not *Jones* “accurately reflect[ed] the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.”⁸

Putting to one side Justice Stevens’ respect for stare decisis,⁹ his opinion suggests two different ways of thinking about statutory interpretation. The first is “archeological”:¹⁰ the meaning of a statute is set in stone on the date of its enactment, and it is the interpreter’s task to uncover and reconstruct that original meaning. This view seems to be the basis for Stevens’ conviction that *Jones* was wrongly decided — that is, the majority in *Jones* incorrectly identified the enacting legislature’s intent.

The second way to think about statutory interpretation is “nautical.” At the risk of overextending a metaphor, it may be described as follows. Congress builds a ship and charts its initial course, but the ship’s ports-of-call, safe harbors and ultimate destination may be a product of the ship’s captain, the weather, and other factors not identified at the time the ship sets sail. This model understands a statute as an on-going process (a voyage) in which both the shipbuilder and subsequent navigators play a role. The dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board. (Of course, Congress may send subsequent messages to the ship or change the waters in which the ship is sailing.) The nautical metaphor is suggested by Justice Stevens’ willingness to test *Jones* by the “*mores* of today.”¹¹

Traditional debates about statutory interpretation have usually been intramural disputes within the archeological metaphor.¹² These

7. 427 U.S. at 189.

8. 427 U.S. at 191.

9. Stevens has consistently indicated a strong inclination not to overrule statutory precedents. See, e.g., *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1459 (1987) (Stevens, J., concurring).

10. My use of this terminology derives, I think, from a sentence in Charles Curtis’ fine article, *A Better Theory of Interpretation*, 3 VAND. L. REV. 407, 415 (1950): “Better be prophetic than archeological, better deal with the future than with the past. . . .”

11. 427 U.S. at 192. This is not to suggest that Stevens adopts a “nautical” metaphor. Indeed, it seems clear that if he were deciding *Jones* as an initial matter, he would hold that the statute does not cover private discrimination. It is stare decisis, not a desire to update statutes, that motivates Stevens’ statements about current *mores*.

12. But there have been early supporters of a more present-minded approach to statutory

have revolved around the terms "plain meaning," "intent," and "purpose." But recent scholarship is taking to the sea. Part I of this article examines archeological statutory interpretation, describing its two main forms — textualism and intentionalism. In Part II, I suggest that significant nonoriginalist elements are present in archeological interpretive theory and practice. In Part III, I offer a defense and an example of nautical interpretation. The concluding comments address the implications of the analysis for *Patterson*.

I. EXCAVATING STATUTORY MEANING: ARCHEOLOGICAL APPROACHES

The archeological metaphor conceives of statutory meaning as determined on the date of the statute's enactment. The model is premised on legislative supremacy and separation of powers. In our system of government, the legislature is assigned the chief law-making responsibility; an interpreter's job is to be faithful to the legislative will — as expressed in authoritative utterances called statutes — lest the interpreter become the lawmaker. The archeological model purports to guard against judicial lawmaking by conceiving of the interpreter's task as essentially a factual inquiry: a judge uncovers and describes an already fixed past.¹³ To be sure, sophisticated archeology is creative and challenging. It must reconstruct a culture from half-buried foundations and some scattered pots. But the archeologist, at least in theory, recreates the past culture as it was without introducing anachronistic artifacts.

Two strategies of interpretation have dominated the archeological perspective: textualism (or plain meaning) and intentionalism (or purpose analysis).¹⁴ Textualism puts primary emphasis on the language of the statute itself. Its battle slogan is Holmes' epigram: "We do not inquire what the legislature meant; we ask only what the statute means."¹⁵

Textualism is linked to legislative supremacy and democratic theory in two ways. First, the concept of legislative supremacy must in-

interpretation. *E.g.*, Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Curtis, *supra* note 10.

13. Cf. J.B. White, *Constructing a Constitution: "Original Intention" in the Slave Cases*, 47 MD. L. REV. 239 (1988) (constitutional interpretation based on the intent of the Framers tends to reduce questions of law to those of fact).

14. These terms derive from Professor Brest's taxonomy for constitutional interpretation. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). Professor Eskridge has also made use of Brest's terminology. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

15. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

clude a "rule of recognition" that tells us which acts of the legislature are authoritative. Textualism is grounded on a positivist claim that only the language actually adopted by the legislature is law. Unenacted intentions, no matter how resolutely stated in legislative materials, cannot be authoritative because they have not been adopted according to constitutionally prescribed procedures.¹⁶ Textualism also makes the claim that "legislative purpose is expressed by the ordinary meaning of the words used."¹⁷ Thus, accepting the "plain meaning" of a statute is said to serve legislative supremacy because it purportedly requires understanding statutory language in the way the legislature wanted it to be understood. While it is apparent that plain meaning will not always identify the legislature's actual meaning, textualism is willing to accept plain meaning as a reasonable approximation of legislative intent in order to serve the other goal of the archeological model — judicial restraint. By restricting courts to the language of the statute, textualism attempts to prevent the creative judicial lawmaking that can occur when judges consult legislative materials and the social context of the statute.¹⁸

It should be stressed that textualism need not be archeological. An interpreter could construe statutory language based on the current meaning of the legislature's words. But if limiting judicial activism is a primary concern of a textualist, she is likely to favor an archeological textualism that restricts interpreters to a fixed past.

Intentionalism, the second major archeological strategy, claims that textualism inappropriately ignores contextual elements in statutory interpretation. Contextual analysis is necessary as a matter of semantics (words have no "plain meaning"; meaning depends on context and usage). Moreover, examination of circumstances preceding enactment may give interpreters a clearer understanding of how the legislature would have wanted the particular statutory question resolved. Getting closer to what the legislature actually intended is thought to serve the goal of legislative supremacy better. Unlike textualism, which sees the words of the statute as "law," intentionalism locates statutory law beyond, or behind, the statutory language. The

16. See Starr, *Observations About the Use of Legislative History*, 1987 DUKE L. J. 371, 375 (under democratic theory, the statute rather than extra-statutory materials governs the nation); R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 9-10 (1975).

17. *United States v. James*, 106 S. Ct. 3116, 3121 (1986) (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)). The "intentionalist" defense of plain meaning is sometimes stated in the form of a presumption: the legislature is presumed to have intended that its statute be read according to its plain meaning. See Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 6 (1939).

18. A plain meaning approach may serve other goals as well, such as obviating the need for expensive and time-consuming investigations of legislative history.

actual words used by the legislature may be strong evidence of its intent, but they are merely windows on the legislative intent (or purpose) that is the law. It is this perspective that allows us to make sense of the claim that "a thing may be within the letter of the statute and yet *not within the statute*, because not within its spirit, nor within the intention of its makers."¹⁹

Some intentionalists are heady archeologists. They would scrutinize the legislative materials to see if the legislature actually considered and expressed an opinion on the question under review. Where no specific intent can be located, they would, in effect, have the interpreter reconvene the enacting legislature to determine how it would have wanted the statutory question resolved.²⁰

The approach of Henry Hart and Albert Sacks outlined in *The Legal Process* represents a weaker intentionalist model.²¹ Recognizing the difficulty of recovering (or creating) the answer that the enacting legislature would have given to a specific question of interpretation, Hart and Sacks suggest that an interpreter identify the broader purposes embodied in the legislation and answer the interpretive question in a manner consistent with those purposes. The approach is archeological because it attributes purposes to the legislation as of its date of enactment, and it is intentionalist because it looks beyond the words of the statute to the underlying purposes that the legislature was attempting to pursue.

Despite theoretical differences as deep as the conception of what constitutes "law," textualism and intentionalism somehow manage to coexist in modern statutory interpretation.²² The typical judicial opinion begins by analyzing the statutory language and then purports to show that the statute's legislative history supports the "plain meaning" of the text.²³ One reason why the American legal system has not settled upon a single theory of statutory interpretation is that neither

19. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

20. *E.g.*, Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) [hereinafter *Statutory Interpretation*]; Horack, *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119 (1931-32).

21. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

22. The confused state of interpretive theory and practice is often "demonstrated" by referring to Karl Llewellyn's famous compilation of matched pairs of canons of construction. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950). Actually, Llewellyn's list betrays more structure than is usually thought. Many of the canons on the "thrust" side of the chart are consistent with a textualist approach; many of those on the "parry" side are intentionalist.

23. *E.g.*, *Webster v. Roe*, 108 S. Ct. 2047 (1988); *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987).

textualism nor intentionalism can fully serve the goals of archeology — legislative supremacy and judicial restraint.

Plain meaning does not allow an interpreter to prefer the spirit to the letter of the law, even if review of the legislative materials would convince the reasonable reader that the enacting legislature could not have intended that "plain meaning" control. "Why should the judge be permitted to impose his own reference or that of some hypothetical average person on statutory words," John Kernochan has asked, "instead of inquiring in the first instance as to the reference of the enactors? Does it not seem obvious that a way to minimize the risk of frustrating the legislative will is to pose the question which is keyed to legislative will, the question as to what was meant or purposed by the legislators?"²⁴ Furthermore, while a textualist court may think it is improving the legislative process ("next time they'll say it clearly"), it may actually be imposing huge costs on a legislature too busy to redraft "unclear" statutes or not prescient enough to provide for future possibilities.²⁵

Intentionalists know that recovery of specific intent is quite unlikely, and that most litigated statutory questions involve issues never considered by the legislature.²⁶ They must satisfy themselves, therefore, with "manifest"²⁷ or "imputed"²⁸ intent; that is, something they are willing to call intent derived from the materials deemed appropriate to consult in the search for intent. As Reed Dickerson notes, "[i]ntended meaning . . . remains the ultimate object of search even though no method has yet been devised by which this meaning can be directly known."²⁹

Judge Richard Posner has adopted several intentionalist metaphors in recent articles.³⁰ He labels his strongest intentionalist model

24. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 343 (1976). See Mikva, *A Reply to Judge Starr's Observations*, 1984 DUKE L.J. 380, 386 ("If judges are to make congressional primacy meaningful, they cannot afford to ignore the obvious tools which members of Congress use to explain what they are doing and to describe the meaning of the words used in the statute.").

25. See Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 420 (1961) ("[O]ne price . . . [of a textualist approach would be] an inordinate amount of delay in correcting what might not have actually been intended — granted the present complicated machinery of the legislative process.").

26. Even where a particular issue has been considered by the legislature, the notion of "intent" of a multi-member body is quite problematic. The mandatory cite here is Radin, *supra* note 12. For recent discussions, see Brest, *supra* note 14; R. DWORKIN, *LAW'S EMPIRE* 317-27 (1986). This truism seems to have lost its power through constant repetition.

27. R. DICKERSON, *supra* note 16, at 85 ("best working approximation" of actual intent is intent "most plausible to infer from the appropriate objective manifestation of intent").

28. Cohen, *supra* note 26, at 418.

29. R. DICKERSON, *supra* note 16, at 36.

30. See, e.g., Posner, *Statutory Interpretation*, *supra* note 20, at 817 ("imaginative reconstruc-

"imaginative reconstruction:" the interpreter "should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him."³¹ The interpretive task, so described, is so daunting that it is difficult to take Posner's suggestion at face value. The reconstruction project demands not only that we completely understand each of the enacting legislators in their own time, but also that we help them fully understand the import of the interpretive question facing us today. For example, we cannot sensibly determine whether a legislature that drafted a statute regulating "vehicles" in 1875 would want it applied to automobiles, unless we can imagine the legislators knowing enough about cars to make a rational judgment. Once we have "educated" the enacting legislature, we must call it back into session and reconstruct how it would have debated and answered today's question as it would have understood it back then knowing what we know now. It is thus not surprising that scholar Posner has subsequently developed a different intentionalist metaphor.³² Furthermore, a review of Judge Posner's recent opinions reveals no full-scale attempt at "imaginative reconstruction."

The leading intentionalist theory — Hart and Sacks' purpose analysis — expressly rejects defining the interpretive task as "ascertain[ing] the intention of the legislature with respect to the matter at issue."³³ By asking interpreters to assume, "unless the contrary unmistakably appears," that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably,"³⁴ their approach hardly guarantees identification of the actual purposes behind a stat-

tion;" interpreter should think himself into the minds of the enacting legislators); R. POSNER, *THE FEDERAL COURTS* (1985) 286-93 ("imaginative reconstruction;" interpreter should put himself in the shoes of the enacting legislators); Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987) [hereinafter *Legal Formalism*] (analogizing statutes to garbled military orders; the task of the interpreter is to figure out what outcome will best advance the program or enterprise set on foot by the enactment); Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 848-52 & 851 n.41 (1988) [hereinafter *Skepticism*] (describing both the imaginative reconstruction and command models as modes of interpretation distinct from logical or scientific reasoning).

31. R. POSNER, *THE FEDERAL COURTS*, *supra* note 30, at 286-87. In an earlier article, Posner defined the task of imaginative reconstruction as "think[ing oneself] . . . into the minds of the enacting legislators." Posner, *Statutory Interpretation*, *supra* note 20, at 817. He has apparently opted for shoes over minds in describing his metaphor. Posner, *Skepticism*, *supra* note 30, at 849 n.37 & 851 ("The proper conception is knowledge by empathy, not knowledge by mind reading."). I leave to the reader whether putting oneself in the shoes of legislators is a task substantially easier than thinking oneself into their minds.

32. Posner, *Legal Formalism*, *supra* note 30. The move here is from asking how the enacting legislature would have answered the question to asking how the enacting legislature would have wanted a subsequent interpreter to answer the question.

33. H. HART & A. SACKS, *supra* note 21, at 1410.

34. *Id.* at 1415.

ute. As will be explored below, the power of the Hart and Sacks methodology is its ability to generate statutory purposes that support and fit into a coherent set of legal principles. But it should be clear that those purposes may be quite inconsistent with the original legislative plan.

In sum, in an attempt to restrain interpreters, textualism accepts a substantial margin of error in identifying legislative will. Plausible versions of intentionalism may get closer to actual intent; however, as Dickerson points out, "there are frequent deviations of manifest intent from actual intent, [and] there is no known way to measure these deviations."³⁵ Furthermore, under an intentionalist approach, an increase in accuracy is purchased at the price of greater opportunities for judicial policymaking. The problem is that the underlying objective of the archeological model — legislative supremacy — is served by accuracy and judicial restraint. Yet we cannot seem to achieve both at the same time.

The inherent limitations of textualism and intentionalism have produced cycles in the history of interpretive theory. According to Harry Jones, the "plain meaning rule" gained dominance in the late nineteenth century when courts grew concerned about the flexibility occasioned by techniques of "equitable" interpretation that looked to intent or spirit of a statute.³⁶ In the first half of the twentieth century,³⁷ the plain meaning approach was undermined by the realist critique of "mechanical jurisprudence" and the rise of an instrumental theory of law. Scholars ridiculed the idea that words had implicit meaning that could simply be read off the page; "modern" theory understood that meaning was a function of usage, context and purpose.

Hart and Sacks, of course, produced the most sustained intentionalist argument,³⁸ and for years they have dominated the interpretive scene. "In a deep sense," Dean Calabresi writes, "we are all followers of Henry Hart and know the moves almost by instinct."³⁹ But textual-

35. R. DICKERSON, *supra* note 16, at 85.

36. Jones, *supra* note 17, at 5. See generally Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985).

37. See, e.g., Jones, *supra* note 17; Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509 (1940); Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335 (1949).

38. Hart and Sacks' theory of statutory interpretation built on and reflected the efforts of many others, including Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947); Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957 (1940); Horack, *supra* note 20.

39. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 87 (1982). See R. DICKERSON, *supra* note 16, at 87 ("For most, [legislative purpose] is the touchstone of statutory interpretation.").

ism never quite gave up the ghost.⁴⁰ Now, after three decades of near hegemony, the Hart and Sacks approach is coming under increasing fire.

The current attack on intentionalism, and Hart and Sacks in particular, comes from several different directions. Public choice theory provides a new basis for the old claim of the realists that "legislative intent" is and can only be a fiction; and it is no more sympathetic to the legal process assumption that legislators reasonably pursue reasonable objectives.⁴¹ If, as public choice theory asserts, legislation is the product of compromises among groups, then attributing a purpose to a statute either may improperly privilege the interests of one group over another (thereby undermining the bargain) or may impute a purpose where none (other than the desire to reach agreement) existed.⁴² These lines of argument will be called "the public choice claim."

A second line of attack — the "judicial activism claim" — asserts that resort to legislative history in search of specific intent or purpose has become a way for activist judges to avoid clear language and to rewrite statutes to further their own ideas of the public good.⁴³ For example, in his dissent in *United Steelworkers of America v. Weber*, Justice Rehnquist argued that the majority had ignored plain statutory language prohibiting race-conscious employment decisions and relied on what it identified as the underlying statutory purpose (integration of blacks into the mainstream of American society) to uphold voluntary, private affirmative action programs.⁴⁴ The judicial activism

40. See Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

41. See, e.g., R. POSNER, *THE FEDERAL COURTS*, *supra* note 30, at 288.

42. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986) (Burger, C.J.).

43. See Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & SOC. POL. 59, 62 (1988) [hereinafter, *Original Intent*] (the search for intent "greatly increases the discretion, and therefore the power, of the court"). *But cf.* Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & SOC. POL. 43, 47 (1988) (claiming that in constitutional adjudication the legislative history "often provide[s] the only restraint upon an expansive and inaccurate interpretation of what [the constitutional] clauses were originally drafted to accomplish").

44. 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting). For a similar claim in another Title VII case, see *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1473 (1987) (Scalia, J., dissenting) (majority opinion "is a demonstration . . . of the instability and unpredictable expansion which the substitution of judicial improvisation for statutory text has produced"). Another recent example is *Communications Workers of Am. v. Beck*, 108 S. Ct.

claim turns *The Legal Process* methodology on its head. Hart and Sacks advocated contextual analysis as the way to resolve the ambiguities inherent in language. Modern critics, however, see contextual analysis as introducing great flexibility in interpretation by expanding the range of factors that may be consulted (or manipulated).⁴⁵

The third route of attack — the “legislative process claim” — is that intentionalism breeds bad legislative habits. Legislators can draft sloppy statutes or leave hard issues unresolved, safe in the knowledge that an intentionalist court will bail them out by fashioning a statutory purpose to resolve novel cases. Furthermore, legislative reports once written to inform legislators about pending legislation, and legislative floor debates once intended to provide a forum for deliberation, are now primarily constructed to influence future interpreters.⁴⁶ As Justice Scalia has noted, “the more the courts have relied upon committee reports in recent years, the less reliable they have become.”⁴⁷

These criticisms of *The Legal Process* methodology suggest two alternative interpretive strategies. One can either try to improve intentionalism (as Judge Posner purports to do by rejecting the Hart and Sacks assumptions of the reasonableness of the legislative process), or one can turn one’s back on intentionalism. Some judges and scholars, choosing this second route, have begun to advocate a method of interpretation that I will label “the new plain meaning.”⁴⁸

Sometimes the new plain meaning is expressly archeological. Judge Easterbrook, for one, advocates what he calls “original meaning”: “meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem.”⁴⁹

2641, 2664 (1988) (Blackmun, J., concurring in part and dissenting in part) (accusing majority of distorting purpose of section of N.L.R.A. and ignoring plain meaning of statute).

45. See, e.g., Starr, *supra* note 16, at 376-79.

46. See W. ESKRIDGE & P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 698-752 (1988).

47. Address by Judge Antonin Scalia, Speech on Use of Legislative History 7 (delivered between fall 1985 and spring 1986 at various law schools in varying forms) (copy on file with the *Michigan Law Review*).

48. The two leading “plain meaning” advocates are Judges Easterbrook and Scalia. E.g., *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1223 (Scalia, J., concurring in the judgment); Easterbrook, *Original Intent*, *supra* note 43; Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983). Other judges have concurred in Scalia’s criticisms of the use of legislative history. See Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 443 (1988) (citing opinions of circuit judges Buckley, Starr and Kozinski); Starr, *supra* note 16.

The trend toward literalism was powerfully demonstrated in my colleague Richard Pildes’ student note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). Pildes provides a slightly different perspective on why the Court has returned to textualism, linking such an approach to a substantive theory of laissez-faire individualism.

49. Easterbrook, *Original Intent*, *supra* note 43, at 61. Elsewhere on the same page, Judge Easterbrook describes his methodology in slightly broader terms: “Original meaning is derived

But other versions do not explicitly yoke "plain meaning" to originalism. Justice Scalia's methodology, for example, is primarily anti-intentionalist, professing a strong aversion to relying on legislative history for interpretive guidance.⁵⁰ "Judges interpret laws rather than reconstruct legislators' intentions," he has written recently. "Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."⁵¹ Scalia recognizes that much statutory language cannot fairly be characterized as clear. In such cases (and where there is no prior agency interpretation to which to defer), he will search for other sources of meaning (for example, the use of similar language in other statutes⁵²) or adopt an interpretation that harmonizes the statute with related legislation.⁵³ These techniques are not necessarily archeological; indeed, it will be suggested below that Scalia's approach ends up including some nautical tools. But his approach generally manages to avoid an investigation of the legislative history.⁵⁴

The case for the new plain meaning, not surprisingly, finds support in the attacks on intentionalism. If legislative intent doesn't exist (because statutes are merely unprincipled bargains), don't look for it; con-

from words and structure, and perhaps from identifying the sort of problem the legislature was trying to address." Under either description, reliance on the intent of the legislators is rejected: "What any member of Congress thought his words would do is irrelevant. We do not care about his mental processes." *Id.*

50. *E.g.*, *United States v. Taylor*, 108 S. Ct. 2413, 2423-24 (1988) (Scalia, J., concurring in part); *I.N.S. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring in the judgment); *Hirschey v. F.E.R.C.*, 777 F.2d 1, 6-8 (D.C. Cir. 1985) (Scalia, J., concurring).

51. *I.N.S. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring in the judgment).

52. *E.g.*, *Pierce v. Underwood*, 108 S. Ct. 2541, 2549-51 (1988); *Kungys v. United States*, 108 S. Ct. 1537, 1546 (1988).

53. *E.g.*, *United Sav. Assn. v. Timbers of Inwood Forest Assocs.*, 108 S. Ct. 626 (1988); *United States v. Fausto*, 108 S. Ct. 668 (1988).

54. The lengths to which Justice Scalia will go to avoid relying on legislative history is demonstrated by his majority opinion in *Pierce v. Underwood*, 108 S. Ct. 2541 (1988). That case considered the exception in the Equal Access to Justice Act that denies attorney's fees to prevailing parties when the position taken by the United States in litigation was "substantially justified." The relevant Senate, House and Conference Committee Reports, relied on by the court of appeals below, stated that the "substantially justified" test was "one of reasonableness in law and fact." Justice Scalia ends up with the same result, but he studiously avoids citing the legislative history. Instead, he refers to the meaning attributed to the terms "substantial evidence" in the Administrative Procedure Act and "substantially justified" in Rule 37 of the Federal Rules of Civil Procedure. Justice Scalia must be admired for the tenacity with which he puts his principles into practice, but his technique here seems quite at odds with other principles he holds equally dear. Well-schooled in public choice theory, Scalia knows that it is perilous to believe that similar terms used in different statutes refer to similar concepts. There is little evidence that Congress seeks or achieves such coherence. Thus Justice Scalia seems to be exchanging one fiction (legislative intent) for another (consistency of meaning across statutes). There may be good reasons for indulging in such a fiction; indeed I will rely on similar fictions below. But one can hardly do so on the basis of the public choice theory that Scalia uses against intentionalism.

centrate on the only thing the legislature actually enacted — the words of the statute. If activist judges manipulate legislative history to achieve their own goals, stop relying on it. And if intentionalism provides an incentive for legislative drafters to be imprecise or to buck issues to future interpreters, then remove the incentive by stating that only the express words of the statute will be enforced.

All interpretive theories must ultimately be grounded in a political theory and a theory of law, even if the interpreter is unwilling to recognize or state the underlying premises. What is potentially pernicious about the new plain meaning is the tendency of its proponents to attempt to justify it on descriptive grounds (*i.e.*, the legislative process produces unprincipled compromises) as if the normative case follows as a matter of course.⁵⁵ But to demonstrate the power of the public choice claim — that is, that the Hart and Sacksian assumption about the reasonableness of legislative behavior may be flawed — is not to establish the legitimacy of a plain meaning approach (or any other interpretive theory).⁵⁶ Jonathan Macey has demonstrated that a strong case can be made for a Hart and Sacks approach even if (or particularly because) the public choice view of the world is correct.⁵⁷ Macey notes that private interest legislation is invariably justified by a public-regarding purpose. An interpretive strategy that searches for and affirms public-regarding purposes will undermine the private deals that may be the basis for the statute. According to Macey, “where [there is] a sharp divergence between the stated public-regarding purpose . . . and the true special interest motivation behind a particular statute, courts will, under the traditional [Hart and Sacks] approach, resolve any ambiguities in the statute consistently with the stated public-regarding purpose.”⁵⁸

Once the descriptive defense of the new plain meaning is pushed aside, what remains are claims about courts and legislatures that have become fashionable among critics from the right — claims that are deeply antagonistic to the political process that plain meaning purports to be defending against anti-democratic liberal judges. To the extent that a review of the legislative history persuades one that the legislature could not have intended what the “plain meaning” seems to

55. Thus, Judge Posner uses the public choice claim to justify his approach of “imaginative reconstruction.” R. POSNER, *THE FEDERAL COURTS*, *supra* note 30, at 288-89.

56. See Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988) (public choice theory does not support any general theory of statutory interpretation).

57. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 COLUM. L. REV. 223 (1986).

58. *Id.* at 251.

indicate,⁵⁹ a judge is doing the legislature no favor in enforcing the "plain meaning."⁶⁰ Thus, the judicial activism claim must be an assertion that the risk of manipulative judging under an intentionalist approach outweighs the benefit of allowing judges to consult legislative history as an aid in determining what the legislature meant. But if the instances of bad-faith judging are so great that the plain meaning theorists are comfortable in their calculation, one wonders why the legislature (which, after all, is the injured party) hasn't taken steps to reduce bad-faith judging by writing statutes more clearly.⁶¹ Furthermore, if we assume such a plethora of willful judges, why should we believe that they will not similarly misuse a plain meaning approach? As Judge Posner has noted in anticipation of charges that his strategy of "imaginative reconstruction" can be manipulated by judges, "the irresponsible judge will twist any approach to yield the outcomes that he desires."⁶²

The response of the new plain meaning advocate might be that we can't expect the legislature to put an end to intentionalist interpretation because the legislature benefits from intentionalism. Thus, the new plain meaning is preferable to intentionalism, the argument might run, because it provides an incentive for the legislature to reform itself. But this strategy seems at war with the judicial activism claim because it puts the courts in the intrusive role of telling the legislature how it can better do its job. Indeed, the new plain meaning ends up being more intrusive than the old legal process. Hart and Sacks developed an interpretive theory that dealt with the problems of the legislative process by telling courts to take the high road: *assume* that legislators are reasonable and construct purposes that pursue reasonable goals and help rationalize the law. The new plain meaning demands that the legislature break bad intentionalist habits or suffer the consequences.

In short, the new plain meaning turns out not to be a theory dedicated to or grounded on legislative supremacy. It is instead a political strategy for disciplining both judges and legislators.

59. See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

60. See Farber & Frickey, *supra* note 48, at 458-60 (a "four corners" rule of interpretation will raise the cost of drafting legislation, require Congress to enact corrective legislation more frequently, tend to discourage additional legislation, and create difficult problems of interpretation readily solvable if legislative history is consulted).

61. Justice Scalia apparently believes that no statute is safe from ill-willed judges. He begins his dissent in *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1465 (1987), with the following acid lines: "With a clarity, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship, Title VII of the Civil Rights Act of 1964 declares. . . ."

62. R. POSNER, *THE FEDERAL COURTS*, *supra* note 30, at 287.

II. NAUTICALNESS IN ARCHEOLOGICAL THEORY AND PRACTICE

Archeological statutory interpretation purports to pay attention only to events occurring before or contemporaneously with the enactment of the statute. Yet the allure of the nautical model proves hard to resist. This section will show how nautical elements are a part of archeological theory and practice.

A. Theory

1. *Intentionalism*

Judge Posner's imaginative reconstruction is explicated in strong archeological terms: "The judge's job is not to keep a statute up to date in the sense of making it reflect contemporary values, but to imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations they did not foresee." What should a judge do when imaginative reconstruction is impossible, "either because the necessary information is lacking or because the legislators had failed to agree on essential premises"? At first, Posner suggests an archeological solution: the judge must attribute a meaning to the statute that yields "the most reasonable result in the case at hand — always bearing in mind that what seems reasonable to the judge may not have seemed reasonable to the legislators, and that it is their conception of reasonableness, to the extent known, rather than the judge's, that should guide decision."⁶³

Yet in a later elaboration, Posner seems to adopt a less archeological stance. He rejects Hart and Sacks' archeology because of their unrealistic assumptions about the way the legislature operates.⁶⁴ Nor will he accept Easterbrook's suggestion that the judge simply "put the statute down."⁶⁵ Posner contends that the judge "cannot just dismiss the case out of hand."⁶⁶ He or she "must decide the case, *even though on the basis of considerations that cannot be laid at Congress's door.*"⁶⁷ Such considerations might include "judicial administrability" or might be drawn from "some broadly based conception of the public interest."⁶⁸ Since most interesting questions of statutory interpretation are difficult precisely because the legislative materials do not yield a deter-

63. *Id.* at 287.

64. *Id.* at 288-89.

65. Easterbrook, *Original Intent*, *supra* note 43, at 65.

66. R. POSNER, *THE FEDERAL COURTS*, *supra* note 30, at 289. See also Posner, *Legal Formalism*, *supra* note 30, at 197-99.

67. R. POSNER, *THE FEDERAL COURTS*, *supra* note 30, at 289 (emphasis in original).

68. *Id.*, at 289. In the earlier article upon which the chapter is based, Posner stated this a bit more strongly: "It is inevitable, and therefore legitimate, for the judge in such a case to be moved

minative answer, Posner's theory provides ample opportunity for nonarcheological factors to play a role in deciding what a statute means.⁶⁹

The Hart and Sacks approach is generally described in archeological terms, and there is much in their complex work upon which one could base such a view.⁷⁰ Certainly, the fact that "legislative purpose" drives the model suggests an archeological approach; one would normally assume that purpose is fixed at time of enactment. A revisionist reading of *The Legal Process*, however, is in order.

One cannot appreciate the Hart and Sacks project without putting their theory of interpretation into the context of the book as a whole. Unlike many of us who write about statutory interpretation, Hart and Sacks begin by laying out a theory of law from which they believe their interpretive method follows. Their conception of law and legal institutions is a deeply instrumental one.⁷¹

Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living. . . . Legal arrangements (laws) are provisions for the future in aid of this effort. Sane people do not make provisions for the future which are purposeless. It can be accepted as a fixed premise, therefore, that every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective, however difficult it may be on occasion to ascertain it or to agree exactly how it should be phrased.⁷²

by considerations that cannot be referred back to legislative purpose." Posner, *Statutory Interpretation*, *supra* note 20, at 820.

Posner also recognizes that some statutes "beg[] . . . the courts to do what they can to make [them] reasonable." An example is the Sherman Act: "It was enacted in 1890, but is interpreted today as if Congress had enacted the evolving economic analysis of monopoly and competition. Today the Act means, not what its framers may have thought, but what economists and economics-minded lawyers and judges think." Posner, *Legal Formalism*, *supra* note 30, at 212, 209.

69. And Judge Posner has shown, on occasion, a willingness to indulge in statutory updating. *E.g.*, *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987). Interestingly, the Supreme Court rejected Posner's nautical approach in *Holzer* in *McNally v. United States*, 107 S. Ct. 2875 (1988). *See also* *Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371 (7th Cir. 1987) (where neither case law nor administrative interpretation provided a sensible reading of the statute, court relied upon policy considerations of minimizing tax-avoidance behavior and protecting reasonable expectations).

70. *But see* G. CALABRESI, *supra* note 39, at 87 (recognizing updating element in Hart and Sacks).

71. The social problem has been broadly described as that of "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man." If this were right, it would follow that the ultimate test of the goodness or badness of every institutional procedure and of every arrangement which grows out of such a procedure is whether or not it helps to further this purpose. It is an important question whether this *is* right. These materials take the position that it is. H. HART & A. SACKS, *supra* note 21, at 110-11 (quoting Snee, *Leviathan at the Bar of Justice*, in *GOVERNMENT UNDER LAW* (essays prepared for discussion at a conference on the occasion of the two hundredth anniversary of the birth of John Marshall, Harvard Law School, Sept. 22-24, 1955), at 47, 52).

72. *Id.* at 166.

The task of the adjudicator is to discover the principle or purpose implicit in the law and apply it to the case at hand. In so doing, the interpreter is carrying forward the project, begun by the enacting legislature, in a sensible and restrained fashion. Hart and Sacks call this process "reasoned elaboration." Recognition of the role of purpose is not just a technique for statutory interpretation; it is the *sine qua non* of law: "Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible."⁷³ Thus, the Hart and Sacks method is more than a way to resolve cases; it is the only way for the result of interpretation to be called "law."

The crucial question is what is being "elaborated." *The Legal Process* makes clear that the adjudicator is not simply charged with analyzing the case in light of the particular purpose behind a particular statute. The design of the book is far grander. The job of the adjudicator is to fit the statute and its application into an ongoing, coherent legal system. Thus, the purpose of any particular legal arrangement "is always a subordinate one in aid of the more general and thus more nearly ultimate purposes of the law. Doubts about the purposes of particular statutes or decisional doctrines, it would seem to follow, must be resolved, if possible, so as to harmonize them with more general principles and policies. *The organizing and rationalizing power of this idea is inestimable.*"⁷⁴

Throughout the chapter on statutory interpretation, Hart and Sacks attempt to show how the process of adjudication imposes on the decisionmaker a duty to understand the statute in its broader legal and social context. Their summary of the approach states that purposes "may exist in hierarchies or constellations," and it singles out one such "constellation" which is "invariable in the law and of immense importance:" "The purpose of a statute must always be treated as including not only an immediate purpose or group of related purposes but a larger and more subtle purpose as to how the particular statute is to be fitted into the legal system as a whole."⁷⁵

The harmonization of American law into a rational whole is no small order. The public choice literature ought to make us skeptical of the ability of a judge to discover the animating purpose (or purposes) of a statute, and that difficulty may be raised exponentially if one is attempting to discover a harmonious set of purposes that inform our

73. *Id.* at 1156.

74. *Id.* at 167 (emphasis in original).

75. *Id.* at 1414.

entire legal system. The work of critical legal studies scholars suggests that irreconcilable tensions lie at the base of most of our legal doctrine and legal institutions. But while post-legal process scholarship may make us doubtful about the chances of success for the Hart and Sacks enterprise, it also, paradoxically, provides greater support for the method. If legislatures are as unprincipled as public choice asserts, then "reasoned elaboration" seems the antidote. That is, courts can make up for the messiness of the legislative process by *assuming* that legislators are constituted by "reasonable people pursuing reasonable objectives reasonably" and by weaving the imputed purpose into the general fabric of the law. This may be a rather poor proxy for actual legislative intent, but so be it. Under this interpretation, *The Legal Process* is not about legislative supremacy; it is about the development and maintenance of a rational legal system in which the courts are the shepherds of purpose and the guardians of principle.⁷⁶

Hart and Sacks, of course, saw law as a dynamic process. Law must change as the needs and demands of society change. What, then, does one do with a statute passed long ago for purposes no longer relevant to today?⁷⁷ The legal process methodology does not openly advocate keeping statutes "up to date," but it seems strongly supportive of such an effort.⁷⁸

Consider an adjudicator who is asked to interpret an older statute. No doubt the legislature has enacted many laws since the statute under scrutiny, and the common law and constitutional law may also have changed over time. The requirement that judges fit the statute into the legal system as a whole will necessarily mean that statement of the older statute's purpose will be influenced by events occurring after enactment. In other words, the Hart and Sacks project must collapse (or fit) the past into the present. This does not argue against strong principles of stare decisis; such principles may be an important part of the current legal system, and earlier precedents may still reflect or be the basis for current substantive values. But ultimately the methodol-

76. Cf. Professor Weisberg's characterization of G. Calabresi, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 256 (1983) (noting Calabresi's "predisposition toward the image of the heroic judge, who can digest an extraordinary variety of materials — legal doctrine, popular belief, science, history, and so forth — and transform them into a coherent vision that will educate the legislature along with the rest of the laity").

77. As will be discussed below, one can always glide over this question by stating an old purpose at a different level of abstraction and reach the result one wishes. See Part II.B.3 *infra*.

78. This is not to deny that parts of Hart and Sacks look starkly originalistic: "In determining the more immediate purpose which ought to be attributed to a statute . . . a court should try to put itself in imagination in the position of the legislature which enacted the measure." H. HART & A. SACKS, *supra* note 21, at 1414. But the modifier "immediate" is crucial; it leaves room for broader principles that support updating.

ogy must be tested against the present to be coherent.⁷⁹

John Kernochan's intentionalism also expressly includes an updating element, at least when traditional intentionalist tools cannot yield a unique result. When the evidence regarding intent is inconclusive, Kernochan argues, the judge must "read the statute so as to make the best possible sense of it in the developing legal and social context, in a manner consistent with the terms of the statute and with purposes reasonably attributable to it. . . . In weighing policy, the court will be acting much as it would act in a common law case when there is no binding precedent."⁸⁰

2. Textualism

If textualism is understood as the search for "original meaning," then there is little room, as a matter of theory, for updating. It is, however, quite likely that the re-creation of the past will be influenced by the values and meanings of the present.⁸¹ More interesting is how few judicial opinions openly adopt a purely originalist strategy.⁸²

79. Other nonoriginalist elements in Hart and Sacks' methodology include: (1) a recommendation that the "rigid" reenactment rule (*i.e.*, that the legislature intends to maintain earlier interpretations if the law is reenacted without changes) be replaced by the presumption that "if a legislature desires a body of law to lose its capacity for continued growth, it should say so expressly and unmistakably," *id.* at 1404; (2) recognition that a statute can "eventually take[] on a life of its own, governed by the evolving principles by which it has been interpreted rather than by any direct reference to original purpose," *id.* at 1379; and (3) willingness to credit post-enactment aids to construction: "where [an administrative or popular] construction has been widely accepted and consistently adhered, it[] may be said to fix the meaning — to be the meaning which experience has demonstrated the words do bear." *Id.* at 1416.

80. Kernochan, *supra* note 25, at 357. Reed Dickerson also argues for serving "current social needs" when statutory and contextual cues cannot provide an answer to the interpretive question. R. DICKERSON, *supra* note 16, at 242-50.

81. See Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793-804 (1983).

82. The most striking recent examples of an original meaning approach, Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987), and Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987), allow one to see how odd the enterprise appears. The question in those cases was whether discrimination against Jews and Arabs was discrimination on the basis of "race," and therefore covered by §§ 1981 and 1982. The Supreme Court, in surprisingly brief unanimous opinions by Justice White, stated that "the question before us is not whether Jews [or Arabs] are considered to be a separate race by today's standards, but whether, at the time [§ 1981 and] § 1982 [were] adopted, Jews [or Arabs] constituted a group of people that Congress intended to protect." 107 S. Ct. at 2022. After examining dictionaries and encyclopedias of the mid-1800s, White concluded that "definitions of race when § 1982 was passed were not the same as they are today" and the statutes were "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Id.* at 2021-22. Discrimination against Jews and Arabs was therefore actionable under the statutes. It is obvious that the Court was not about to tackle the extremely complex question of what constitutes a "race" today (in a footnote in *Al-Khazraji*, it noted that some scientists "conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature," 107 S. Ct. at 2026 n.4). It therefore resorted to "original meaning" as a way to expand the civil rights laws without opening up controversial issues in social science, biology, and group politics. But one senses that the decisions of the Court had far more to do

If one adopts Justice Scalia's version of textualism, the question becomes a matter of the sources from which one derives the "plain meaning" of the text. Scalia's anti-intentionalism studiously avoids examining legislative history for such meaning.⁸³ Instead, he has tended to rely either on current understandings of the statutory language (for recently enacted statutes)⁸⁴ or on the meaning that has been given to similar phrases in other statutes.⁸⁵ The first manifestly applies current meaning; the second may or may not, depending on the age of the statutes consulted and the time of their interpretation. But the second strategy will certainly be a rather poor measure of original meaning and is quite likely to yield a meaning generally accepted today.

B. Practice

Despite the common impression that statutory interpretation is generally archeological, a look at the tools of the trade display some surprisingly nautical instruments.

1. *Canons at Sea*

Courts are often called upon to interpret statutes existing in a world of related statutes enacted at different times. The canons of statutory construction provide a number of suggestions for helping the interpreter understand the influence of later-enacted legislation on the earlier. Justice Scalia has reminded us that the traditional rules in such situations are these: (1) repeals or amendments by implication are disfavored; and (2) statutes should be construed so as to give effect to each.⁸⁶ As Scalia notes, these rules cannot and do not serve original intent: "[T]he earlier statute will be given one interpretation at the time it is first passed, but a different interpretation later, when there is a need to narrow it in order to 'make room' for the operative effect of the later enactment. In no way can this be considered a process of 'giving effect' to the intent of the earlier legislature — nor of the later

with current views on ethnic discrimination than with a conviction that nineteenth-century notions of race should control the application of civil rights laws today.

83. See text at notes 50-53 *supra*.

84. E.g., *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1224 (1987) (concurring in the judgment); *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1465 (1987) (Scalia, J., dissenting) (interpreting Title VII of the 1964 Civil Rights Act).

85. E.g., *Pierce v. Underwood*, 108 S. Ct. 2541 (1988) (examining use of "substantial" in federal procedure statutes to give meaning to term "substantially justified" in Equal Access to Justice Act, 29 U.S.C. § 2412(d)(1)(A)); *Kungys v. United States*, 108 S. Ct. 1537, 1546 (1988) (looking to interpretations of various criminal statutes to give meaning to term "material" misrepresentation in the denaturalization statute, 8 U.S.C. § 1451(a)).

86. Scalia, *supra* note 47, at 9.

legislature if amendment by implication is excluded.”⁸⁷

Another common canon — one actually rather regularly followed by the Court — is that statutes ought to be interpreted to avoid constitutional questions.⁸⁸ Courts invoking this canon examine *current* constitutional doctrine, not the constitutional rule extant at the time the statute was enacted. The canon, therefore, is likely to exert an updating influence on the interpretation of statutes.

To see this at work, consider *NLRB v. Catholic Bishops of Chicago*.⁸⁹ The issue there was whether the National Labor Relations Act granted the NLRB jurisdiction over church-operated schools. Recognizing the serious constitutional question that would be raised by upholding the NLRB’s assertion of authority, the Court stated that it would have to identify “the affirmative intention of the Congress clearly expressed” before concluding that the Act granted jurisdiction.⁹⁰ Examining the legislative history of the 1935 Act (as well as 1947 and 1974 amendments to the Act), the majority could find no express intent to cover church-operated schools and therefore ruled against the Board. There can be little doubt here that the lurking constitutional issue influenced the Court’s interpretation of the statute. As the dissent noted, the term “employer” had consistently received an expansive reading, given both the manifest public purpose behind the Act and the fact that Congress had written into the definition eight specific exceptions.⁹¹ Thus, it seems clear that but for the constitutional issue, the statute would have been interpreted to grant the NLRB jurisdiction. Yet the constitutional doctrine that provided the interpretive weight in the case was not around at the time Congress wrote the definition of “employer.”⁹²

87. *Id.* See *United States v. Fausto*, 108 S. Ct. 668, 676 (1988) (Scalia, J.).

88. *E.g.*, *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988) (citing cases).

89. 440 U.S. 490 (1979). This example was suggested by W. ESKRIDGE & P. FRICKEY, *supra* note 46, at 676-89.

90. 440 U.S. at 501 (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957))).

91. 440 U.S. at 511-18 (Brennan, J., dissenting).

92. Modern free exercise doctrine is usually traced to *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which invalidated the conviction of a Jehovah’s Witness for soliciting funds in the distribution of religious materials without a license. *Cantwell* was decided five years after Congress enacted the NLRA. A leading constitutional treatise reports:

As of 1960, no case in the Supreme Court had resulted in the overturning of police power regulations solely on the basis that they had a coercive effect on the free exercise of religion. If the end pursued was a significant secular goal, the Court would uphold incidental restrictions on religiously motivated activity.

J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 1071 (3d ed. 1986).

It is conceivable that a Congress concerned about undue regulation of religion might have not intended for the NLRB to regulate church-operated schools. *Cf.* *Holy Trinity Church v. United*

2. *Nonoriginalism in Subsequent Legislative Action*

Courts continue to struggle with the question of the significance that should be attributed to a legislature's failure to overrule a prior interpretation of a statute. (Professor Eskridge's article in this Symposium provides a detailed and insightful analysis of the "legislative inaction" doctrine.⁹³) It is interesting that the debate is largely based upon nonoriginalistic assumptions.

Suppose Congress passes a statute at time *T*. Five years later a court (or an agency) construes the statute to mean *X*, and that interpretation is consistently followed in subsequent decisions. Interpretation *X* is well known to the legislature; bills have been introduced in most sessions which would overturn *X* but none has been enacted. Should an interpreting court, now called upon to reconsider *X*, give weight to the legislative inaction?

An archeologist would begin by wondering why any subsequent legislative activity should be relevant to the interpretive question. New evidence may cast doubt on whether *X* was a proper interpretation of the statute as enacted at time *T*;⁹⁴ but, the archeologist would reason, subsequent legislatures cannot change that original intent or meaning (without passing a statute).

But judges do not dismiss the question out of hand. They regularly (if inconsistently) attach significance to "legislative acquiescence." If the legislature has "acquiesced" in an interpretation that accurately captured original intent, the court's use of the subsequent legislature's action will not have an updating effect. However, given political realities, this course of events seems unlikely. Legislators will benefit or lose from a decision to acquiesce in *X* primarily based on current views of the policy embodied by *X*. While legislators may well couch their support for *X* in originalist terms (thereby hoping to appease opponents of *X* by shifting the "blame" to the enacting legislature), they clearly have a greater interest in whether *X* makes sense today than in accurately reporting the "original intent" of the statute. The nautical effect will be even stronger when the legislature acquiesces in an

States, 143 U.S. 457 (1892) (holding that immigration laws prohibiting immigration of contract labor do not cover contract to bring minister to the United States). But this is not the way the Court's analysis in *Catholic Bishop of Chicago* proceeded.

Changes in constitutional interpretation may also produce expansion of the scope of a statute. *E.g.*, *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944) (holding Sherman Act applicable to insurance industry after Court overrules early decision that insurance was not interstate commerce). *See also* Lyon, *Old Statutes and New Constitutions*, 44 COLUM. L. REV. 599 (1944).

93. Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71-90 (1988).

94. *See, e.g.*, *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961), based upon a reevaluation of the legislative history of § 1983).

agency interpretation since, as will be discussed below, agency constructions are quite likely to be based on a present-minded approach to statutes.

It is therefore more likely that “acquiescence” — if it is found⁹⁵ — represents a judgment on the current acceptability of the policy of *X*. Even where acquiescence is not found, simply to have considered the impact of subsequent congressional inaction is to adopt a nonarcheological stance.⁹⁶

3. *Nautical Purposes*

Two indeterminacies pervade purpose analysis. First, it will always be possible to identify a number of purposes that fit the data from which one infers purpose (legislative history, the state of the law prior to enactment, the “mischief” sought to be prevented). Some purposes may be more plausible than others, but often alternatives will appear equally sensible. For example, in *Weber*, the majority derived from Title VII the purpose of integrating blacks into the economic life of the nation; the dissent saw the primary purpose as establishing a colorblind standard in private employment decisions. Each view found enough support in the record to make its explanation plausible.⁹⁷

A second indeterminacy arises from the fact that purposes may be stated at various levels of generality. To borrow an example from constitutional law, one may create a set of nested purposes for the equal protection clause: (1) to grant blacks protection against discrimination in the exercise of only those rights mentioned in the Civil Rights Act of 1866; (2) to grant blacks protection against discrimination in

95. Of course, a legislature's failure to overturn a statutory precedent may say nothing about its views of the earlier interpretation. It may indicate inattention, uninterest, or shortness of time.

96. The unwillingness of courts to credit post-enactment legislative history is generally defended on the ground that statements made after passage of the statute cannot be challenged or corrected by the enacting legislators and are often likely to represent simply a legislator's attempt to accomplish after the fact what he or she could not accomplish during debate of the measure. This position appears to be based on archeological concerns. (Even so, the Court has, from time to time, been willing to give weight to subsequent legislative statements. See, e.g., *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).) However, a thoroughgoing nautical approach might also be suspicious of such statements. Since they are often made while legislative attention is focussed elsewhere, they may have very little probative value of current understandings of the statute or the needs and values of the day; rather, they are likely to represent simply the spin that the individual or committee contributing the statement wants to put on the statute.

97. For other examples, see *Communications Workers of Am. v. Beck*, 108 S. Ct. 2641 (1988); and compare *NLRB v. Am. Natl. Ins. Co.*, 343 U.S. 395 (1952) (principal purpose of federal labor law is to support voluntary collective bargaining and not to write substantive terms of a contract), with *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962) (federal labor policy in favor of arbitration leads Court to read arbitration provision into no-strike clause).

the exercise of all federal rights; (3) to grant all racial minorities protection against discrimination; (4) to grant all "oppressed groups" protection against discrimination.⁹⁸

The flexibility (as one might politely call it) of purpose analysis provides room for updating statutes without so acknowledging. As time passes, courts may shift the "purpose" of the statute to accommodate changed circumstances. Professor Langevoort's rich study of the banking laws provides a good example.⁹⁹ He describes how the Court, faced with dramatic changes in the banking industry, attributed a purpose to the Glass-Steagall Act (maintaining bank soundness) quite different from that upon which the legislation was originally predicated (forcing banks to channel funds towards traditional commercial and agricultural lending rather than speculative uses).

Consider another example, drawn from *The Legal Process*.¹⁰⁰ Massachusetts had an old statute that required cities and towns to keep the highways "reasonably safe and convenient for travellers, with their horses, teams and carriages at all seasons." Does the statute mandate that communities make sure their roads are safe for the new-fangled carriages called automobiles? If the purpose attributed to the statute is that cities and towns have an obligation to assure safety of travel, then the answer should be yes. But if the purpose is that safety of travel must be assured without overburdening the fiscal resources of the responsible community, then the answer might well be no. Each purpose is consistent with the original enactment. Yet the latter purpose (which is what the Massachusetts Supreme Court relied upon in 1908 in determining that cars are not "carriages" within the meaning of the statute) was likely to be formulated only after changes in social conditions forced an interpreter to see the statute in a new light.

4. *Agencies at the Helm*

Contrary to popular belief, most statutory interpretation does not occur in the courts. Agencies are the captains of the ship of state, and they are constantly giving meaning to statutes as they write regulations, bring enforcement actions, adjudicate claims, or issue interpre-

98. See generally R. DICKERSON, *supra* note 16, at 87-88 (noting range of "ever-widening purposes" implicit in legislative action).

99. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987). Langevoort's study does much more than simply chart this shift. He describes what he calls the "transitional jurisprudence" that older statutes go through — from purpose analysis to literalism, application of mechanical canons, and deference to agency interpretation as the statute ages and the original purpose seems unresponsive to current conditions.

100. H. HART & A. SACKS, *supra* note 21, at 1214-15.

tive guidelines. This means that in a significant number of statutory cases, the Supreme Court is reviewing a prior agency construction of a statute.

Under the regime of *Chevron, U.S.A., Inc. v. NRDC*,¹⁰¹ courts have shown substantial deference to agency interpretations. The well-known *Chevron* standard states:

If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹⁰²

This judicial stance on agency determinations is the most important nautical element in the practice of modern statutory interpretation.

To understand why, one must consider the political world in which agencies live. Agencies within the executive branch are headed by persons appointed by, and directly responsible to, the President. So-called "independent agencies" are generally governed by a number of commissioners appointed by the President and approved by the Senate. All agencies must come to the Congress for appropriations, and they are regularly asked to testify on substantive issues within their jurisdiction. In such an environment, it seems clear that current policy considerations, rather than "the original intent of the legislature," is likely to guide agency interpretations of statutes. Pleasing a sitting President and a sitting Congress is going to keep an agency funded and out of trouble.¹⁰³

Archeological judicial attitudes could counteract these present-minded pressures. Irrespective of the current political winds, an agency would be unlikely to adopt an updated interpretation of a statute if it knew that a court would strike it down on originalist grounds. Under *Chevron*, however, the agencies need rarely fear such disciplining judicial behavior. Indeed, the case specifically acknowledges the role that current policy considerations ought to play in agency actions:

101. 467 U.S. 837 (1984).

102. 467 U.S. at 842-43.

103. Colin Diver, in an important article, develops a number of reasons why deference to agency interpretations may promote "policy coherence." These include uniformity promoted by a single agency's decisions (rather than several courts of appeals); continuity of policy over time; harmonization of policy with other statutes within an agency's purview; integration of policy creation and enforcement; and expeditiousness. Diver recommends deference to administrative interpretations when the agency exercises significant policymaking responsibility under the statute. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 585-92 (1985).

[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.¹⁰⁴

This is not to say that such updating will necessarily reflect the preference of the current *Congress*. Given the difficulty of enacting legislation (as well as the President's veto power), delegation may give an agency a fair degree of insulated power. The current controversy over the Fairness Doctrine provides a striking example. When an FCC dominated by Reagan appointees announced its intent to revoke the doctrine, Congress passed legislation to keep it in place. The bill was vetoed by President Reagan, and thereafter the FCC formally repealed the doctrine.¹⁰⁵ Clearly, the action of the agency did not conform to the wishes of the current Congress; but just as clearly, it was based on present-minded political judgments, not the original intent of the Congress that granted the FCC authority to impose the Fairness Doctrine.

It is unlikely that a nautical model of statutory interpretation accounts for the Court's decision in *Chevron*. Concerns about judicial competence and activism are more likely to have been the motivating factors.¹⁰⁶ The Court no doubt thought that where Congress had not provided a clear answer, somebody would have to, and it preferred the courts not fill that role. "Judges are not experts in the field," the Court noted, "and are not part of either political branch of the Gov-

104. 467 U.S. at 865-66. See Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON., & ORGANIZATION 81 (1985) (delegations to agencies promote responsiveness to desires of the electorate). For an extraordinary recognition of the influence of presidential politics on agency policy, see Justice Rehnquist's opinion in *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (concurring in part, dissenting in part): "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." (Footnote deleted.)

105. For a detailed review of these events, see Note, "In Stark Contravention of Its Purpose": *Federal Communications Commission Enforcement and Repeal of the Fairness Doctrine*, 20 U. MICH. J.L. REF. 799 (1987).

106. For an interesting alternative understanding of *Chevron*, see Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987) (deferring to agencies fosters national uniformity that, given the press of the Court's caseload, cannot easily be achieved by Supreme Court review of courts of appeals decisions regarding agency determinations).

ernment.”¹⁰⁷ Furthermore, strict judicial scrutiny of agency decisions may frustrate the agency’s ability to carry out its mission effectively.¹⁰⁸ But whether by design or accident, *Chevron* provides a major route for the updating of statutes.

It would be misleading to suggest that *Chevron* has left the courts defenseless in the face of imperialist, recalcitrant or renegade agencies. The Supreme Court, pursuing the new plain meaning, has been willing to overturn agency constructions that contradict the “express language of the statute.”¹⁰⁹ Furthermore, *Chevron* itself includes language that may be used by an aggressively originalist court to keep agencies in line. Recall that the case states that deference is not necessary “if the intent of Congress is clear.” A footnote elaborates as follows: “[I]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”¹¹⁰ Some post-*Chevron* cases have understood this language as permitting a wide-ranging review of the legislative history to see if it shows “with sufficient clarity that the agency construction is contrary to the will of Congress.”¹¹¹

Not surprisingly, Justice Scalia has viewed with alarm the willingness of the Court to consult legislative history when reviewing agency actions. Since “the traditional tools of statutory construction” may readily be used to discover (or create) a congressional intent, an intentionalist reading of *Chevron* “would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise

107. 467 U.S. at 865.

108. See, e.g., *INS v. Wang*, 450 U.S. 139 (1981) (per curiam) (recognizing broad authority in the Attorney General to define terms in a statutory provision providing for relief from deportation and to fashion procedures for handling motions to reopen deportation proceedings).

109. *Bethesda Hosp. Assn. v. Bowen*, 108 S. Ct. 1255, 1258 (1988). Other examples include *FLRA v. Aberdeen Proving Ground, Dept. of the Army*, 108 S. Ct. 1261 (1988), and *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987).

Two other factors blunt somewhat the updating power of *Chevron*. First, the Court has been willing to set aside some agency interpretations as “unreasonable,” even though it has not concluded that the intent of Congress on the precise question was clear. E.g., *Board of Governors v. Dimension Fin. Corp.*, 106 S. Ct. 681 (1986). Second, a regularly cited canon of construction is that agency interpretations that have changed over time are entitled to less deference. See, e.g., *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). (This canon, however, seems to be in tension with *Chevron* (Why should it matter if the agency interpretation is new, so long as it is a permissible reading of the statute?).)

110. 467 U.S. at 843 & n.9.

111. *Japan Whaling Assn. v. American Cetacean Socy.*, 106 S. Ct. 2860 (1986) (upholding agency determination after examination of legislative history). For other cases where the Court has extensively reviewed legislative history, see *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987) (rejecting agency interpretation), and *Chemical Mfrs. Assn. v. NRDC*, 470 U.S. 116 (1985) (upholding agency interpretation).

be unable to construe the enactment at issue."¹¹² Scalia's preferred reading of *Chevron* provides a minimalist role for courts: where the language is clear, the courts should apply the plain meaning; where it is not clear and an agency has offered an interpretation, the court should defer to the agency.¹¹³ This approach, it should be apparent, is driven not by a normative principle supporting originalism, but by a concern about judicial activism. It is striking that in an attempt to limit policymaking by the judiciary, Scalia embraces that aspect of the practice of statutory interpretation most likely to be non-originalistic.¹¹⁴

III. TOWARDS A NAUTICAL APPROACH

The previous section does not establish that modern statutory interpretation, in theory or in practice, follows the nautical model. Most opinions display a decidedly archeological mind-set. Nevertheless nonoriginalism seems to exert a significant tug on statutory interpretation. Despite deeply ingrained notions of legislative supremacy, we seem to feel that statutes ought to be responsive to today's world. They ought to be made to fit, as best they can, into the current legal landscape.¹¹⁵

Ronald Dworkin and William Eskridge have recently developed elaborate nonarcheological theories of interpretation.¹¹⁶ Their complex and thoughtful analyses will not be recapitulated here.¹¹⁷ This

112. *E.g.*, *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1225 (1987) (Scalia, J., concurring in the judgment). *See also* *NLRB v. United Food and Commercial Workers Union*, 108 S. Ct. 413, at 426 (1987).

113. Another way to avoid judicial second-guessing of agency actions is to read expansively the APA provision precluding judicial review. *See Webster v. Doe*, 108 S. Ct. 2047 (1988) (Scalia, J.).

114. The claim is not that Scalia's schema is incoherent (although one would think that adherence to a "plain meaning" approach would be intellectually unsatisfying). But the discussion should come as a surprise to those who see Scalia as a raving originalist. He is not. He wants policy to be made by the political branches, not the courts — a view which sometimes supports originalism (for example, in constitutional adjudication) and sometimes does not.

115. *Cf.* G. CALABRESI, *supra* note 39, *passim* (describing social and legal context into which an interpretation of a statute should fit as the "legal topography," "legal landscape," or "the fabric of the law").

116. R. DWORKIN, *supra* note 26, ch. 9; Eskridge, *Dynamic Statutory Interpretation*, *supra* note 14. For earlier nonoriginalist theories, see Radin, *supra* note 12; Curtis, *supra* note 10; Witherspoon, *Administrative Discretion To Determine Statutory Meaning: "The Middle Road"*, 40 TEXAS L. REV. 751 (1962). Dean Calabresi has argued for a "common law approach" to statutes in its strongest version: courts should be held to have the power to "overturn" outdated statutes. G. CALABRESI, *supra* note 39.

117. Let me briefly contrast my approach with those of Dworkin and Eskridge.

In an attempt to distinguish his theory of "law as integrity" from "pragmatism" (*i.e.*, the view that judges "should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake," R. DWORKIN, *supra* note 26, at 95), Dworkin asserts that an interpretation of a statute "must justify the story

section will show that a nautical approach to statutory interpretation is sensible and defensible. It may be best to start with an example.

A. *A Nautical Example: Exclusion of Homosexual Aliens Under the Immigration and Nationality Act*

In 1950, the Senate Judiciary Committee issued a massive report analyzing the existing immigration system and proposing a comprehensive rewriting of the statute.¹¹⁸ One of its recommendations was that the grounds excluding persons on the basis of mental disease be amended to specify the exclusion of "homosexuals and other sex perverts." When the bill came up in the Senate the next year, the proposed exclusion ground read: "aliens afflicted with psychopathic personality, epilepsy, or a mental defect." The Senate Report explained that "[t]he Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect . . . is sufficiently broad to provide for the exclusion of homosexuals and sex perverts."¹¹⁹

The Senate language was adopted, and the exclusion ground took its place among the other medical grounds for exclusion in section 212(a) of the McCarran-Walter Act. As enacted, the first six (of 33) grounds of exclusion were:

- (1) Aliens who are feeble-minded;
- (2) Aliens who are insane;

as a whole, not just its ending." *Id.* at 338. Consistent with his "chain novel" approach to common law and constitutional adjudication, he asks the judge to "make the best he can of [a statute's] continuing story." *Id.* at 348. Dworkin makes clear that this is not a demand that law "recapture . . . the ideals or practical purposes of the politicians who created it"; law as integrity "commands a horizontal rather than vertical consistency of principle across the range of the legal standards the community now enforces." *Id.* at 227. My approach is similar, although it is less concerned with Dworkin's dimension of "fit" (that is, the telling of a story that harmonizes earlier interpretations into a coherent whole). "Fit" may be quite important in common law or nontextualist constitutional adjudication as a check on judicial inventiveness, but it seems less important with a statute that, because it is written, provides substantial limits on the range of possible interpretations. My proposal that we treat statutes as if they had been recently enacted requires a story of sorts — one that fits text, structure, purpose, and context into a horizontally consistent account. But earlier chapters need not be explained or apologized for.

Eskridge describes a tripartite model that examines text, original legislative expectations, and evolution of the statute (including current context). He views the evolutionary element "as most important when the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law." Eskridge, *supra* note 14, at 1484. I would be inclined to carry out the textual analysis in a present-minded fashion, giving primary weight to the evolutionary perspective and little weight to the historical expectations of the enacting legislature.

118. S. REP. NO. 1515, 81st Cong., 2d Sess. (1950). For a detailed analysis of law and policy relating to the exclusion of homosexuals, see Note, *The Propriety of Denying Entry to Homosexual Aliens: Examining the Public Health Service's Authority over Medical Exclusions*, 17 U. MICH. J.L. REF. 331 (1984).

119. S. REP. NO. 1137, 82d Cong., 1st Sess. 9 (1951).

- (3) Aliens who have had one or more attacks of insanity;
- (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;
- (5) Aliens who are narcotic drug addicts or chronic alcoholics;
- (6) Aliens who are afflicted with tuberculosis in any form, or with leprosy, or any dangerous contagious disease.¹²⁰

In 1967, in *Boutilier v. INS*, the Supreme Court ruled that the phrase 'psychopathic personality' in the 1952 provision included homosexuals and that the phrase was not unconstitutionally vague.¹²¹ The Court stated that "[t]he legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals," and it specifically rejected the alien's claim that the term was "medically ambiguous": "[T]he test here is what Congress intended, not what differing psychiatrists may think. It was not laying down a clinical test, but an exclusionary standard which it declared to be inclusive of those having homosexual and perverted characteristics."¹²²

Two years before *Boutilier*, Congress had amended section 212(a)(4) to include "sexual deviation" as a ground for exclusion. (*Boutilier* was based on the original provision and did not consider this phrase.) At that time, the relevant Senate report quoted the 1952 report's statement that the failure to mention homosexuality explicitly in the statute should "not . . . be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."¹²³ Section 212(a)(4) currently reads: "Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect."

The immigration act provides for medical examinations of aliens to determine whether they are excludable on medical grounds. Exams made in the United States are usually done by the Public Health Service under the supervision of the Surgeon General. Until 1979, the Immigration and Naturalization Service referred aliens suspected of being homosexuals to the P.H.S. for examination. In that year, the Surgeon General announced that the P.H.S. would no longer carry out such examinations because (1) "according to 'current and generally accepted canons of medical practice', homosexuality *per se* is no longer considered to be a mental disorder"; and (2) "the determination of homosexuality is not made through a medical diagnostic

120. 66 Stat. 163, 182 (1952).

121. *Boutilier v. INS*, 387 U.S. 118 (1967).

122. 387 U.S. at 120, 124.

123. S. REP. NO. 1137, 82d Cong., 1st Sess. 9 (1951), quoted in S. REP. NO. 748, 89th Cong., 1st Sess. 19 (1965).

procedure.”¹²⁴

Assume that a homosexual alien appears at the border today and applies for admission, arguing that section 212(a)(4) should not be read to exclude him. Does he have a good case? The archeological interpreter would no doubt be startled by the claim. From an originalist perspective, the case for exclusion appears overwhelming.¹²⁵ Congress twice and the Supreme Court once has said that the statute excludes homosexuals.

But suppose we start the analysis a different way. Suppose we treat the statute *as if it had been enacted yesterday* and try to make sense of it in today's world. We might pursue this present-minded analysis by asking the following kinds of questions. Would a reader of the statute today be likely to think it requires the exclusion of homosexuals? Why would a legislature enact this law? What could it have been trying to accomplish? If a legislature today sought to exclude aliens based on their sexual orientation, would it be likely to choose the words of the statute to do so? If the statute is read to exclude homosexuals, how would we then be inclined to state the objective of the statute? Would this reformulated purpose cover other cases that the words would lead us to believe ought to be covered? Would this reformulated purpose make us understand the words in a new way? If read to cover homosexual aliens, how would the statute fit with other laws on the books? Does such an interpretation appear consistent with broader prevailing common law and constitutional norms?

These questions, for the most part, should appear familiar. They are the stuff of statutory interpretation as practiced in our legal system. What is missing is talk of original intent, and what is added is a distinct present-mindedness. By treating the statute as if it had been enacted recently, we are attempting to weave it into today's legal sys-

124. *Hill v. INS*, 714 F.2d 1470, 1472-73 (9th Cir. 1983) (quoting a report of the Surgeon General's decision in 56 INTERP. REL. 387, 398 (1979)) (footnote omitted).

The Surgeon General's new policy presented problems for the INS, which was unsure whether it could exclude aliens on medical grounds without a medical inspection. The courts of appeals have split on this issue. Compare *Hill v. INS*, 714 F.2d 1470 (medical inspection needed for exclusion), with *Matter of Longstaff*, 716 F.2d 1439 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984) (no exam necessary for determination of excludability).

125. Although clever originalist arguments can be made to the contrary. For example: (1) Congress intended the ground to be a medical exclusion ground; once the medical authorities no longer consider homosexuality a medical disease, the ground no longer applies (much as if science now decided that syphilis is not a contagious disease, and therefore persons afflicted with the disease should not be excludable under § 212(a)(6) (dangerous contagious diseases)). See *Lesbian/Gay Freedom Day Commn. v. INS*, 541 F. Supp. 569, 585 (N.D. Cal. 1982) (“once medical authorities decided that homosexuality per se was no longer a medical problem of any type, the court cannot ascribe to Congress an intention that homosexuals still be excluded from entry”); (2) By asking the P.H.S. to undertake medical examinations, Congress implicitly delegated to the P.H.S. the power to determine the scope of the exclusions.

tem, to make it responsive to today's conditions. We are seeking, for lack of a better term, synchronic coherence.¹²⁶

A nautical interpreter ought to begin by noticing that the statute nowhere mentions homosexuality, and the phrase "psychopathic personality" does not spring to mind as a ready category into which to place it. "Sexual deviation" might well include homosexuality. But how should we decide if it does or does not? The location of the exclusion ground appears particularly significant; it is placed among the other medical exclusion grounds in section 212(a). Thus the structure of the current Act suggests that the paragraph might be limited to medically diagnosable diseases. This view is supported by the detailed provision relating to medical examinations by the P.H.S. which specifically refers to section 212(a)(4).¹²⁷ Stated another way, the statutory language and structure suggest a *current* purpose to exclude persons with either physical or mental medical problems.

If the position of the highest medical officer of the United States government (which is charged with enforcement of the immigration laws) is that homosexuality per se is not a disease, and if that opinion is now the accepted view of the medical and psychiatric professions,¹²⁸ then it would not be unreasonable to conclude that homosexuality ought not to be considered a medical ground of exclusion.¹²⁹ That is, treating the statute as if recently enacted, one might well decide that section 212(a)(4) is limited to medical exclusions, and exclusion on the basis of homosexuality would not readily come within it. This interpretation does not read the phrase "sexual deviation" out of the statute; it limits the term to "deviations" that are currently considered pathological (perhaps pedophilia or exhibitionism).¹³⁰

126. For similar concepts see Eskridge, *supra* note 93, at 116 (1988) ("horizontal continuity"); R. DWORKIN, *supra* note 26, at 338 (interpreter must construct justification that fits and flows through the statute and is, if possible, consistent with other legislation in force); Brink, *Legal Theory, Legal Interpretation and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 129-33 (1988) (what law requires is that decision that coheres best with existing legal principles, constitutional provisions, statutes, and precedents).

127. See Immigration and Naturalization Act § 234, 8 U.S.C. § 1224 (1982).

128. See 56 INTERP. REL. 387, 398 (1979) (reprinting Surgeon General's statement that referred to views of the American Psychiatric Association, the American Psychological Association, the American Public Health Association, and the American Nurses' Association).

129. This conclusion would be strengthened if homosexual activity were considered constitutionally protected. The Supreme Court recently said it was not in *Bowers v. Hardwick*, 478 U.S. 186 (1986). But growing acceptance of homosexual behavior might cut in the other direction.

130. It might be asked why I would not put great weight — even conclusive weight — on the fact that many Americans may consider homosexuality "sexual deviation" (that is, conduct that differs from the norm). See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding Georgia sodomy statute as applied to homosexual behavior; "majority sentiments about the morality of homosexuality" sufficient to supply rational basis for law). This question, which neatly identifies the difference between my approach and a present-minded plain meaning approach, is discussed in Part III.B *infra*.

This is pretty strong stuff to the archeologist. Not only does the nautical interpretation violate the clearly expressed intent of the enacting legislators, but it also overturns a decision of the Supreme Court. This requires a few words about stare decisis.

Under traditional rules, statutory precedents are not lightly overruled. The usual justification is that Congress can, if it so chooses, reverse a judicial interpretation of a statute. The interests of stability, predictability, efficiency, consistency and reliance — indeed, the idea of a rule of law — are said to be at stake when courts too easily reverse statutory precedents.¹³¹ These arguments figure prominently in Justice Stevens' opinion in *Runyon*, and also in his dissent from the order requesting reargument in *Patterson*.¹³² Not surprisingly, civil rights groups opposed to the overruling of *Runyon* place substantial weight on the principle of stare decisis.

How should stare decisis affect the exclusion case? Even under the traditional doctrine, a plausible argument can be made that *Boutillier* (the case holding that homosexuals are excludable under section 212(a)(4)) should be reversed. It would be difficult for the government — the prevailing party — to claim that it has relied to any great extent on the case. Only a handful of aliens were ever excluded under the provision. More importantly, after the Surgeon General announced that the P.H.S. would no longer conduct medical examinations to test for homosexuality, the Department of Justice adopted a policy that severely restricted application of the exclusion ground. Under current policy, arriving aliens are not asked any question regarding their sexual preference. Only if an alien makes an unambiguous oral or written admission of homosexuality, or another arriving alien, without prompting, identifies an alien as homosexual will the exclusion process be triggered.¹³³ In short, the Executive Branch has all but repealed the exclusion through administrative practice. The Justice Department policy is known to Congress, which has taken no action to change it. In fact, bills have been introduced to repeal the exclusion ground.¹³⁴ While it would be difficult to conclude that Congress has "ratified" the administrative action, it is fair to say that the momentum in Congress is towards repeal.

For similar reasons, the stability, predictability, and consistency

131. *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970). See generally Eskridge, *Overruling Statutory Precedents*, 76 GEO. L. REV. 1361 (1988).

132. *Patterson v. McLean Credit Union*, 108 S. Ct. 1419, 1422-23 (1988) (Stevens, J., dissenting).

133. *Hill v. INS*, 714 F.2d 1470, 1472 (9th Cir. 1983).

134. E.g., H.R. 1119, 100th Cong., 1st Sess. (1987).

interests look weak. Most Americans are unaware of the exclusion ground, and arriving gay and lesbian aliens know that they will be admitted to the United States if they simply don't identify their sexual preference.

The principle roadblock, of course, is intentionalism. Given the clear congressional intent to exclude homosexuals, an archeological Court could hardly find that it had made a "mistake" in *Boutilier*. Nor do legal or social conditions appear to have changed enough to compel an archeological court to forgo original intent. But these conclusions follow from the interpretive theory used to decide the case, not the role of precedent. My claim here is that if the Court were to adopt a nautical approach, concerns about stare decisis need not stand in its way in reconsidering *Boutilier*.

I should make clear that a nonoriginalist approach does not reject the idea of precedent. Stability, predictability, and reliance are terribly important norms of our legal system. Thus, under a nautical approach, a court may well reach a result following precedent that it would not reach if it were considering the question for the first time. But it should be clear that such an approach would not accord statutory precedents the current "super-strong presumption."¹³⁵ The value that a nautical approach places on current coherence in the law would inform its stance towards precedent.

I have focussed on the "psychopathic personality"/"sexual deviation" exclusion ground because that is the provision upon which intentionalists rely for concluding that homosexuals are excludable. But there is another part of the exclusion provision that must be addressed from a nautical perspective. Section 212(a) includes the following subset of exclusion grounds:

- (11) Aliens who are polygamists or who practice polygamy or advocate the practice of polygamy;
- (12) Aliens who are prostitutes or who have engaged in prostitution, or aliens coming to the United States solely, principally, or incidentally to engage in prostitution; . . .
- (13) Aliens coming to the United States to engage in any immoral sexual act.

Interestingly, under an archeological analysis, this provision provides no problem for homosexuals. The legislative history of the 1952 Act shows that an earlier proposed version of the paragraph provided for the exclusion of "[a]liens coming to the United States *solely, principally, or incidentally* to engage in any illicit sexual act or any other

135. This is Professor Eskridge's phrase. Eskridge, *supra* note 131.

immoral act.”¹³⁶ Since Congress deleted the italicized language, the administrative authorities concluded early on that the provision condemned only those aliens coming *for the purpose* of engaging in immoral sexual behavior; that is, it did not cover the alien who sought entry to the United States in order to work and who happened to be living with a woman not his wife.¹³⁷ Nor would the act be read, therefore, to exclude from the U.S. a persons whose homosexuality is incidental to his reasons for entering the country.

But might not the present-minded interpreter conclude that paragraph (13) demands exclusion of homosexuals? One cannot plausibly claim that the three grounds deal with medical problems; they seem clearly to be about conduct considered immoral. And while homosexuality may now be tolerated in parts of the United States, it is clear that a substantial number of Americans continue to consider homosexual behavior unacceptable on moral grounds. Just recently, in *Bowers v. Hardwick*, the Supreme Court upheld the constitutionality of a Georgia sodomy statute as applied to consensual homosexual acts. It noted that some twenty-five states have sodomy laws on the books, and concluded that the State’s belief that “homosexual sodomy is immoral and unacceptable” provided a rational basis for the law.¹³⁸

It thus seems plausible (even if deplorable, from my point of view) that a current Congress could exclude homosexuals; and it might choose general language (“any immoral sexual act”) to do so, in order to cover other kinds of sexual behavior deemed morally unacceptable today. It would be difficult to argue that exclusion of homosexuals is wildly out of step with current social values and legal doctrine.

Arguing against exclusion of homosexuals is the language and structure of the statute and issues of administrability of the exclusion ground. Read together, the three paragraphs quoted above clearly distinguish between status (aliens “who *are* polygamists”; aliens “who *are* prostitutes”) and purposive behavior (aliens who are coming “to engage in prostitution”; aliens who are coming “to engage in any immoral act”). Furthermore, paragraph (12) includes the qualifier “incidentally” (to engage in prostitution), while paragraph (13) does not. Together, these cues suggest that paragraph (13) ought to be read to condemn only those aliens who are seeking entry for the purpose of engaging in immoral sexual activity. This interpretation would not make homosexuality per se a ground of exclusion. For most homosex-

136. S. 3455, 81st Cong., quoted in *Matter of B.*, 5 I. & N. Dec. 185, 188 (BIA 1953) (emphasis in original opinion).

137. *Matter of B.*, 5 I. & N. Dec. 185 (BIA 1953).

138. 478 U.S. 186 (1986).

uals, their sexual orientation would only be incidental to their entry. Under this reading, we would state the purpose of the provision as excluding aliens who enter primarily for the purpose of engaging in immoral sexual acts.

Furthermore, an interpretation of paragraph (13) that covers "incidental" sexual conduct may produce troubling consequences in enforcement of its provisions. Because of the vagueness of the word "immoral," a broad interpretation of the exclusion ground vests dangerous censorial power in agencies not known for their tolerance of deviant behavior. The statute could arguably be enforced against married couples who practice oral sex or unmarried heterosexual couples who cohabit. Current constitutional protections of privacy ought to make a court pause before adopting an interpretation that would exclude aliens for such acts undertaken "incidental" to entry.¹³⁹ Restricting the provision to aliens who enter in order to pursue immoral activities does not eliminate the problem of defining "immoral sexual act," but it substantially limits the area within which such judgments would have to be made.¹⁴⁰

For me the case is close (closer than it would be were I an archeologist), but I would hold that the provision does not exclude aliens simply on the ground that they are homosexual. Of course, the case for not excluding homosexuals under paragraph (13) would be much stronger — from the nautical perspective — if homosexuality were no longer considered "immoral" behavior. But until *Bowers v. Hardwick* is overruled, it would be difficult for a court to so conclude. Yet this fact is not controlling. A nautical approach is an interpretive model. The task is not to make current policy judgments or to ask how the current legislature would decide the issue today, but to make sense of a statute's language and structure in light of the current social and legal context.

B. *Other Approaches Contrasted*

Unlike the Hart and Sacks methodology, the proposed nautical approach would not place at the center of the analysis the actual "mis-

139. A further consideration might be the consistent administrative interpretation, since enactment of the provision, that the provision does not exclude aliens for "incidental" behavior. However, where such an interpretation is based on an archeological reading, it should carry less weight in a nautical approach.

140. Cf. *United States v. Kozminski*, 108 S. Ct. 2751, 2763 (1988), where the Court rejected the government's argument that a statute criminalizing involuntary servitude should be read to cover compulsion through psychological coercion: "[T]he Government's interpretation would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes. It would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction."

chief" that the enacting legislature sought to overcome. The history of the enactment might be important in giving the interpreter a sense of the area in which the statute operates, and the legislative reports and debates may provide examples of the meaning that the statutory words might bear.¹⁴¹ Often, a generalist interpreter hasn't the foggiest idea of what a technical statute is all about; the legislative history provides a window on the specialist world. But such information would not be privileged in any sense, and certainly would not constitute the Holy Grail of statutory interpretation.¹⁴²

An "original meaning" approach is obviously inconsistent with my nautical model. However, an advocate of nonarcheological plain meaning might argue that he or she can serve the goals of present-mindedness without introducing judicial willfulness. As applied to the medical exclusion ground, the advocate might argue: "My dictionary (and common parlance) defines 'deviation' as 'noticeable or marked departure from accepted norms of behavior.'¹⁴³ While homosexuality may be tolerated in parts of the United States, it has certainly not yet become an accepted norm of behavior. Homosexual marriage is prohibited in most states, and the Supreme Court recently upheld a Georgia sodomy statute as applied to homosexual behavior. The Court found that the 'belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable' provided a rational basis for the law.¹⁴⁴ Given all this, how can even a nautical interpreter conclude that a statute's condemnation of 'sexual deviance' does not today require the exclusion of homosexuals?"

This line of reasoning demonstrates the weakness, not the strength, of the new plain meaning. One might well share the concern that drives the new plain meaning — the use and abuse of legislative history. But plain meaning, it seems to me, can never be an adequate theory of interpretation. As noted above, plain meaning is primarily a strategy for restraining the judiciary and reforming legislatures. It is

141. This flips Hart and Sacks, who would have consulted post-enactment interpretation for evidence of the meaning that the language would bear. H. HART & A. SACKS, *supra* note 21, at 1416.

142. "[T]he quest is not properly for the sense originally intended by the statute, . . . but rather for the sense which *can be quarried out of it* in light of the new situation." Llewellyn, *supra* note 22, at 400 (emphasis in original). Cf. Posner, *Skepticism*, *supra* note 30, at 845-46 (precedents as information, not authority).

143. Webster's New Collegiate Dictionary 309 (1981).

144. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). In a concurring opinion, Chief Justice Burger stated that condemnation of homosexual conduct "is firmly rooted in Judeo-Christian moral and ethical standards" and that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." 478 U.S. at 196-97.

not interested in searching for a sensible reading of a statute,¹⁴⁵ one that would seek either to further the project begun by the enacting legislature or to weave the statute into the warp and woof of the legal system.¹⁴⁶ By declaring conventional meaning to be legal meaning, a plain meaning approach is anti-interpretive. It isolates a particular instance of legal language, stripping it of its connections to the legal enterprise of which it is a part.¹⁴⁷

C. *In Defense of the Nautical Model*

Despite the established nonoriginalist elements in common law and constitutional adjudication, something rubs us the wrong way about nautical models of statutory interpretation. The legislature did something back then, our intuitions tell us, and until they act again it is not up to the courts (or any interpreter) to update the law.¹⁴⁸ To update is to usurp the legislature's job, to violate important notions of legislative supremacy and separation of powers, to undermine the rule of law. Warren Lehman has, with irony, identified the allure of intentionalism: "we know no better way to express the ideas of sovereignty and legitimacy."¹⁴⁹

Perhaps somewhat curiously, it is possible to defend a nautical approach in intentionalist terms. The court that resolutely applies the original intent of the legislation (assuming we abide by the fiction) is often disserving that legislature. By leaving issues for subsequent interpreters, the legislature has necessarily recognized that it needs help

145. For an incomprehensible application of the plain meaning rule, see *United States v. Locke*, 471 U.S. 84 (1985). There, the Court read literally a federal statute requiring that specified mining claims to federal land be filed "prior to December 31." Thus, the stakeholders who filed on December 31 were held to have forfeited their claims to the government. This rigid application of plain meaning (if the statute can be said to be "plain") serves no reasonable objective, other than to trap the unwary.

146. See also Farber & Frickey, *supra* note 48, at 459-60 (interpreter who ignores elected drafter's intent "strains the chain of legitimacy from the electorate to the drafter and then to the implementor").

Justice Scalia's interpretive theory is not a simple-minded version of plain meaning. He recognizes that much legal language is not "plain," and therefore he often examines other aspects of the legal landscape to see how the statute might sensibly be read. The nautical approach sketched in this essay is sympathetic to this part of Scalia's methodology. It would never, however, declare statutory language "plain" and then end the analysis. See *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring in the judgment).

147. Cf. Brink, *supra* note 126, at 121 (rejecting semantic theory underlying plain meaning approach that identifies meaning with the set of properties or descriptions conventionally associated with the word or phrase).

148. Cf. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 376 (1981): "Our legal grundnorm [in constitutional law] has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment." (Emphasis in original; footnote omitted.)

149. Lehman, *How To Interpret a Difficult Statute*, 1979 Wis. L. REV. 489, 501.

in making the statute work in unprovided-for cases. An interpretation that makes no sense in today's world, even if it accurately reflects original meaning, can hardly be said to "work" today.

But it would be overstating the case to say that updating statutes is always consistent with the intent of the enacting legislature. If public choice theory is correct, groups that have bargained their way to a statutory result may be quite interested in maintaining their gains irrespective of changes elsewhere in the legal system. Thus, nautical models must ultimately be defended on other than intentionalist grounds.

Nautical models are built on an understanding of the nature of statutes and the role of interpreters that is fundamentally different from the view that underlies an archeological approach. Archeologists see statutes as once-shouted commands that continue simply to echo through time. Current readers of the statute are not interpreters; they are receivers of messages, capturing and recording the communication precisely as it was uttered long ago. This is a singularly inapt description of statutes and interpreters. Enactment of a statute represents the beginning of a journey, not the end.¹⁵⁰ The statute "means" nothing until it takes its place in the legal system, until it begins to interact with judges, lawyers, administrators, and lay people. Each of these interactions changes, or fills out, the meaning of the statute. In deciding that an exclusion provision does (or does not) apply to homosexuals, we have made the statute something other than what it was before we picked it up. We have not *applied* the statute, as if it were a pre-existing, self-contained, unchangeable thing; we have operated within the statute, done something to it — we have *interpreted* it. Interpreters are not reporters or historians, searching out the facts of the past. They are creators of meaning.¹⁵¹

This view of statutes is not necessarily inconsistent with an originalist approach. A thoughtful archeologist recognizes that the profession is not about just digging up old pots; it is concerned with recreating and understanding the culture of which the pots are evidence. That is, the archeological process can attempt to give meaning to artifacts, rather than simply put them in a museum.

Thus a nautical approach must offer something more than simply a

150. See R. DWORKIN, *supra* note 26, at 313, 348-50.

151. See Witherspoon, *The Essential Focus of Statutory Interpretation*, 36 IND. L.J. 423, 441 (1961):

[T]he court is not an interpreter whose function is merely to discover the historical meaning of language used in statutory rules and to apply these rules as so interpreted to individual cases. More accurately the court is engaged in assignment of meaning to statutes or in making statutes meaningful for administration. This involves attribution of purpose to statutes and in discovery, or more accurately, development and evolving of statutory principles in light of these purposes and relevant administrative standards.

richer description of statutory interpretation. It must defend present-mindedness. To do so, it can begin with some very simple ideas that are universally recognized. Law is a tool for arranging today's social relations and expressing today's social values; and we fully expect our laws, no matter when enacted, to speak to us today. Statutes compiled in the United States Code are not color-coded based on date of enactment. Each is viewed as a present statement of the law and treated as such. When a person who has suffered racial discrimination in employment goes to federal court for relief, section 1981 and Title VII of the Civil Rights Act of 1964 are of equal authority in remedying civil rights violations even though the latter statute was enacted almost a century later. Charles Curtis has described how the past and present come together as follows:

As soon as a statute is enacted, it joins the rest of the law, and together with all the rest it speaks to the judge at the moment he decides the case. When it is enacted, to be sure, it was a command, uttered at a certain time in certain circumstances, but it became more than that. It became a part of the law which is now telling the judge, with the case before him and a decision confronting him, what he should now do. And isn't this just what the legislature wanted? The legislature had fashioned the statute, not for any immediate occasion, but for an indefinite number of occasions to arise in an indefinite future, until it was repealed or amended.¹⁵²

There is another dimension implicit in a nautical approach beyond simply understanding law as an enterprise that exists in the present. It is the project described by Hart and Sacks of fitting the statute into the current legal system as a whole — what I have called above synchronic coherence.

The case for coherence is based, in part, on traditional legal values of fairness and equality (treating like cases alike) and — perhaps surprisingly — notice (that is, lay persons consulting the statute may be more likely to read it in light of current understandings than by searching out the legislative history and the state of the law at the time of enactment). Most significantly, consistency in the present is important because we recognize that fundamental understandings, such as right and wrong, entitlement, responsibility, fairness, and duty, lie behind every aspect of our legal system. These notions provide a backdrop for legislative and judicial behavior, providing norms to be taken into account in making decisions and standards for judging the appropriateness of decisions. To fit statutes into the overall fabric of the law is to make them reflect, to make them responsive to, these evolving background norms. To the extent that archeological approaches aim

152. Curtis, *supra* note 10, at 415.

at describing another time they risk undermining the moral force necessary to legitimate current positive law.

Finally, there is an important way in which law does more than simply fulfill present-mindedness purposes. As Robert Cover has noted, law creates, and is part of, a normative universe. It is "a bridge linking a concept of a reality to an imagined alternative."¹⁵³ When we decide whether our immigration law excludes homosexuals from the United States, we are implicitly making a statement about the kind of world we live in and want to live in. These judgments are complex and controversial. But we cannot even begin to approach them sensibly through an archeological analysis, which can only present us with images of the past rather than visions of a normative present and future.¹⁵⁴

It must be stressed that an interpretive approach based on a nautical understanding of statutes does not ask an interpreter to keep a statute "up to date" in the sense of predicting how a current legislature would answer the statutory question. The nautical approach suggests a process of interpretation that uses familiar tools of statutory construction — the language, structure, and purpose of a statute, related statutory provisions, and prevailing common law and constitutional norms. What the nautical approach demands is that the process of interpretation be carried out in a present-minded fashion, as if the statute had been recently enacted.

Archeologists would no doubt have a number of criticisms of the defense of a nautical model just sketched. They might begin by charging that it ill-behooves the nonoriginalist to base his or her case on claims about legitimacy. Legitimacy is maintained, the argument might go, not by allowing willful judges to update the law, but by respecting legislative supremacy (and therefore democratic government). This argument, although frequently repeated, strikes me as curious. The archeological claim cannot be that we hope that we are ruled by the meanings of the past; it must be that we would rather be so ruled than subjected to the policymaking of unelected judges.¹⁵⁵ But this is certainly a false dichotomy. Archeological methods are hardly exact and objective; nor, given the ability of legislatures to manipulate legislative history, are they guaranteed to represent majority

153. Cover, *The Supreme Court 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

154. See J.B. White, *supra* note 13, at 266-67.

155. One aspect of updating may well be viewed as unfair or illegitimate: to apply a new rule to a transaction that was crafted under an earlier reading of the statute. Notions of fair notice and reliance run deep in our law. But these concerns can be handled within a nonarcheological model by giving altogether new interpretations prospective effect.

views of the legislature or the electorate. Furthermore, as the example above tries to show, nautical interpretation is not unconstrained judicial activity. It does not ask the interpreter to undertake the legislative task of devising public policy. It is a demand that the interpretive process be present-minded.

Few would deny that we expect our laws to be up to date and as consistent as possible with other laws and with underlying legal and moral principles. Indeed, we accept nonoriginalism in constitutional law for precisely these reasons, even though there the expectations ignored are those of a supermajority of the states as well as a majority of both houses of the federal legislature. Constitutional nonoriginalism is all the more striking when one factors in the difficulty of "correcting" a decision by the Supreme Court. Of course, some Justices and commentators condemn the Court's excursions into nontextual analysis.¹⁵⁶ And much of the current support for constitutional originalism is based on a desire to rein in overzealous judges.¹⁵⁷ But these complaints about constitutional interpretation — whatever their merit — do not apply with much force in statutory interpretation.

It is crucial to see that while nautical models of statutory interpretation may be openly *nonarcheological*, they are not *nontextual*. The approach suggested here, similar to other nautical approaches, attributes meaning to printed words written by the enacting legislature.¹⁵⁸ Ultimately the question is, what is the most plausible meaning today *that these words will bear*. Of course, this calls for judgment, and interpreters have a wide range of sources they may consult. Nonetheless, the fact that the statute is written — at least as measured against the range of possible actions that may be taken to solve a social problem — provides a significant restraint on judges.

Other objections can be lodged against my defense of nautical approaches. One may question whether our legal system is or ever can be fully coherent. Critical legal scholarship has powerfully demonstrated that in virtually every area of law, inconsistent or contradictory background principles fight for dominance. To find coherence may be simply to privilege one underlying principle over another,

156. E.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976).

157. E.g., Address of Attorney General Edwin Meese III before the American Bar Association, July 9, 1985, reprinted in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (Federalist Society, 1986), at 9 ("A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.").

158. Thus, relevant constitutional analogy is not *Roe v. Wade*, 410 U.S. 113 (1973), but *Reed v. Reed*, 404 U.S. 71 (1971) (expanding coverage of Equal Protection Clause beyond race to gender).

often in service of existing social relationships that distribute power. But on the level of resolving disputes, it may well be possible to identify which of the competing principles is currently salient in the legal system as a whole. For example, in the *Patterson* case, we can readily identify two conflicting norms of our legal system: an anti-discrimination norm and a freedom of association norm. Yet there can be little doubt that in today's world the anti-discrimination norm trumps the associational norm in the employment context.

It might also be claimed that a nautical approach sacrifices the benefits of an interpretive tradition: rather than trying to connect up to a historical chain of interpretations, a nautical approach will plunk down present-minded interpretations helter-skelter with no respect for the smooth, evolutionary development of legal doctrine. This criticism, however, neglects the extent to which the past is reflected in the present. "We shall have a false view of the landscape," Cardozo wrote, "if we look at the waste spaces only, and refuse to see the acres already sown and fruitful."¹⁵⁹ The synchronic coherence sought by a nautical interpreter will take into account existing and well-established doctrines which will necessarily be represented in the current legal landscape. Furthermore, nautical models are not likely to create great instability and unpredictability in the law. To be sure, nonoriginalism produces doctrinal change, but both the common law and constitutional law seem to achieve both a reasonable degree of certainty and an ability to respond to new social conditions. It is not obvious why statutory law could not do the same.

So far, I have tried to build a case for a nautical model of statutory interpretation. The approach I have sketched would treat statutes as if they were enacted yesterday and would refuse to make the search for original intent the central interpretive task. This is not, however, a complete theory of statutory interpretation. I have not considered the role that reliance, legislative acquiescence, *stare decisis*, the age of a statute, or agency action ought to play. Nor have I discussed how one can make coherent a statute whose parts have been interpreted at different times under different conditions. These topics must await another day. My limited purpose is to demonstrate that one can, and should, start the interpretive analysis in the present, not the past.¹⁶⁰

159. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 129 (1921).

160. An additional question is how my approach would apply to *recent* statutes. It should be evident that I share the concerns of Justice Scalia about legislative history (abuse by the legislatures and overuse by the courts); thus I would try to understand a statute primarily based on its words, structure and other aspects of the legal and social context. This is what I tried to do in the example in the text in the previous section.

IV. CONCLUSION: RECONSIDERING *RUNYON*

In *Brown v. Board of Education*, the greatest civil rights case of modern constitutional law, Chief Justice Warren wrote, "In approaching [segregation in public schools] we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was written, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."¹⁶¹

There is a wonderful, appropriate, double meaning in Warren's language. The briefs on reargument in *Brown* had displayed the predictable difference of opinion about the original intent of the Fourteenth Amendment;¹⁶² and Warren's opinion noted that while the original "sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive."¹⁶³ Thus, the Court is *unable* to turn the clock back.

But perhaps more importantly, the "cannot" has a normative sense. It would be *wrong* to decide a case of such fundamental importance—a case that penetrates to the core of a society's moral fiber—based on the views of another century. The constitutional law of race discrimination must speak to us (and about us) today. As has been repeatedly noted in this article, nonoriginalism is well-ingrained in constitutional law. Indeed, the lesson of the defeat of the nomination of Robert Bork to the Supreme Court may be that an originalist jurisprudence is inconsistent with popular understandings of the norms for constitutional adjudication.

A nautical model of statutory interpretation makes the same claims against an archeological theory of statutory meaning. Agreeing with the Realists of half a century ago, the model seriously doubts the coherence of a concept of "original intention"; and like the new plain meaning, it is concerned about current legislative practice that occurs in an intentionalist world. Yet it accepts neither the solution of policy analysis nor "plain meaning." Nautical models see interpreters as supplying important direction to the development of law in a complex,

161. 347 U.S. 483, 492-93 (1954).

162. John W. Davis, who reargued *Brown* on behalf of the school boards, summarized the differing conclusions about original intent as follows:

Now, your honors then are presented with this: we say there is no warrant for the assertion that the Fourteenth Amendment dealt with the school question. The appellants say that from the debates in Congress it is perfectly evident that the Congress wanted to deal with the school question, and the Attorney General, as a friend of the court, says he does not know which is correct. So your honors are afforded a reasonable field for selection.

Quoted in R. KLUGER, *SIMPLE JUSTICE* 671 (1975).

163. 347 U.S. at 489.

changing society. Courts (and agencies) serve, but are not subservient to, legislatures. Together, drafters and interpreters create a legal system.

The theory of statutory interpretation proposed here suggests a fairly clear answer to the question on which the Court has requested reargument in *Patterson*. Let's put the issue of stare decisis to the side by assuming that *Runyon* had not been decided, and see how the nautical approach would analyze the issue of whether section 1981 applies to private action.

Section 1981 provides: "All persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

The "plain" language of the section (not surprisingly) does not answer the question of whether it applies to acts of private discrimination. It is arguable that use of the word "right," combined with the kinds of discrimination prohibited (involving legal proceedings), suggests a "state action" limitation. But the language of the statute may be contrasted with the Fourteenth Amendment ("nor shall any State . . . deny") and other civil rights statutes that are clearly limited to governmental discrimination. For example, section 1983 provides, "Every person who, *under color of any statute, ordinance, regulation, custom, or usage of any State*, . . . [deprives a person] of any rights, privileges or immunities . . . shall be liable to the party injured . . ."¹⁶⁴ On the other hand, other civil rights laws appear, on their face, to cover acts of private discrimination. The public accommodations section of the 1964 Civil Rights Act states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race."¹⁶⁵ The language of section 1981 seems to fall between these poles.

What purposes can be attributed to the protections afforded by the statute? When combined with section 1982, the provision seems quite clearly aimed at guaranteeing that race not be a factor that prevents blacks from participating in society, living and working, on the same terms as whites. To be sure, such restrictions may be the product of official action, and modern civil rights laws would be justified in condemning such conduct. But it is also clear that private discrimination

164. 42 U.S.C. § 1983.

165. 42 U.S.C. § 2000a.

puts tremendous obstacles in the way of opportunities for minorities. Would it be sensible for the scheme of civil rights laws today to set its face against public but not private discrimination?

Certainly the evidence runs the other way. The 1964 and 1968 Civil Rights Acts expressly attacked private discrimination in public accommodations, employment and housing. And the Supreme Court has made clear that private discrimination in some contexts is wholly inconsistent with public policy. In *Bob Jones University v. United States*, the Court upheld a ruling of the I.R.S. that denied tax-exempt status to a private school that practiced racial discrimination.¹⁶⁶ “[E]ntitlement to tax exemption,” wrote Chief Justice Burger, “depends on meeting certain common law standards of charity — namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.” Recognizing that “determinations of public benefit and public policy are sensitive matters with serious implications for the institution affected,” the Court adopted a test quite favorable to the entity seeking tax-exempt status: “a declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to fundamental public policy.” Nonetheless, the Court had no trouble concluding that racial discrimination in education violates “deeply and widely accepted views of elementary justice” and “fundamental national policy.”¹⁶⁷

Few could deny that ending racial discrimination — both public and private — is fundamental national policy.¹⁶⁸ But it might be claimed that reading section 1981 to cover acts of private discrimination would upset the carefully crafted scheme (including complex enforcement provisions) that Congress has enacted in recent years prohibiting only certain discriminatory conduct. For example, in the employment context, section 1981 has been interpreted to permit recovery of damages not authorized under Title VII, such as punitive damages and damages for mental distress.¹⁶⁹ Whatever merit this argument has in areas specifically covered by recent detailed civil rights laws,¹⁷⁰ it would be wrong to allow it to determine the broader ques-

166. 461 U.S. 574 (1983).

167. 461 U.S. at 586, 592, 593.

168. 461 U.S. at 595 (“Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination . . .”).

169. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (punitive damages); *Williams v. Trans World Airlines*, 660 F.2d 1267, 1272-73 (8th Cir. 1981) (damages for mental distress).

170. This is not to suggest that the mere existence of a specific statute automatically limits coverage of a general civil rights statute. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409,

tion of whether section 1981 reaches any private discrimination. There are large areas of private commercial activity not regulated by civil rights laws enacted in this century. Nothing in the 1964 or 1968 Civil Rights Acts would condemn a day care center's decision to deny a place to a black child, a private nursing home's policy of not admitting black patients (provided neither received federal funds), or a bookshop's refusal to serve customers on the basis of their race.¹⁷¹ My guess is that these gaps in protection would startle most Americans; most would believe that such conduct "must be against the law."

Runyon provides a particularly important example. There, the plaintiffs challenged discriminatory admissions policies of private schools set up in the 1950s to avoid the mandate of *Brown*. No other federal civil rights law condemned the private discrimination. The Court's holding that section 1981 prohibits such discrimination is an important reaffirmation of the goal of guaranteeing equal educational opportunity.¹⁷²

It is, therefore, apparent that reading section 1981 (and section 1982) to apply to private discrimination is fully consistent with the warp and woof of our current legal system and social norms condemning racial discrimination.¹⁷³ A conclusion that such discrimination is not forbidden would leave significant gaps in civil rights protection and represent a marked step backward in the battle against racism. This is not to say that the Court is empowered to pass statutes to combat evils that Congress has left uncorrected. But when a statute is open to two interpretations, only one of which fits well within the overall scheme of our current laws, that interpretation ought to be preferred.

Finally, recent congressional action seems predicated on the assumption that the statute condemns private discrimination.¹⁷⁴ Irre-

416-17 (1968) (enactment of Fair Housing Act of 1968 does not prevent application of § 1982 to private discrimination in housing).

171. Section 1981 claims have challenged discrimination in private schools, restaurants, clubs, recreational facilities, housing, utility services, access to roads, insurance coverage, medical treatment, commercial ventures, franchise relationships, and banking transactions. See Brief Amici Curiae of the State of New York, *et al.*, *Patterson v. McLean Credit Union* (No. 87-107) at 17-18.

172. *Bob Jones University*, of course, represents another battle in the long struggle to end discrimination in education. In words that are equally applicable in *Runyon*, the Court stated: "Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy." 461 U.S. 574, 595 (1983).

173. This point is stressed by a number of the amici briefs filed in *Patterson*. See, e.g., Brief of 66 Members of the U.S. Senate and 118 Members of the U.S. House of Representatives at 5-7; Brief of American Jewish Congress at 18-20; Brief of the State of New York *et al.*, at 8-21.

174. See Brief for Petitioner on Reargument, *Patterson v. McLean Credit Union* (No. 87-107) at 71-100; Eskridge, *supra* note 93.

spective of arguments of "congressional ratification," such action helps define the legal fabric into which the Court must weave section 1981.

I have not said anything about original intent. While Justice White's dissent in *Runyon* convinced many that the majority's decision violated the intent of the enacting legislature, the brief for the petitioner on reargument makes White's analysis far less persuasive. Under my nautical approach, however, the Court need not be overly concerned about the historical debate. It might be interested that some legislators at the time thought the language covered private discrimination; this finding would at least support the conclusion that the words of the statute can bear that meaning. But the Court would not have to decide whether a majority of the legislators thought the statute applied to private acts.

These considerations would point towards the conclusion that, under a nautical approach, section 1981 ought to be read to prohibit private discrimination. When concerns of stare decisis are factored in, the case for maintaining *Runyon* becomes very strong indeed.

* * * *

"Better be prophetic than archaeological," Charles Curtis wrote. "[B]etter pay a decent respect for a future legislature than stand in awe of one that has folded up its papers and joined its friends at the country club or in the cemetery. Better that the courts should set their decisions up against the possibility of correction than make them the shadow of a fiction which amounts to a denial of any responsibility for the result."¹⁷⁵ Justice Stevens assumed responsibility when he declared in *Runyon*, that whether or not the Reconstruction Congress thought its legislation covered private discrimination, such an interpretation "surely accords with the prevailing sense of justice today."¹⁷⁶

175. Curtis, *supra* note 10, at 415. Curtis continued:

Let the courts deliberate on what the present or a future legislature would do after it had read the court's opinion, after the situation has been explained, after the court has exhibited the whole fabric of the law into which this particular bit of legislation had had to be adjusted. The legislature would then be acting, if it did act, in the light of the tradition of the whole of law, which is what the courts expound and still stand for.

Id. at 415-16.

176. 427 U.S. at 191.