1995

The Modern Parol Evidence Rule and its Implications for New Textualist Statutory Interpretation

Stephen F. Ross
Penn State Law

Daniel Trannen

The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation

STEPHEN F. ROSS AND DANIEL TRANEN*

The "New Textualist" movement in statutory interpretation seeks to exclude from judicial consideration what could be termed extrinsic evidence of legislative intent. The primary source of this extrinsic evidence is a statute's legislative history, such as committee reports, floor debates, sponsor statements, and other indicia of legislative intent not included in the text of the statute.[1] New Textualists reject the notion that judges should seek out the statute's intended meaning from these sources. Rather, they believe that judges should give the statute the meaning that would be attached to the textual language by an ordinary speaker of English.[2] The movement's best-known advocate, Justice Antonin Scalia, has clearly stated that the most prominent and practical reason for textualism is that "under the guise or even the self-delusion of perusing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires."[3] Scalia concludes that on balance the use of legislative history "has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law."[4] Although there are other, more formalist arguments in favor of textualism,[5] Justice Scalia makes clear that even these ostensibly formalist arguments are really functional, for they serve to ensure a "government of laws, not of men,"

---

* Professor of Law, University of Illinois; B.A., J.D., University of California (Berkeley). Associate, Goldstein and Price, L.C. (St. Louis); B.A., University of Pennsylvania, J.D., University of Illinois, respectively. The authors wish to thank Professors Ian Ayres, James Brudney, William Eskridge, Jr., Daniel Farber, Kit Kinports, Russell Korobkin, Peter Maggs, John Nagel, William Popkin, Marie Reilly, Richard Speidel, and Peter Strauss and Judges Alex Kozinski and Patricia Wald for extremely valuable comments and suggestions on an earlier draft. Valuable assistance, of course, does not necessarily signal agreement.

1. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). Eskridge's article publicly coined the term.

2. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

3. SCALIA, *supra* note 1, at 17-18. The key to New Textualism is not its rigid insistence on text-based interpretation. Indeed, as detailed below in text accompanying notes 138-53, New Textualists use a host of presumptions and engage in a "holistic textualism." *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 41-47 (1994). Rather, what distinguishes New Textualism is its rigid insistence on an "objective" interpretation, which, as we suggest in this article, is objective only in the sense that it rejects the relevance of the objective manifestations of the subjective intent of the statute's drafters as an integral part of the interpretive process.

4. SCALIA, *supra* note 1, at 35.

5. The formalist argument is that legislative history has not been passed by both houses of Congress and presented to the President, and it is therefore unconstitutional to give it legal effect. *See, e.g.*, *In re* Sinclair, 870 F.2d 1340, 1343-44 (7th Cir. 1989); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997). We discuss this at *infra* text accompanying notes 169-78.

by reducing judicial discretion.[6]

The claim that judicial discretion is constrained by textualism but facilitated by the use of extrinsic interpretive aids such as legislative history is highly contested. For example, two well-known commentators whose backgrounds include extensive legislative experience—Judge Abner Mikva and Professor Eric Lane—completely disagree with Justice Scalia on this fundamental point. As Mikva and Lane observe, when legislative history is excluded, the remaining interpretive tools available to a judge "effectively permit unfettered discretion."[7] Some support for Mikva's and Lane's argument can be gleaned from the candid opinions of commentators whose principal focus is *not* statutory interpretation. Senator Orrin Hatch, a conservative who rails against left-wing "judicial activism," has endorsed reliable forms of legislative history because these references can serve as "additional strands to tie judges to the law itself," notwithstanding the risk of manipulation.[8] On the other hand, support for Scalia's legisprudential goal of textualism comes candidly from a leading advocate of an activist jurisprudence that Scalia purports to abhor. Professor Jerry Mashaw, who expresses sympathy for the view that judges should interpret statutes not as a faithful agent for the legislature that actually voted on the legislation, but rather as an agent for an idealized body cured of "republican legislative malfunctions," has commended New Textualism and criticized authoritative reliance on legislative history.[9] According to Mashaw, "the exclusion of legislative history is more likely to increase the flexibility of statutes than to render them static or rigid."[10] When Mashaw speaks of "flexibility," he of course means flexibility in the hands of the interpreting judge.

When judges do not use extrinsic aids, what are the consequences, in terms of the extent of judicial power, the influence of a judge's personal perspective on the case, and the drafters' ability to effectuate their own policy preferences through agreement on a text? Justice Scalia and his followers are not the first to advocate the exclusion of these proffered indicia of the writers' intent. Approximately half a century ago, virtually the same arguments were made by Professor Samuel Williston and other defenders of the First Restatement of Contracts, who sharply criticized the admissibility of parol evidence to assist judges and juries in interpreting contracts. Like Scalia, Williston argued that judges should

---

6. SCALIA, *supra* note 1, at 25. Another leading textualist, Judge Frank Easterbrook, seems to emphasize the formalist objection, although he too adds that textualism "cuts down the amount of judicial discretion, for judges free to bend law to 'intents' that are invented more than they are discovered become the real authors of the rule." Herrman v. Cencom Cable Assoc., 978 F.2d 978, 982 (7th Cir. 1992).

7. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 33 (1997).

8. Orrin Hatch, *Legislative History: Tool of Construction or Deconstruction*, 11 HARV. J.L. & PUB. POL'Y 43 (1988).

9. Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 836 (1991).

10. Jerry L. Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1692-93 (1988).

rely instead on the plain meaning of the text as understood by a "reasonable" third party.[11]

Williston's advocacy of a broad and exclusionary parol evidence rule was sharply criticized by other leading contracts scholars, most notably Professor Arthur Corbin. Corbin rejected the notion that extrinsic evidence would taint the reliability of interpretation by giving judges or juries free rein to reach results they felt were desirable, even if such results were not faithful to the terms of the contract. Indeed, the opposite result was more likely. As Corbin argued:

> when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience.[12]

Corbin's view that extrinsic evidence *reduces* the influence of a judge's personal biases, and thus results in a more accurate interpretation of the words written by the drafters, has been widely accepted in contract law. Both the Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts reflect that

---

11. Williston candidly recognized that, when interpreting a contract, "it is not the intention of the parties that is material, but the meaning that the court gives to their manifestations." 3 SAMUEL WILLISTON & GEORGE G. THOMPSON, WILLISTON ON CONTRACTS § 603, at 1731 (rev. ed. 1936) [hereinafter WILLISTON]. The appropriate standard for most contracts, he concluded, is that of "reasonable expectation, which would attach to words or other manifestations of intention the meaning which the party employing them should reasonably have apprehended that they would convey to the other party." *Id.* at 1732. As his editorial successor explained:

> As applied to contracts and agreements, interpretation is the process of determining from the expressions of the parties what external acts must happen or be performed in order to conform to what the law considers their will. But it is pertinent to note at the outset that if the parties [have a written contract], the law does not recognize their will, or, as it is more frequently stated, their intent, unless it is expressed in, or may be fairly implied from, their writing.

4 WALTER H. E. JAEGER, WILLISTON ON CONTRACTS § 600A, at 286 (3d ed. 1961) [hereinafter JAEGER/WILLISTON].

This position has recently been echoed in *Trident Center v. Connecticut General Life Insurance Co.*, 847 F.2d 564, 569 (9th Cir. 1988). Bound under *Erie* to apply the prevailing California law that freely admits parol evidence (see *infra* text accompanying notes 36-37) to a contract case that appeared in federal court because of diversity, the court reversed a district court judgment that had excluded such evidence, but not before the opinion's author, Judge Alex Kozinski, openly questioned the wisdom of California's approach:

> If [parol] evidence raises the specter of ambiguity where there was none before, the contract language is displaced and the intention of the parties must be divined from self-serving testimony offered by partisan witnesses whose recollection is hazy from passage of time and colored by their conflicting interests. We question whether this approach is more likely to divulge the original intention of the parties than reliance on the seemingly clear words they agreed upon at the time.

Trident, 847 F.2d at 569.

12. Arthur L. Corbin, *The Interpretation of Words and the Parole Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965).

view.[13]

Our principal argument focuses on the applicability of key aspects of the anti-Willistonian critique of objectivity to statutory interpretation. Specifically, we suggest that, in both free markets and free countries, the effective drafting of documents is facilitated when judges seek—subject to justifiable exceptions—to effectuate the parties' intent;[14] that the rejection of extrinsic aids inevitably increases rather than decreases the ability of judges to effectuate their own personal preferences at the expense of those of the documents' drafters; and that excluding extrinsic evidence results in a shift of power from private parties or legislators (as the case may be) to judges.

We do not suggest, of course, that the jurisprudence of interpretation should be identical without regard to the text involved. An analysis of the differences between drafting and interpretation in the contract and statutory contexts, however, suggests that the case for the conventional practice of considering legislative history absent a clear manifestation of legislative intent to the contrary is even stronger than the case for admitting parol evidence absent a similar manifestation of contrary intent by the contracting parties.[15]

---

13. *See* E. ALLEN FARNSWORTH, CONTRACTS 471 (1990); Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13, 14 (1981) (indicating most significant change from original Restatement "is an increased emphasis on the context in which a contract is made and on the meanings attached by the parties to their words and conduct"). Ironically, Justice Braucher, writing just before the onset of New Textualism, suggested that the outmoded textualist techniques of the original Restatement reminded him of the plain meaning rule, which he characterized as "now largely discarded in the realm of statutory interpretation." *Id.*

Corbin's view is also reflected in Article 8(3) of the Convention on the International Sale of Goods, which provides that negotiations are to be considered in interpreting international commercial agreements unless the parties agree otherwise. *See* John F. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention of Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 44 (1988) (stating that the CISG rejects parol evidence rule).

14. *See* Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1127 (1994) (arguing that major goal of contract law "is to facilitate the power of self-governing parties to further their shared objectives"). *See also* James M. Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 886 (1930):

> The Anglo-American scheme of government conceives of lawgivers apart from and at times paramount over courts. Such a function, commonly vested in a legislature, presupposes an intelligible method of making known to the organs of administration, courts or otherwise, its desires and hopes. That method centuries ago crystallized into the formalism of passing statutes. It is from such a conception that one derives the rule of statutory interpretation emphasizing the intent of the passer of statutes.

15. This article is solely concerned about the wholesale attack on the use of legislative history as an objective manifestation of legislative intent. Just as Professor Corbin recognized that judges should admit, but then reject as unconvincing, unreliable parol evidence, *see* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 583, at 465 (2d ed. 1960) [hereinafter CORBIN], we believe that judges must be sensitive to the use and abuse of legislative history. *See* MIKVA & LANE, *supra* note 7, at 33 (1997) ("[w]hat seems in order is not the avoidance of legislative history but its careful use"); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (arguing textualists should "claim victory once they have made judges more sensitive to problems of the abuse of legislative history; they ought not to condemn its use altogether.").

To be sure, recognition of the strong analogy between contract and statutory interpretation does not provide a complete response to New Textualists, but the analogy does significantly call into question two of the more popular textualist arguments: that textualism promotes a more objective and reliable interpretive regime, and that textualism lessens the ability of unelected judges to frustrate the policy preferences of the legislature.[16]

Part I of this article focuses on the history of parol evidence in contract interpretation, describing both Williston's and Corbin's definition and application of the parol evidence rule. With the adoption of the UCC and the Second Restatement, we suggest that Corbin's position—that expansion of admissibility of parol evidence will more accurately reflect the drafters' manifest intentions and minimize the judge's personal biases—has been accepted by experts and legislators alike. In Part II, we summarize the use of legislative history in statutory interpretation, focusing on the rise of the New Textualism and its critique of the use of legislative history in statutory interpretation. Our analysis reveals that interpretation based on a judge's view of a text's "ordinary meaning" combined with the use of interpretive canons does not seriously constrain judicial discretion. Part III compares and contrasts the use of parol evidence in contract interpretation with the use of legislative history in statutory interpretation. We identify differences that actually strengthen the argument for extrinsic aids as a means of limiting the effects of judicial bias in statutory interpretation, and differences that do not affect the strong analogy between contract and statutory interpretation; we then conclude with a response to formalist objections to the use of legislative history.

I. EXTRINSIC EVIDENCE IN CONTRACT INTERPRETATION

A revolution in the use of parol evidence in interpreting contracts occurred nearly fifty years ago. Professor Samuel Williston, the principal drafter of the Restatement (First) of Contracts and the Uniform Sales Act, believed that contracts should be interpreted in much the same manner as the New Textualists interpret statutes today. Williston argued that parol evidence—evidence of

16. This article does not address the normative claim that judges should interpret contracts to further their own vision of an efficient marketplace, or an equitable marketplace, or some combination of the two; nor do we address the normative claim that judges should interpret statutes to further their own vision of a just society. We would suggest, however, that arguments for judicial activism are best made and effectuated openly, and on their own merits. For example, if contract law ought to protect unsophisticated consumers from wealthy and sophisticated corporate manufacturers, we suggest the preferred course is a substantive contract rule that insists upon minimum standards of the merchantability of goods, rather than interpreting particular contract terms in a manner designed to achieve these results while claiming to be simply interpreting the meaning of the text. Similarly, whether statutes should be interpreted to protect state prerogatives in our federal system, or instead construed to protect the interests of disadvantaged and politically powerless citizens, the preferred course is to explicitly create presumptions in favor of these interpretations, rather than have these judicial biases seep into a purported effort to give meaning to the "four corners" of a text. *cf.* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 739 (1992).

contemporaneous agreements and negotiations about the contract and the meaning of its terms, including evidence of trade usage and other gap-fillers—should not be admissible to explain the parties' intentions or to vary or contradict the plain meaning of the agreement (unless, in the judge's view, a reasonable person would view the writing, on its face, to be ambiguous or incomplete). As contract and commercial law doctrines were being re-examined by the American Law Institute and the uniform law movement, this view on the proper use and admissibility of parol evidence was replaced by the views of Arthur Corbin, Karl Llewellyn, and other scholars who advocated that parol evidence be admitted so that a writing could be interpreted according to the actual intention of the parties, notwithstanding the "objective" meaning that a judge might attach to the words.[17] This view has been adopted in the Restatement (Second) of Contracts, and the UCC, as well as by a number of jurisdictions.[18]

A. INTERPRETATION OF CONTRACTS AND THE PAROL EVIDENCE RULE ACCORDING TO WILLISTON

For Professor Williston, contract interpretation was a rigorous and mechanical exercise in which a judge followed a hierarchy of rules. Although the judge was nominally to follow the intent of the parties to the contract,[19] Williston believed that the language of the contract was the only admissible evidence of the parties' intent.[20] In fact, he argued that the law did not recognize intent unless memorialized in the agreement either expressly or impliedly.[21] Consequently, although Williston professed to follow the intent of the parties, a contract under his view had nothing to do with the actual intent of the parties; rather, it was an obligation attached by the force of law to a text agreed to by the

17. *See* Interform Co. v. Mitchell, 575 F.2d 1270, 1277 (9th Cir. 1978). The court noted that the UCC's version of the parol evidence rule "reflects Corbin's influence," which is on "the intentions of the parties and not the integration practices of reasonable persons acting normally and naturally," the contrasting view advocated by Williston. The court concluded that the relevant law "being, in its relevant parts, infused with Corbin's spirit, the trial judge in this case was acting within both its spirit and letter when he admitted evidence extrinsic to the purchase orders to determine whether the transaction was a sale or a lease." *Id.*

The modern view retains the traditional standard that parol evidence may not "vary or contradict" the written contract. However, the reformist emphasis on the parties to the transaction, rather than the judge's view of "reasonable" people, has resulted in a much narrower concept of what varies or contradicts a text. Specifically, the modern view admits extrinsic evidence to demonstrate that the parties attached a particular meaning to a textual term, even if the judge would otherwise believe the term to have a different, unambiguous meaning. *See* U.C.C. § 2-202 cmt. 1(c) (stating that "[t]his section definitely rejects. . . . [t]he requirement that a condition precedent to the admissibility of . . . [parol evidence] is an original determination by the court that the language used is ambiguous."). Williston would, in these circumstances, conclude that the parol evidence "contradicted" the text.

18. *See infra* notes 37-40 and accompanying text.

19. *See* WILLISTON, *supra* note 11, §610. *See also* JAEGER/WILLISTON, *supra* note 11, § 600, at 284-85.

20. *See* WILLISTON, *supra* note 11, § 610, at 1752.

21. *See id.* at 1755. The point is restated more clearly in JAEGER/WILLISTON, *supra* note 11, § 600A, at 286.

parties. In other words, Williston believed that the parties' written expression of intent was, in most cases, the only relevant evidence of objective intent, and that this limited conception of objective intent should govern the judicial enforcement of contracts.[22]

According to Williston, the search for the intent of the parties required the judge to follow the "common or normal meaning" of the agreement's text.[23] The presence or absence of ambiguity, therefore, was determined by looking at the language; if the judge found the language unambiguous, the inquiry stopped. Absent evidence of local usage or meaning, the judge, reading the contract as a whole, need deploy nothing more than *his own* common sense regarding ordinary usage.[24]

If, after employing these rules, the judge was still unsuccessful in discovering which of the parties' alternative meanings ought to govern the contract, Williston called upon judges to use "secondary" canons of interpretation, which did not inquire as to the actual intent of the parties, but instead reflected generalizations about the use of language and judicially-created normative views about how contracts ought to be drafted.[25] As we shall see, many of the primary and secondary rules of contract interpretation bear a striking similarity to the textualist canons of statutory construction.[26] The Willistonian process thus resulted in the judge rarely allowing evidence that the parties had actually agreed to a particular meaning to affect his judgment that the words meant something else.[27]

Williston's views on the parol evidence rule are reflected and explained in the American Law Institute's Restatement (First) of Contracts. According to the First Restatement, the standard for interpretation of a contract reflecting the parties' complete bargain (an integration) is "the meaning that would be

---

22. *See supra* note 11. *See also* Hotchkiss v. National City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, J.); OLIVER WENDELL HOLMES, THE COMMON LAW 242 (Mark DeWolfe Howe ed., 1963).

23. WILLISTON, *supra* note 11, § 618, at 1777.

24. *See id.* at 1777-80. *See also, e.g.*, BBCI Inc. v. Canada Dry Del. Valley Bottling Co., 393 F. Supp. 299, 301 (E.D. Pa. 1975) (stating that "[t]he question of whether its provisions are ambiguous or obscure on the one hand, or unambiguous and clear on the other hand, is a question of law for the Judge"); Easton v. Washington County Ins. Co., 137 A.2d 332, 336 (Pa. 1957) (stating that only "after the court is satisfied that a latent ambiguity exists is the question of what the parties intended by language used in the contract—taking into consideration the extrinsic facts and circumstances—an issue to be submitted to the jury").

25. WILLISTON, *supra* note 11, at 619-26. The secondary rules included such canons as: construe so as not to conflict with the main purpose of the contract; pay attention to grammar and punctuation; the specific governs the general; construe against the drafter; written matter trumps printed matter; and prior clauses trump latter clauses. Williston also employed the interpretive maxim *noscitur a sociis* (words should be given a meaning consistent with surrounding words), *id.* at 618, a technique common to statutory interpretation as well. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 233-34 (1975). *See also, e.g.*, Heathman v. Giles, 374 P.2d 839, 839 (Utah 1962) (holding that statute covering "any sheriff, constable, peace officer, state road officer, or any other person charged with the duty of enforcement of the criminal laws of this state" did not apply to prosecutor but intended to cover only "badge-carrying officers" who were "in the front line of law enforcement").

26. *See infra* text accompanying notes 75-79.

27. *See generally* cases collected and criticized in CORBIN, *supra* note 15, at 542.

attached to the integration by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, *other than oral statements by the parties of what they intended it to mean.*"[28] Again, as in Williston's treatise, the actual meaning intended by the parties is irrelevant to the court and inadmissible to the jury. The reading of the objective "reasonably intelligent person" standard replaces the actual intent of the parties, even though that meaning may not have been anticipated by one or both parties.[29] In the end, extrinsic evidence was admissible to aid the court in interpreting obscure words to which a reasonably intelligent individual could not ascribe any plain meaning, but not admissible to prove the actual intent of the parties.

B. THE EVOLUTION OF THE PAROL EVIDENCE RULE UNDER CORBIN

Foreshadowing the debate between Justice Scalia and his critics, Professor Arthur Corbin criticized the Williston approach for failing to accurately effectuate the preferences of the contracting parties and for unduly favoring judges' views on how "reasonable" contracts ought to look. Williston contended that reference to parol evidence was inappropriate if a contract appeared to be "integrated" (that is, to reflect a complete bargain between the parties) by virtue of having all the necessary ingredients. Corbin rejected this approach. He insisted that the document itself could not be used as the sole evidence of the parties' intent to have the document represent their bargain, and that all relevant evidence should be admitted when determining whether the agreement was an integration.[30] This evidence is especially needed because determination of the meaning of the text often will establish that the parties did not simply agree to the words, but to the meaning of the words. In his view, flimsy and improbable evidence as to whether a writing was integrated should be treated as flimsy and improbable rather than automatically excluded from consideration.[31]

Critical to our analysis is Corbin's reliance on the manifest intent of the actual parties, rather than a "reasonable person" standard, in interpreting contracts. Williston feared that without the latter standard, parol evidence would be admitted and the writing would be varied or contradicted. The two scholars fundamentally disagreed about the relative reliability of a judge's ability to interpret the four corners of a contract and the jury's ability to ascertain the manifest intention of the parties from parol evidence. Williston feared that false

---

28. RESTATEMENT OF THE LAW OF CONTRACTS § 230 (1932) (emphasis added).

29. *See id.* at cmt. a. For examples of Williston's "reasonable person" approach, see *Sietz v. Brewers Refrig. Mach. Co.*, 141 U.S. 510, 517 (1891) (refusing to consider surrounding circumstances where written contract was in all respects definite and unambiguous); *Caputo v. Continental Constr. Corp.*, 162 N.E.2d 813, 815 (Mass. 1959) (considering surrounding circumstances in determining whether writings in question state entire agreement); *Danielson v. Bank of Scandinavia*, 230 N.W. 83, 86 (Wis. 1930) (same); and *Mitchell v. Lath*, 160 N.E. 646, 647 (N.Y. 1928) (finding that a reasonable person reading the contract would conclude that reciprocal obligations of parties were fully detailed).

30. *See* CORBIN, *supra* note 15, § 583, at 465.

31. *See id.* § 583, at 465.

or unreliable parol evidence would mislead juries; Corbin believed that the greater risk was that judges would be misled by their own background to inaccurately attach a "plain meaning" to words when the parties intended no such meaning. Corbin wrote:

> Before holding that the words of a written contract are so "plain and clear" that extrinsic evidence in aid of interpretation is not admissible, the court's attention should be called to the fact that in so holding it is substituting [its] own linguistic education and experience for that of the contracting parties.[32]

Once it was conceded that parties might attach a meaning to words that would not coincide with a judge's view of the meaning a reasonable person would attach to those same words, admission of extrinsic evidence would not *change* the writing, as Williston believed. Rather, this evidence would help the interpreter understand the words' actual intended meaning. In other words, a jury cannot change what isn't fixed.[33] As a result, Corbin supported the introduction of all relevant information to aid the court in the interpretation of contracts even if the words were superficially unambiguous.[34]

Because, according to Corbin, the widespread use of parol evidence would prevent judges from substituting their own biases for the meaning that the parties understood each other to manifest when enacting and perfecting their agreement, his approach would not necessarily threaten the integrity of the written contract. The writing itself remains the best evidence of intent.[35] Indeed, because parol evidence more accurately reflects the parties' manifest intent than

---

32. CORBIN, *supra* note 15, § 542, at 111. *See* Meyers v. Selznick Co., 373 F.2d 218, 222 (2d Cir. 1966) (Friendly, J.) (noting "the courts' growing appreciation of Professor Corbin's lesson that words are seldom so 'plain and clear' as to exclude proof of surrounding circumstances and other extrinsic aids to interpretation"). As Corbin wrote, a judge will often be found to say that

> "a court can not make a contract for the parties"; but when it holds the parties bound in accordance with a meaning that seems "plain and clear" to the court and excludes convincing evidence that the parties gave the words a different meaning, it is doing exactly what it can not do: the court is making a contract for the parties that they did not themselves make.

CORBIN, *supra* note 15, § 542, at 111-12.

33. *See id.* § 579, at 421-22 (stating that "[s]uch testimony does not vary or contradict the written words; it determines that which cannot be varied or contradicted"). *Cf.* Breyer, *supra* note 15, at 863 (writing "[a] judge cannot interpret the words of an ambiguous statute without looking beyond its words for the words have simply ceased to provide unequivocal guidance to decide the case at hand").

34. *See* CORBIN, *supra* note 15, at 414-20. *See also* Richard E. Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785, 789 (1982) (citing Arthur L. Corbin, *Book Review*, 30 YALE L.J. 773 (1921) (reviewing SAMUEL WILLISTON, THE LAW OF CONTRACTS (1920))); Arthur L. Corbin, *Book Review*, 29 YALE L.J. 942 (1920) (reviewing SAMUEL WILLISTON, THE LAW OF CONTRACTS (1920)) (Williston placed an excessive reliance on theory not responsive to the actual facts in dispute). *Cf.* United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) (stating that "there certainly can be no 'rule of law' which forbids" use of legislative history, "however clear the [text] may appear on 'superficial examination' ").

35. Corbin suggests that the introduction of apparently contradictory parol evidence is not problematic. He argues that the more bizarre and unusual the asserted interpretation, the more convincing must be the testimony that supports it. *See* CORBIN, *supra* note 15, at 420.

the judge's "objective" review, Corbin's approach *promotes* the integrity of the contract as a means of allowing parties the freedom to effectuate their economic goals.[36]

---

36. The Williston/Corbin debate over integrity of the contract is illustrated by two famous cases that exemplify opposing approaches. In *Gianni v. R. Russel & Co.*, 126 A. 791 (Pa. 1924), an oral agreement made contemporaneous to the writing was determined to be inadmissible because the court deemed the writing a complete integration. The contract was a lease, which included clauses specifying which products could and could not be sold by a tenant/vendor in the lessor's building. Gianni claimed to have reached an oral understanding that in exchange for his agreement not to sell tobacco, the landlord would give him exclusive rights to sell soft drinks in the building. When the landlord permitted another tenant to violate the alleged exclusivity agreement, Gianni sued on the oral promise. Although Gianni had a witness to the oral agreement, this testimony was declared to be inadmissible parol evidence, not only in interpreting the contract, but also in ascertaining that the parties intended the written text to reflect a complete integration of their agreement. This example illustrates how, according to the traditional rule, evidence that a writing was not intended by the parties to be a fully integrated agreement is inadmissible if the judge is comfortable with making a determination on the basis of the writing alone. *See also* WILLISTON, *supra* note 11, § 633, at 1821 (stating that "the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms"); *id.* at 1822 (citing Eighmie v. Taylor, 98 N.Y. 288, 294 (1885) (writing that there is little value to parol evidence rule if extrinsic evidence admissible to show no intent for complete integration)).

In contrast, California Supreme Court Chief Justice Roger Traynor held that rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. *See* Pacific Gas and Elec. Co. v. G.W. Thomas Brayage & Rigging Co., 442 P.2d 641, 645 (Cal. 1966). Thus, the court reversed the trial judge's decision that, because he found the contract to be unambiguous, he would not consider parol evidence that the defendant's contractual promise to "indemnify" the plaintiff against "all loss . . . arising out of or in any way connected with the performance of this contract" was meant to cover only injury to third parties, and not to plaintiff's property. According to both Corbin and Justice Traynor, a judge who relies on the "plain language" is determining the meaning according to the judge's own education and experience. *See id.* at 643 (citing CORBIN, *supra* note 15, § 579, at 225 n.56 (Supp. 1964)).

The facts in these cases illustrate the very point that Corbin and Justice Traynor were trying to make. Consider the reliability of Williston's approach in the context of the *Gianni* case. How can we reconcile the plaintiff's testimony about the separate oral agreement with the court's conclusion that reasonable persons would have included such an agreement in the writing? Three possibilities present themselves. One is that the plaintiff and his corroborating witness were lying. To justify the exclusion of the evidence, of course, Willistonians would need to fear that juries would find for the plaintiff anyway. *See* Charles T. McCormick, *Parol Evidence Rule as a Practical Device for Control of the Jury*, 41 YALE L.J. 365 (1932). Another possibility is that the defendant engaged in fraud (deliberately excluding a critical element in a written contract with a less sophisticated party), but that such fraud is unprovable. Courts have often found for the plaintiff in these circumstances, by making a finding of fraud in the inducement, which is not subject to the parol evidence rule. *See, e.g.*, Wilburn v. Steward, 794 P.2d 1197 (N.M. 1990); RESTATEMENT (SECOND) OF CONTRACTS, § 214(d) & cmt c. *But see* McGuire v. Schneider, Inc., 534 A.2d 115 (Pa. Super. Ct. 1987), *aff'd*, 548 A.2d 1123 (Pa. 1988) (refusing to admit parol evidence regarding fraud in inducement of employment contract). Absent fraud, the last possibility is that the judges were wrong in concluding that reasonable people would necessarily include this side agreement in a writing. Perhaps the parties were unfamiliar with the parol evidence rule. Perhaps, not anticipating later litigation, it was too much trouble to memorialize the side agreement. Perhaps the justices of the Pennsylvania Supreme Court were simply poorly informed as to ordinary business practices. Whatever the truth, the opinion shows a result governed neither by the actual preferences of voluntary parties to a contract nor neutral principles of law, but rather one dictated by judges effectuating their own backgrounds and objectives.

Similarly, in the California case, despite the fact that the language at issue was "classic language for a third party indemnity provision," the trial judge determined for himself that the plain meaning of the language required the defendant to indemnify the plaintiff as well as third parties. *Pacific Gas*, 442 P.2d

For our purposes, the critical aspect of the Williston-Corbin struggle is that Corbin won.[37] The Restatement (Second) of Contracts radically departed from its predecessor's approach to plain meaning of contract text and to the admissibility of parol evidence, largely due to Corbin's influence.[38] As a result, under the Second Restatement, extrinsic evidence that was excluded under the First Restatement is available to fact finders who interpret contracts.[39] The American Law Institute thus established Corbin's liberalized parol evidence rule as the new standard for admissibility of extrinsic evidence in contract interpretation.

Perhaps the most dispositive evidence of Corbin's triumph is the substantial adoption of his rule by state legislatures in the Uniform Commercial Code (UCC or the "Code"). Article 2 of the Code replaced the Uniform Sales Act, which had been drafted chiefly by Williston, as the model law governing the sale of goods. One of the many changes it makes is reflected in § 2-202, which controls the admissibility of parol evidence in the sale of goods.[40] In fact, the chief purpose of that section was apparently to loosen the common law parol evidence rule.[41]

---

at 642-43. A Willistonian might argue that the trial judge simply was a poor textualist, incorrectly settling on an interpretation to which reasonable people would not subscribe. Corbin would disagree—the judge's error in this case exemplifies why judges should not put on blinders. In so doing, they inevitably limit themselves to the extrinsic evidence of their own background and experience, and are thus likely to erroneously substitute their personal interpretation for that of the parties—the precise claim that nontextualists like Judge Mikva make, in contradicting the New Textualists.

37. *See* Interform Co. v. Mitchell, 575 F.2d 1270, 1276 (9th Cir. 1978). *Pacific Gas* has since become the rule of law in California and elsewhere. *See, e.g.*, Ward v. Intermountain Farmers Ass'n, 902 P.2d 264 (Utah 1995); Taylor v. State Farm Mutual Automobile Insurance Co., 854 P.2d 1134 (Ariz. 1993); Berg v. Hudesman, 801 P.2d 222 (Wash. 1990); Isbraudtsen v. North Branch Corp., 556 A.2d 81 (Vt. 1988).

38. *See* Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 598 (1969).

39. While the First Restatement excluded evidence of the parties' intent in favor of the judge's view of a reasonable third party, the Second Restatement allows the trier of fact to determine the credibility of extrinsic evidence concerning the operative meaning of terms from the context of the transaction. RESTATEMENT (SECOND) OF CONTRACTS § 212. Unlike the First Restatement's reliance upon the judge's view of the reasonable person to determine whether the writing is integrated, the Second Restatement permits evidence of prior or contemporaneous agreements and negotiations to establish the parties' intent regarding the finality or completeness of their agreement, and to explain the meaning of the writing. *See id.* at § 214 cmt. a (explaining that the determination of whether a contract is integrated may be supplemented by extrinsic evidence pertaining to the meaning of the terms of the contract). *See also* Speidel, *supra* note 34, at 798:

> The *Restatement Second*'s approach to contract interpretation rejects the view that words have plain meanings, that the court should, as a matter of law, determine meaning from the four corners of a writing, and that there are rules of interpretation or reasonable meanings waiting "out there" for discovery and application [citing article by Restatement Reporter Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13 (1981)]. Rather, whether or not the language used is ambiguous on its face, the *Restatement Second* encourages the parties to plumb the context surrounding the particular bargain to aid the trier of fact in interpreting the "term"—that is, ascertaining its "meaning."

40. *See* U.C.C. § 2-202.

41. *See* NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 598

The Code makes extrinsic evidence more readily admissible because it permits supplementation of the written contract with contemporaneous oral and written agreements unless the written contract is proved to be a complete integration.[42] The UCC clearly rejects the "four corners" approach in adopting an express provision concerning the admissibility of evidence of trade usage or course of dealing between the parties. The official comment explicitly states that the Code

> rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action. . . . which may explain and supplement even the language of a formal or final writing.[43]

The modern judicial trend, the Second Restatement, and Article 2 of the UCC all point toward the victory of Corbin's view of the parol evidence rule. Most courts today[44] admit parol evidence for purposes of determining whether a

---

(1955). The UCC reflected Karl Llewellyn's view that the "law of the transaction is embedded in the total situation and that the task of the 'law authority' is to discover it." Such an inquiry was, in Llewellyn's view, "a more reliable source of certainty" that "the rigid, external system of contract law." Speidel, *supra* note 34, at 791.

42. *See, e.g.*, Michael Schiavone & Sons, Inc. v. Securalloy Co., 312 F. Supp. 801, 804 (D. Conn. 1970) (holding that U.C.C. § 2-202 "was intended to liberalize the parol evidence rule and to abolish the presumption that a writing is a total integration").

43. U.C.C. § 1-205 & cmt. 1. Marie Reilly has suggested to one of us that this "co-reverence" for contextual evidence with textual evidence of intention was Corbin's ultimate victory over Williston. *See, e.g.*, Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981) (stating that trade usage that asphalt seller would allow buyers who needed asphalt for previously bid contracts to purchase for price at time of bid not inconsistent with contract provision that buyer would pay seller's "posted price").

44. *But see, e.g.*, Nicholson v. United States, 29 Fed. Cl. 180, 193 (1993). The court determined that under the plain meaning rule and the Willistonian parol evidence rule extrinsic evidence about the agreement was inadmissible since the integration was complete and final.

In a recent article, Professor Ralph Mooney has suggested that several western state courts, most notably in California, have reverted to excluding extrinsic evidence in contract interpretation in a manner that Williston would have favored and Corbin deplored. Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1146 (1995). In several cases, Professor Mooney reports that California courts have excluded specific and precise extrinsic evidence of promises made by employers because of provisions in form contracts (or, in one case, an employment application) that the courts determined demonstrated the parties' agreement that the written text was completely integrated. *See id.* at 1151-53 (citing, for example, Gerdlund v. Electronic Dispensers Int'l, 235 Cal. Rptr. 279 (Cal. Ct. App. 1987); Wagner v. Glendale Adventist Med. Ctr., 265 Cal. Rptr. 412 (Cal. Ct. App. 1989)).

Professor Mooney also cites *Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd.*, 243 Cal. Rptr. 300, 304 (Cal. Ct. App. 1988), in which the court, in seeming contradiction to *Pacific Gas*, conceded that a contract must be interpreted to give effect to the parties' intent, but that intent, whenever possible, must be "ascertained from the writing alone." We believe that this case illustrates our thesis that exclusion of extrinsic evidence can *enhance* judicial subjectivity and discretion.

The litigation arose in the context of the highly controversial (favored in Southern California, despised in the San Francisco Bay Area) uprooting of the Oakland Raiders football team to Los Angeles. A 1966 agreement set forth a rental fee based on a percentage of gross receipts, with a clause providing that the rent would be significantly reduced if the Oakland Coliseum "entered into" a lease

writing is integrated, either partially or fully, and ascertaining the meaning even of words that appear to the judge—based on the "extrinsic evidence" of her own background and experience—to be plain and unambiguous. This approach is regarded, correctly in our view, as facilitating the ability of private parties to reach voluntary bargains through manifesting shared understandings, and limiting judges' ability to frustrate these bargains through "objective" interpretations.

II. EXTRINSIC EVIDENCE IN STATUTORY INTERPRETATION

The New Textualism movement and its focus on the plain meaning of a statute's language did not arise in a vacuum. Rather, it emerged as a reaction to the use of legislative history in the process of statutory construction. The courts' extensive use of legislative history since World War II provided an inviting target for New Textualists, who raised a host of objections to this prevalent interpretive technique. This part of our article develops the argument that New Textualism's hostility to extrinsic interpretive evidence is, in many significant ways, a resurrection of Willistonian principles of contract interpretation. Such hostility is inconsistent with the widespread view held by courts, commentators, and legislators that extrinsic evidence is a useful tool in interpreting contracts. Given the rejection of Williston's view and the ascendancy of Corbin's view that judges who limit their analysis to the contract's text will simply bring their

---

with a baseball tenant "during the term of the agreement." In 1968, the Athletics moved to Oakland, and the Raiders' rent was reduced. In 1979, when the Raiders' terminated the agreement, the parties entered into short-term leases, with rent "in accordance with" the original 1966 agreement. The Coliseum then insisted that the rent not reflect the presence of the baseball team, because it had not "entered into" any agreement with the Athletics "during the term of the [new, short-term] agreement." The Raiders sought to introduce declarations by counsel and letters exchanged between the parties supporting their construction of the contract that the rent would reflect the same reduction that existed in the original, terminated agreement. However, a trial judge sitting in Oakland, and three Northern Californian appellate judges, found that the plain language of the contract provided that no rent reduction was necessary.

To be sure, result-oriented judges could well have reached the same result even if the extrinsic evidence had been admitted, but it would have been more difficult for them to do so. The case illustrates how the ability of judges to interpret the "plain meaning" of a text in a manner consistent with their own backgrounds and biases can be enhanced, and not limited, by the exclusion of extrinsic evidence.

Whether Professor Mooney's observations accurately reflect a resurrection of the Willistonian approach to contract law is beyond the scope of this Article. *Cf.* City of Manhattan Beach v. Superior Court, 914 P.2d 160, 188 (Cal. 1996) (citing *Pacific Gas* for proposition that extrinsic evidence can demonstrate an ambiguity even if court does not believe one appears on its face). We note, in any event, there are some plausible arguments for exclusion of parol evidence in contracts that would not apply to statutory interpretation, *see* text accompanying *supra* notes 107-10, and that do not undercut Corbin's essential argument that excluding extrinsic aids promotes rather than limits judicial discretion. Significantly, Professor Mooney concluded that this textualist trend—wholly judicially created—almost always seems to benefit sellers, banks, insurers, and employers, and disfavors economic "underdogs." Mooney, *supra*, at 1170. Although we might agree with Professor Mooney's personal view that this trend is troubling, even for those who believe that it reflects an essential correction of the excesses of the last twenty-five years and will result in economic efficiency and increased social wealth, it is clear that the result is judicially activist.

own prejudices and perspectives to bear, advocates of New Textualism bear the burden of demonstrating that either Corbin is wrong or that statutes are different from contracts. In this Part, we first describe the background in which New Textualism arose and then describe the principal textualist techniques. Finally, we suggest that New Textualism, like Williston's theory of contract interpretation, overstates the inherent clarity of "plain meaning" and understates the inevitability that textualist interpretation means that extrinsic evidence is limited to the judge's personal background and predilections.

A. STATUTORY CONSTRUCTION PRIOR TO NEW TEXTUALISM

The two dominant modes of statutory construction in this century have reflected efforts by judges either to effectuate the legislature's actual intent, or to carry out the public purposes underlying the legislation. Both of these approaches were intended to constrain judicial policymaking and to further the policy preferences of elected legislators. In applying either an intentionalist or a purposivist approach, judges often resorted to the legislative debates.

A well-known example that illustrates both the trend toward and the case for an intentionalist approach is *Johnson v. Southern Pacific Co.*[45] The lower court used a strict textual approach to reject the claim that Southern Pacific had violated the Railway Safety Appliance Act.[46] In defending the textual approach, Circuit Judge Sanborn used language that could have been drafted by Williston:

> The primary rule for the interpretation of *a statute or a contract* is to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect to. They cannot lawfully assume or presume secret purposes that are not indicated or expressed by the statute itself and then enact provisions to accomplish these supposed intentions. While ambiguous terms and doubtful expressions may be interpreted to carry out the intention of a legislative body which a statute fairly evidences, a secret intention cannot be interpreted into a statute which is plain and unambiguous, and which does not express it. The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more. Construction and interpretation have no place or office

45. 196 U.S. 1 (1904).

46. 27 Stat. 531 (1893) (codified as amended at 45 U.S.C. §§ 1-43 (1982)). Section 2 of the statute prohibited a railroad from using "on its line any car . . . not equipped with couplers coupling automatically by impact, and which [could] be uncoupled without the necessity of men going between the ends of the cars." Invoking the canon *expresio unius est exclusio alterius*, the court noted that because section 1 of the Act specifically governed locomotives and required certain brake equipment, the reference in Section 2 to "any car" excluded locomotives from its scope. *See* Johnson v. Southern Pacific Co., 117 F. 462, 466 (8th Cir. 1902), *rev'd*, 196 U.S. 1 (1904). The court also noted that the statute was in derogation of common law and, because it provided for fines, was penal in nature, thus requiring a strict construction of the word "car." *See id.* at 467.

where the terms of a statute are clear and certain, and its meaning is plain.[47]

The Supreme Court unanimously reversed. The Court noted that the interpretive maxims relied upon by the court of appeals in its analysis were not gospel, but only guideposts to discerning Congress's intent.[48] And, according to the Court, determining congressional intent requires a study of legislative history. To support its conclusion that Southern Pacific was liable under the statute, Chief Justice Fuller relied not only on textual analysis but also on the purpose behind the legislation, as reflected in President Harrison's messages to Congress advocating the law, and the House and Senate Committee reports.[49] The Court also utilized legislative history to reject alternative interpretations of the statute that would have exonerated the railroad from liability.[50]

Southern Pacific reflected a change in accepted interpretive techniques. The first edition of Sutherland's celebrated treatise on statutory interpretation had announced that courts "will not hear proof of extrinsic facts known to the

---

47. *Southern Pacific*, 117 F. at 465 (citations omitted) (emphasis added).

48. *See id.* at 15.

49. *See id.* at 16 (context, subject-matter, and object all suggest that statutory phrase "any car" meant all kinds of cars running on the rails, including locomotives, and broader definition of "car" to include locomotives was supported by dictionary definitions); *id.* at 19-20 (citing four annual presidential messages, S. REP. NO. 1049, 52d Cong. (1892), and H. REP. NO. 1678, 52d Cong. (1892).

50. In the court of appeals, Judge Thayer had concurred on a separate textual ground—that Southern Pacific had complied with the statute by installing automatic couplers on each car, even though they were not compatible. *See Southern Pacific*, 117 F. at 473-74. The Supreme Court unanimously rejected this theory, finding evidence in the Senate floor debates that the "difficulty as to interchangeability was fully in the mind of Congress, and was assumed to be met by the language which was used. The essential degree of uniformity was secured by providing that the coupling must couple automatically by impact without the necessity of men going between the ends of the cars." *Southern Pacific*, 196 U.S. at 20 (citing 24 CONG. REC. 1246, 1273 *et seq.* (1892)).

The need for extrinsic evidence is even more apparent when considering another question raised by Judge Thayer's concurrence. As detailed in Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 323-24 (1990), a strong policy argument could be raised that couplers were an emerging technology with dozens of designs, that the use of standard equipment was not common in the railroad industry, and that an interpretation requiring a single design could result in an anticompetitive monopoly for one equipment manufacturer. Although such an argument is plausible, it is not what Congress intended. The legislative debates quoted by the Supreme Court, *see Southern Pacific*, 117 F. at 20-21 (relying on Senate and House committee reports and floor debates), and the fact that the Interstate Commerce Commission, authorized by the statute to establish its effective date and to enforce the provision, had consistently taken the view that cars must be equipped with compatible couplers, demonstrate that the overriding policy concern of the day was the desire to prevent the significant injuries caused when railroad workers were required to manually couple or decouple cars. *See* Strauss, *supra*, at 324 n.10. These historic facts, of course, are not apparent from the four corners of the text, and cannot be gleaned from interpretive maxims.

Some New Textualists might argue that, pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the ICC's interpretation, rather than the Senate debates, is entitled to great deference, suggesting that the correct result could have been reached in *Southern Pacific* in the lower court without resort to legislative history. But *Chevron* instructs courts to defer to agencies only when the statutory text is unclear. *See, e.g.*, National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 417 (1992); K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). The Eighth Circuit, recall, had found that the text was unambiguous.

legislature or members thereof which are supposed to indicate their intention in passing a law."[51] By the time the second edition was published in 1904 (the same year that *Southern Pacific* was decided), the treatise had changed, announcing that "proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing the act."[52]

That two appellate judges, without the benefit of extrinsic evidence, thought that the railroad was not liable based on a narrow definition of the word "car," and that nine Supreme Court Justices, with the benefit of such evidence, thought that the word "car" "manifestly" included locomotives, is illustrative of the difficulties posed by a textualist approach to interpretation. One could argue that the court of appeals' decision in *Johnson* was simply bad textualism.[53] Corbin might well concede the point, but he would likely respond that it was no accident that those who looked at the broad array of extrinsic evidence correctly answered the textual question.[54]

Intentionalism was not without its critics. The Legal Realists charged that intentionalist judges were inverting their reasoning process by determining in some other way whether the statute should or should not cover the issue in litigation, then announcing their conclusion clothed in intentionalist rhetoric.[55] Although this critique has been echoed by New Textualists,[56] the latter ignore

---

51. William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 371 n.18 (1990) (quoting JABEZ G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 380 (1st ed. 1891)).

52. JABEZ G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 879–83 (John Lewis ed., 2d ed., 1904).

53. The keynote to textualism is to interpret words in accord with their ordinary meaning. *See infra* text accompanying notes 74-79. Excluding locomotives from the definition of a "railroad car" is arguably inconsistent with such a meaning. *Cf.* HENRY H. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1142 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

54. Within the last few years, the British House of Lords overturned centuries of precedent to permit reference to parliamentary debates as an aid to interpreting British statutes, guided in large measure by precisely the recognition that extrinsic evidence increases the accuracy of judicial interpretation, rather than increasing judicial willfulness. *See* Pepper v. Hart, 3 W.L.R. 1031 (H.L. 1992). Initially, a panel of the Lords had ruled—limiting its inquiry to the sort of techniques approved by Williston and Justice Scalia—that a tax statute favored Inland Revenue. This judgment was reconsidered and reversed by a subsequent panel who examined the legislative debates and found an express statement by the relevant minister that the statute was intended to favor the taxpayer. One reason why Parliament might enact a provision that subsequent inquiry shows to be capable of multiple meanings "is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve." *Id.* at 1056.

Significantly, although the Lords stated that it would not "attach a meaning to words which they cannot bear," *id.*, five Lords had previously found that the term had only one meaning, which was opposite of that intended by the drafting minister.

55. *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 868-69 (1930).

56. *See* Eskridge, *supra* note 1, at 651-52 (Scalia's attack on legislative history "was primarily a realist one," following Radin critique of the concept of collective legislative intent). Then-Judge Scalia (as he then was) said:

> That a majority of both houses of Congress (never mind the President, if he signed rather than vetoed the bill) entertained any view with regard to [interpretive] issues is utterly beyond belief. For a virtual certainty, the majority of Members were blissfully unaware of the existence of the issue, much less had any preference as to how it should be resolved.

the Realist deconstruction of text as well as intent. For example, Max Radin's solution was not to rely on a statute's objective meaning, but to allow judges and administrators to use the text to "perform their own specialized functions."[57] These functions included having judges ask, "[W]hat is desirable . . . , what is just, what is proper, what satisfies the social emotions of the judge, what fits into the ideal scheme of society which he entertains."[58]

The academic response to Radin further supports the proposition that the use of extrinsic evidence frustrates government-by-the-judiciary. Writing in the same issue of the *Harvard Law Review* as Radin, Professor James Landis saw legislative history as critical to identifying the real, rather than fictitious, intent of a legislature. He felt that the use of legislative history was essential in order to restrain judges from attempting to "override the intent of the legislature in order to make law according to their own views."[59] A well-known opponent of judicial activism, Justice Felix Frankfurter, shared the view that the failure to consider extrinsic evidence facilitates judicial bias.[60]

In response to the Realist critique of intentionalism, Professors Henry Hart and Albert Sacks proposed that courts involved in the task of statutory interpretation should ascertain the statute's meaning so as to carry out its purpose.[61] Legal

---

Id. at 652 n.118 (quoting Antonin Scalia, Speech on Use of Legislative History delivered at various law schools (fall 1985 and spring 1986)).

57. Radin, *supra* note 55, at 871.

58. *Id.* at 884.

59. Landis, *supra* note 14, at 890-91. *See* Eskridge, *supra* note 51, at 374 (endorsing view of Landis and others that "authorial intent is a more objective, more reliable source of statutory meaning than textual analysis standing alone").

60. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947). Frankfurter, whose expressed goal was judicial restraint, *id.* at 534, criticized the English refusal to consider legislative history. Sounding much like Corbin, Frankfurter wrote that British "judges deem themselves limited to reading the words of a statute. But can they really escape placing the words in the context of their minds, which after all are not automata applying legal logic but repositories of all sorts of assumptions and impressions?" *Id.* at 541. Although cautioning that "[s]purious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute," and that a loose statement made by the sponsor "will hardly be accorded the weight of an encyclical," he suggested that, for example, a "painstaking, detailed report by a Senate Committee bearing directly on the immediate question may settle the matter." *Id.* at 543.

61. *See* HART & SACKS, *supra* note 53, at 1374. This purposivist approach was not original to Hart and Sacks, of course; it has been with us since at least 1584, when the Exchequer Court set forth a four-step process for the "sure and true interpretation of all statutes":

> 1st. What was the common law before the making of the Act.
> 2nd. What was the mischief and defect for which the common law did not provide.
> 3rd. What remedy the parliament has resolved and appointed to cure the disease of the commonwealth.
> And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Heydon's Case, 30 Co. 7a, 76 Eng. Rep. 637, 638 (Exch. 1584).

process theory relies upon the notion that judges and lawyers can determine the purpose of a statute by examining both the statutory text and the legislative history produced in the legislative process. Rather than binding herself to the text of a statute, the purposivist seeks to ascertain the statute's purpose so as to provide a context for its language. The legal process theory thus departs from both intentionalism and textualism by implying that courts exercise a lawmaking function by attributing a purpose to a statute that may or may not have been recognized by the voting legislators themselves.[62] Still, critical to the interpretive process was that while legislatures have unfettered discretion to establish policy through statutes, "courts are charged with the reasoned elaboration of policies chosen by legislatures, a process that limits judicial discretion."[63]

Both intentionalism and purposivism have attracted strong theoretical criticism. However, our question, as we will try to develop it, is not whether these critiques have validity, but whether an alternative approach that bars judges from using legislative history as an interpretive aid represents an improvement.

B. THE NEW TEXTUALIST RESPONSE TO CONVENTIONAL INTERPRETATION

Justice Antonin Scalia, recognizing the shortcomings of both intentionalism and purposivism, has championed a vision of statutory construction that emphasizes the need for judges to disregard legislative history in the vast majority of cases.[64] Dismissing indicia of the intent of the members of Congress who enacted a law, Justice Scalia would interpret a statute based on the meaning which is:

> (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical or legislative material . . . to lead me to a result different from the one that these factors suggest.[65]

Hence, in this "four corners"[66] approach to interpretation, statutory meaning is determined solely on the basis of the interpreting judge's view of the language itself, within the context of the surrounding language.[67] The reason courts must

62. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 335 (1990).

63. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HART & SACKS, *supra* note 53, at cxx.

64. *See* Eskridge, *supra* note 1, at 650.

65. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

66. While "four corners" is a contract term specifying the limits of what a court may use to interpret the writing, it has found its way into the lexicon of statutory interpreters. *See, e.g.*, Gustafson v. Alloyd Co., Inc., 115 S. Ct. 1061, 1074 (1995); West Va. Univ. Hosps. v. Casey, 499 U.S. 83, 112 (1990).

67. *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 455 (1988).

look for an "objectified" intent, according to Scalia, is that "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated."[68] Justice Scalia makes it clear that his principal practical objection to the intentionalist and purposive approaches is that reliance on legislative history "has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law."[69] When using legislative history:

> judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean.[70]

---

68. SCALIA, *supra* note 1, at 17.

69. *Id.* at 35.

70. *Id.* at 17-18 (emphasis in original). At times, though, Justice Scalia and other New Textualists suggest that the problem with legislative history is not that it gives too much discretion to judges, but not enough—that it gives too much power to legislative subgroups. For example, in a concurring opinion in *Blanchard v. Bergeron*, 489 U.S. 87 (1989) Justice Scalia castigated his eight colleagues for interpreting a statute in accord with a committee report that approvingly cited the holdings of three lower court cases. Reasoning that a member of the committee staff or a lobbyist, rather than Congress itself, who probably intended the statute to follow these prior cases, Justice Scalia wrote: "What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself." *Id.* at 99.

The concerns that Justice Scalia articulated in *Blanchard* reveal the difficulty with his mission of accomplishing judicial objectivity through textualism. The case involved an interpretation of a provision of federal law allowing the prevailing party to receive "a reasonable attorney's fee as part of the costs" in an action brought under certain federal civil rights laws. *See* 42 U.S.C. § 1988 (1994). Although Justice Scalia disapproved of the majority opinion's reliance on the committee report, he nonetheless concurred in the judgment, endorsing the additional justifications that the majority offered to explain why its ruling was "reasonable, consistent, and faithful to [the statute's] apparent purpose." 489 U.S. at 100. In other words, Justice Scalia concluded that fees should be awarded based on what *judges* thought was a reasonable standard, rejecting the only evidence as to what the *legislature* thought was a reasonable standard.

As Judge Wald cogently observed:

> This approach, however, begs the questions: "reasonable" *to whom*? "Apparent" *to whom*? The answer, so far as I can see, is the writing judge. Which, then, is the best source: 1) the ruminations of an article III judge who has turned away from legislative materials to discern independently a "pattern" or a "reasonable purpose" in a statute in order to shed light on an issue that the statutory language itself fails to clearly settle; or, 2) the admittedly non-binding, but often illuminating, declarations of a House or Senate report explaining what the committee thought it was doing, or the speech of a bill's sponsor in which the sponsor declares his or her objectives in introducing the legislation? Given a choice, I would pin my hopes for fidelity to the "intentions of Congress" on the latter.

Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the U.S. Supreme Court*, 39 AM. U. L. REV. 277, 305 (1990) (citations omitted).

These attacks on the use of legislative intent seem to be traceable to an old nugget passed on from Justice Holmes: "we do not inquire what the legislature meant; we ask only what the statute means."[71] Holmes' views are mirrored in the Seventh Circuit by Judge Easterbrook,[72] who has written that original meaning can be derived from the words and structure and perhaps from the purpose of the text, but what any member of Congress thought about these words is irrelevant, since meaning and intent are not the same thing.[73] The

71. Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1912). As William Eskridge has astutely noted, though, Justice Holmes in fact *did* rely on legislative history in statutory interpretation, insisting that the plain meaning rule did not "preclude consideration of persuasive evidence if it exists." Eskridge, *supra* note 51, at 388 n.87 (quoting Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928)).

72. Then-Professor Easterbrook favorably cited Holmes' quotation in his own exposition of proper techniques of statutory construction. *See* Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533, 535 (1983).

73. *See In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.); Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL. 56, 61 (1988). Judge Easterbrook's discussion of legislative history in *Sinclair* has a shotgun quality, but deserves fuller attention. First, and significantly, he suggests that to "decode words one must frequently reconstruct the legal and political culture of the drafters." *Sinclair*, 870 F.2d at 1342. In this regard, legislative history "may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood." *Id.* Significantly, Easterbrook suggests, contrary to Williston and Justice Scalia, that legislative history should be used even when a judge's examination of the text suggests a contrary, plain meaning, although he may have intended this to be a narrow exception for technical terms. *Id.* (legislative history "may show, too, that words with a denotation 'clear' to an outsider are terms of art, with an equally 'clear' but different meaning to an insider). It is thus unclear, for example, whether, to play on the facts of *Blanchard v. Bergeron* (discussed *supra* note 70), Easterbrook would consider, in interpreting a floor amendment that provided that prevailing attorneys were to receive "reasonable" fees, a floor statement by the sponsor that explained an intent to incorporate several judicial interpretations of "reasonableness."

Ultimately, Easterbrook concludes that legislative history "may help a court discover but may not change the original meaning." *Id.* at 1344 (citing Pierce v. Underwood, 487 U.S. 552 (1988)). This conclusion itself is ambiguous. Perhaps this means, given the suggestion that extrinsic evidence may create an ambiguity that is not apparent from a study of the text, that clear legislative history should govern unless a court concludes that legislators certainly would not have used the words chosen for the text if they really meant what the history claims. If so, this view is akin to the UCC's approach to parol evidence that requires the exclusion of extrinsic evidence if a reasonable person "certainly" would have included the proffered provision in the written contract. *See supra* text accompanying notes 40-44. Alternatively, Easterbrook could mean that if the judge is not persuaded that the words mean what the legislators said they mean, she should go with her own linguistic interpretation. *Cf.* Central States, Southeast and Southwest Pension Fund v. Central Cartage Co., 69 F.3d 1312 (7th Cir. 1995). In that case, Judge Easterbrook rejected parol evidence that the collective bargaining agreement requirement for employer contributions to the Teamster's pension fund was not intended to cover casual workers who were not Teamsters. He noted that (analogous to statutes) a multiparty pension agreement was "not a normal two-party contract for which evidence of idiosyncratic meaning may be used to depart from the objective meaning of the words," *id.* at 1315, but then suggested that the evidence would be inadmissible even if it could be shown that the entire multi-member pension board was aware of its negotiator's parol understanding. *See also* Bidlack v. Wheelabrator Corp., 993 F.2d 603, 616 (7th Cir. 1993) (en banc) (Easterbrook, J., dissenting) (arguing that dissent plus plurality all agree that "extrinsic evidence cannot create an ambiguity in otherwise clear documents"). Such a view, like Justice Scalia's and Williston's, by permitting a judge to say that a textual phrase is clear even when there is evidence that the parties thought it was not, is not likely to reduce judicial discretion.

Holmesean approach rejects the simple maxim that beauty, or in this case meaning, is in the eye of the beholder.

Because the New Textualists refuse to rely upon legislative history as evidence of the actual intent behind the statutory text, they must rely upon some other indicia of meaning. In their view, courts should discern a "reasonable meaning" for the statutory text they are construing.[74] To aid them in this task, the New Textualists advocate the use of interpretive tools that bear a remarkable resemblance to Williston's approach to construing contracts: the *judge*'s view of the plain meaning of the words; *her own* review of the structure and logic of the statute; and *judicially* created canons of statutory interpretation.[75]

Justice Scalia, for example, has suggested a variety of interpretive techniques that do not require analysis of legislative history, but give weight to "objective" indicia that reflect the judge's view of what a reasonable person would mean, rather than the objective manifestations of the legislature's subjective intent that might be found in legislative history.[76] Another New Textualist method is simply to see which interpretation "better fits" with the statute when read as a whole. With this method, Justice Scalia seeks a construction that "fits most logically and comfortably" into the *corpus juris*.[77] If these tools do not prove dispositive, the New Textualists resort to a host of canons of statutory construction.[78] Of course, the choice of meanings that is the "better fit" and the

74. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1988) (Scalia, J., concurring).

75. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting); West Va. Univ. Hosps. v. Casey, 499 U.S. 83, 98-99 (1991). *See also* United States v. Marshall, 908 F.2d 1312, 1319 (7th Cir. 1991), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453 (1991).

76. In *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring), he suggested that judges first adopt the meaning most in accord with (their view of) context and ordinary usage, reasoning that this meaning was what the whole Congress would have understood when voting, stopping to compare the words at issue with the surrounding body of law into which the provision is integrated. In other cases, Justice Scalia looked to a dictionary definition of the relevant term, *see, e.g.*, Chan v. Korean Airlines, 490 U.S. 122, 128 (1989); Pittston Coal Group v. Sebben, 488 U.S. 105, 113 (1988), and the structure of the act itself (to see if the same term is used in other parts of the statute in a way that clarifies its meaning), *see* United Savings Ass'n v. Timbers of Inwood Forest Assoc., 484 U.S. 365, 371 (1988).

77. *West Va. Univ. Hosps.*, 499 U.S. at 100-01.

78. *See, e.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring) (prescript that the specific controls the general and that statutes dealing with similar subjects ought to be interpreted harmoniously). In *Chan*, 490 U.S. at 131-33, for example, Justice Scalia relied upon the canon *inclusio unius est exlusio alterius* (the inclusion of one implies the exclusion of others) in holding that the inclusion of a certain sanction in two sections of a treaty, coupled with its omission in a third section, indicated that the drafters meant to exclude the sanction in that third section, over objections that the bargaining history of the treaty at issue in *Chan* suggested that the drafters intended for all three sections to be treated the same. *Id.* at 139 (Brennan, J., dissenting). *Cf. In re* American Reserve Corp., 840 F.2d 487, 492 (7th Cir. 1988) (questioning canon for inaccurately assuming omniscience on the part of drafters); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973) (same); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 813 (1983) (same). Significantly, in *American Reserve*, Judge Easterbrook suggested that reference to legislative history may be appropriate to determine if Congress has created an intentionally exhaustive statute or if, instead, Congress has not yet grappled with the problem at issue in the case. *See* 840 F.2d at 492. *See also* DICKERSON, *supra* note 25, at 234 (listing this

selection of the appropriate interpretive canon is subject to considerable judicial discretion.[79]

Critical to the New Textualists' rejection of legislative history is their argument that actual legislative intent is irrelevant.[80] Of course, the true "subjective intent" of the legislators is almost impossible to ascertain, but no serious advocate of the use of legislative history in statutory interpretation really supports the straw argument textualists have raised in opposition to their own approach—there is no suggestion, for example, that if Robert Taft had a secret diary, it ought to be consulted in interpreting the Taft-Hartley Act. Rather, the real controversy is not whether to apply an objective or a subjective approach to

---

as among several "Latin maxims [that] masquerade as rules of interpretation while doing nothing more than describing results reached by other means").

Other canons which have been revived by the New Textualists include the "federalism canon," which creates a presumption against interpreting congressional statutes to usurp traditional state powers, *see, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 538 (1994), and the canon that requires an incredibly strong statement of intent to change the law when Congress revises and consolidates statutes. *See* Finley v. United States, 490 U.S. 545, 554 (1989).

79. *West Virginia Hospitals* is illustrative. Splitting roughly on conventional ideological lines, a six-justice majority, including Chief Justice Rehnquist and Justices Scalia, White, O'Connor, Kennedy, and Souter, held that denying reimbursement for expert witness fees in civil rights cases provided the best "fit" for an interpretation of the relevant statute, 42 U.S.C. § 1988 (1994). Justices Blackmun, Marshall, and Stevens all dissented, presenting arguments as to why they thought that permitting reimbursement for expert witnesses was a better interpretive fit. *West Virginia Hospitals*, 499 U.S. at 102 (Marshall, J., dissenting); *see id.* at 108-09 (Stevens, J., dissenting). Professor Corbin, certainly, would not be surprised that the justices' findings regard something so subjective as "fit" would follow predictable ideological lines. *See also infra* note 162 and accompanying text (conservative, textualist judges reach conservative results).

For a critique of the objectivity of the use of canons, see Karl L. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

80. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., dissenting); Continental Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) (only the "text of the statute, and not the private intent of the legislators, is the law"); SCALIA, *supra* note 1, at 16 (equally criticizing use of floor debates or subsequent affidavits from legislators about what they "*really* meant" (emphasis added)).

Legisprudential commentators have occasionally ventured into the contract analogy by citing Judge Learned Hand in *Hotchkiss v. National City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911). *See, e.g.*, W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation under the Rule of Law*, 44 STAN. L. REV. 383, 421 (1992). Hand wrote:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.

Hotchkiss, 200 F. at 293. However, the relevant passage contains an important additional, qualifying sentence. Judge Hand added, "[o]f course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent." *Id.* at 293. Courts will often quote the first portion of the paragraph, without the second. *See, e.g.*, Luden's Inc. v. Local Union No. 6, 28 F.3d 347, 364 (2d Cir. 1994).

meaning, but whether to consider evidence (pre-contract oral agreements, or pre-enactment legislative history) that demonstrates, in an objective way, how the parties manifested their subjective intentions.[81]

C. SOME CRITIQUES OF NEW TEXTUALISM

New Textualism has attracted widespread criticism.[82] The most obvious

---

81. This distinction reveals a major problem with a recent argument against the contract analogy raised in Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145 (1998). Movsesian suggests that contracts are properly interpreted to give effect to the parties' subjective intent, thus justifying the use of parol evidence in contract interpretation. However, neither Corbin nor nontextualist statutory interpreters advocate subjective intentionalism; rather, they propose the use of extrinsic aids to allow judges to effectuate the objectively manifested intent of the parties.

As an effective illustration of the importance of objective manifestations of intent, Professor Marie Reilly observes that negotiations finalized by a handshake would often be taken by Americans to be strong evidence of an intention to be bound, while in Japan the handshake would not have this significance. She suggests that New Textualists find legislative history to be as probative of intent as Japanese bankers would find a handshake.

The problem with the New Textualist position is that is simply empirically wrong. There is ample evidence that legislators do consider floor statements, committee reports, and, occasionally, statements (usually admissions against interest) in hearings to be highly relevant and objective manifestations of the meaning they attach to text. According to Rep. Robert Kastenmeier, chair (as he then was) of a key House Judiciary Committee subcommittee:

> It is probably safe to say that most of us in the Congress assume committee reports, colloquies on the floor and other sources of legislative history can explain and amplify statutory language in ways that are instructive to the courts.

Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice, Comm. on the Judiciary, 101st Cong. 2 (1990). Even those in the legislative minority, who have less control of the legislative record, agree. According to Rep. Carlos Moorhead, Kastenmeier's senior Republican counterpart on the subcommittee:

> I think there are situations where we can provide specific guidance to the courts as to congressional intent by way of carefully constructed legislative history.
>
> Sometimes, I think it would be helpful if more of the judges had legislative experience because it is very difficult . . . to get a feeling of legislative intent unless you look to the reports and to the debates.

Id. at 2-3. *See also* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 40 (1994).

Indeed, the common use of legislative history intended to provide explanations for textual meaning is itself good evidence that legislators do find such history to be relevant. For example, in developing a specific statutory standard to guide courts in reviewing antitrust challenges to research and development joint ventures, Congress chose to reject more specific criteria spelled out in earlier legislative proposals in favor of a broad standard of "reasonableness, taking into account all relevant factors affecting competition." Pub. L. No. 98-462 § 3, 98 Stat. 1816 (codified at 15 U.S.C. § 4302 (1994)). In doing so, the Conference Report clearly provided that the drafters' intent was to have the detailed legislative history agreed to by the conferees serve as an authoritative gloss on this broad standard. *See* H.R. CONF. REP. NO. 98-1044, at 8 (1984).

82. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE, pt. III (1990); RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION, ch. 5 (1988); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 SO. CAL. L. REV. 845, 861-74 (1992); Brudney, *supra* note 81, at 40-66; Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129 (1992); Eskridge, *supra* note 1; William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993*

problem with the New Textualist approach to statutory construction is that in many cases textual context provides insufficient insight to enable the legal community to reach a consensus on the proper interpretation of a statute. Language is almost always open to interpretation.[83] This is particularly true in Supreme Court cases, because challenges to statutes with a widely agreed upon meaning are usually resolved before they reach that level.[84] As a result, reliance upon the dictionary definition of words (many of which have multiple and often very different meanings) or interpretive canons[85] is an inadequate substitute for the type of context that can be provided by outside sources.[86]

A second criticism raised by those who, like New Textualists, seek to constrain a judge's ability to substitute her own policy preferences for those of the legislature, is that the very elected legislators whose primacy textualists are supposedly promoting often expect the courts to look to the legislative history in interpreting statutes.[87] From this perspective, ignoring the will of the policy-

---

Term—Foreword: Law as Equilibrium, 108 HARV. L. REV. 27, 77 (1994); Eskridge & Frickey, *supra* note 62, at 340-45 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 549-54 (1992); Hatch, *supra* note 8; Michael Herz, *Textualism and Taboo: Interpretations and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1670 (1991); Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1 (1996); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 872 & n.36 (1993); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 825-31 (1994); Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057 (1995); Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399 (1990); Bernard Schwartz, *"Shooting the Piano Player"? Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1 (1995); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Wald, *supra* note 70, at 306; Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1639 (1991); Nicholas A. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990); *see also* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 751 n.3 (2d ed. 1994) (collecting additional citations).

83. One of us has previously discussed this point in a bit more detail. *See* Ross, *supra* note 82, at 1061-62.

84. Wald, *supra* note 70, at 278.

85. *See* DICKERSON, *supra* note 25, at 234 (listing several "Latin maxims [that] masquerade as rules of interpretation while doing nothing more than describing results reached by other means").

86. *See, e.g.*, Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945) (Hand, J.) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"); Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L. J. 1561, 1614-16 (1994); Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50 (1993).

87. Congress goes to a great deal of trouble to explain the text with sponsor statements, committee reports, and other sources of legislative history by creating a formal historical record of the enactment

making branch of the government by refusing to consult information that Congress expects will be consulted constitutes unwarranted judicial activism.[88]

Most significantly, while New Textualists claim that reliance on legislative history allows judges to engage in policymaking, the use of "judicial common sense" in determining plain meaning also allows considerable judicial subjectivity. While New Textualists complain that legislative history contains so much information that judges can willfully select those portions that support the result they otherwise prefer,[89] the textual quiver also contains a plethora of sources to choose from.[90] When left only with the text, without the benefit of the legislative history to provide context, judges are forced to supply their own context instead. As Judge Wald has noted:

> Several opinions this past Term that eschewed legislative history replaced it with what sometimes looked like a free-form romp through the "structure" of a statute, or its "evident design and purpose." The phrase "Congress must

---

process. *See* Correia, *supra* note 82, at 1154. Although legislators are not likely to be intimately familiar with the details of either the legislative history or the statute itself, members rely on the understanding attached to the text by those members who are actively involved in sponsoring and supporting the legislation. Indeed, when the drafters of a bill are concerned that material contained in hearings, committee reports, or the floor debate may mislead judges called upon to interpret the statute, they are free to specifically exclude such history from consideration, as Congress has in fact done on at least one notable occasion. The Civil Rights Act of 1991, § 105(b) Pub. L. No. 102–166, 105 Stat. 1071 (1991) provides:

> No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

Query whether a textualist who believes in the reliability of the maxim *expresio unius est exclusio alterius*, *see* Chan v. Korean Airlines, 490 U.S. 122, 131-33 (1989) (Scalia, J.), and who believes that judges should construe statutes to make the entire body of statutory law as coherent as possible, *see* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529 (1989) (Scalia, J., concurring), should view this significant textual provision as evidence that, where such language is *not* included in the statute, judges *must* consult legislative history! *Cf.* Dunning v. General Elec. Co., 892 F. Supp. 1424, 1430 & n.9 (M.D. Ala. 1995) (relying on two uncontradicted statements from Senate floor debate on Civil Rights Act of 1991 as reliable indicia of legislative intent, and noting specifically that this history "takes on added significance because of the importance legislators attached to legislative history in other areas of the 1991 Act").

88. As Judge Wald has written, to disregard committee reports "is to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively." Wald, *supra* note 70, at 306-07. *See also* Brudney, *supra* note 81, at 40 (rejecting or systematically discounting legislative history is countermajoritarian, both in declining to consult materials that are integral to Congress's chosen lawmaking process and in failing to acknowledge the substantial opportunity costs imposed on Congress). Professor Brudney's article demonstrates how refusal to credit reliable legislative history can frustrate Congress's ability to pass desired legislation.

89. *See* SCALIA, *supra* note 1, at 36 (stating that in any major piece of legislation "the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.").

90. *See* Pierce, *supra* note 82, at 765.

> have meant this or that" . . . appear[s] without apparent source other than the writing judge's mindset.[91]

Indeed, a number of well-known and controversial decisions employing New Textualist methods appear to have reached results contrary to the congressional intent manifested in seemingly reliable legislative history.[92]

The New Textualists thus seem to be validating the complaint made by James Landis two-thirds of a century ago that the "real difficulty" in statutory interpretation was that "strong judges prefer to override the intent of the legislature in order to make law according to their own views" and that "barbaric rules of interpretation" such as those that exclude legislative history "too often exclude the opportunity to get at legislative meaning in a realistic fashion."[93] Indeed, Republican Senator Arlen Specter repeatedly raises the New Textualist philosophy at confirmation hearings for federal judges, asserting that when judges ignore legislative history they are making the law themselves.[94]

These observations are especially true with respect to interpretive canons. Not only does each possible canon have a plausible counterpoint that a judge can utilize to justify the contrary result,[95] but, as Justice Scalia admits, a key textualist canon is the "benign fiction" that Congress has carefully chosen its language and writes its statutes in such a way as to maintain a harmony throughout the *corpus juris*.[96] Justice Scalia candidly acknowledges that some

---

91. Wald, *supra* note 70, at 304-05. Textualist rhetoric obscures this theoretical flaw, by drawing a false dichotomy between clear text and manipulable legislative history. Like the words in the *Congressional Record*, the words in Statutes-at-Large have no single or objective meaning, and are equally subject to manipulation. *See* Zeppos, *supra* note 82, at 1323.

92. *See, e.g.*, Sullivan v. Stroop, 496 U.S. 478 (1990). The court narrowly interpreted the meaning of "any child support payment" in the Social Security Act to exclude insurance benefits paid to children pursuant to Title II of the Social Security Act, despite clear legislative history that Congress intended the statutory phrase in a broader sense, *id.* at 492-94 (Blackmun, J., dissenting), and notwithstanding the fact that most state courts which had ruled on the issue have found the plain meaning of child support to include Title II payments. *See id.* at 488 n.2.

Professor Brudney, *supra* note 81, at 14-15, provides another example: *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989). In an earlier case, *McMann v. United Airlines*, 434 U.S. 192 (1977), the Court had narrowly defined the meaning of "subterfuge" under § 4(f)(2) of the Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602, 603 (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993). Despite clear language in the conference report disapproving of the court's "holding and reasoning" in *McMann*, H.R. CONF. REP. NO. 95-950 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 529, *Betts* held that because Congress had failed to amend the textual provision at issue the legislative history would not be given effect. 492 U.S. at 172.

93. Landis, *supra* note 14, at 890. Justice Scalia suggests that Dean Landis "would be aghast" at the results, fifty years after Landis advocated the use of legislative history. SCALIA, *supra* note 1, at 35. This conclusion, however, is entirely based on Justice Scalia's factual assertion that legislative history has "facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law." *Id.* This article, of course, suggests that recourse to legislative history has had precisely the opposite effect.

94. *See* Joan Biskupic, *Listening In on the 'Conversation' Between Court and Congress*, WASH. POST, May 1, 1994, at A4.

95. *See* Llewellyn, *supra* note 79, at 401-06.

96. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

interpretive canons are troublesome for "honest textualists."[97] He concedes, for example, that the rule that statutes in derogation of common law will be narrowly construed "seems like a sheer power grab."[98] Without explanation, however, Justice Scalia asserts that others accurately reflect objective meaning.[99] But, significantly, he is unwilling to credit the less fictional assumption that legislative history provides insight into the meaning intended by the legislative body that created it.

Critical to the New Textualist project is the empirical assertion that the exclusion of extrinsic evidence offered to provide an objective manifestation of the drafters' intent furthers, rather than hinders, the effectuation of that intent (as expressed in text). As applied to contract law, we suggested in Part I that Corbin's insights are precisely to the contrary—limiting judges to textual sources of interpretation furthers, rather than hinders, an interpretation consistent with the judge's background, not the drafters. In Part III, we suggest that the differences between contracts and statutes actually support, rather than weaken, the applicability of Corbin's insights to statutory interpretation.

III. SIMILARITIES AND DIFFERENCES BETWEEN CONTRACT AND STATUTORY INTERPRETATION

Corbin's insights into how extrinsic evidence constrains judicial subjectivity in contract interpretation only inform the debate about statutory interpretation if the process by which judges give meaning to the text of a contract is analogous to the process by which judges implement a statute. In this part, we explore the striking similarities between contract and statutory interpretation, particularly in light of the rationales the New Textualists have advanced to support their position. Both statutes and contracts are formalized bargains among actors with diverse and partially conflicting interests. In both the legislative process and the economic marketplace, bargains must be struck for anything to be accomplished, and there are significant transactions costs associated with achieving these bargains.[100]

At a relatively abstract level, most contract and statutory interpreters share similar goals. As a general rule, the ability of private parties engaged in commerce to enter freely into desired commercial arrangements should be facilitated, and not frustrated by judicial interference with the parties' manifest

---

Professor Brudney notes that the arguments for recognizing a "benign fiction" that legislators rely on explanations in legislative history concerning the effect that pending legislation may have on prior judicial decisions are even "more legitimate and realistic," Brudney, *supra* note 81, at 79, although Justice Scalia has expressly rejected such recognition, *see* Blanchard v. Bergeron, 489 U.S. 87, 97 (1989) (Scalia, J., concurring).

97. SCALIA, *supra* note 1, at 28.

98. *Id.*

99. *See id.* at 29 (endorsing, without any support, canon assuming Congress intends to preserve state prerogatives).

100. *See* McNollgast, *supra* note 16, at 708.

agreement; likewise elected legislators should be able to effectuate their policy preferences through legislation, and not have their manifest agreement as to policy frustrated by a judge's personal views about the meaning of the text.[101] As Professors McNollgast explain:

> Much like the canons of contract law, canons of statutory interpretation should decrease rather than increase the costs bargainers face in trying to reach an agreement and should expand rather than reduce the range of issues over which agreements can be reached. If the legislative process is more efficient and if conflicting factions can reach accord on a broader range of issues, political leaders will be able to achieve their objectives more effectively.[102]

The aim of both contract and statutory interpretation is to ascertain the meaning of the words used by the writing's creator. In each context, meaning cannot be derived without considering all objective evidence of the intent of the parties who wrote the document, including the context in which the writing was created.[103] Theories that support the legitimacy of the free commercial market and the primacy of the elected legislature suggest that, in each instance, the purpose of interpretation is to effectuate the manifest intent of the parties who created the writing.[104]

---

101. The freedom of the marketplace and the freedom of the legislature are, of course, both subject to substantive constraints. Laws or regulations can preempt the ability of parties to make certain agreements by declaring them illegal; constitutions preempt the ability of legislatures to effectuate certain policies in a similar manner.

For purposes of this analysis, we put aside the practice of judges interpreting the text in a manner not originally agreed to by the drafters, either pursuant to the doctrine of course of performance, U.C.C. § 2-208(2), or using the technique of dynamic statutory interpretation, *see, e.g.*, King v. Smith, 392 U.S. 309 (1968) (reasoning that, although legislative history of 1935 Social Security Act showed clear intent to allow states to deny welfare benefits on basis of "moral character," subsequent changes in attitudes and administrative determinations justified holding that Act forbade such practices in 1968). As the leading academic exponent of dynamic interpretation demonstrates, the latter approach involves a pragmatic "fusion" of original concerns with modern ones, a technique that inevitably requires resort to extrinsic aids such as legislative history. *See* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 665 (1990).

102. McNollgast, *supra* note 16, at 716. Synthesizing the insights of Corbin and McNollgast, when judges limit their consideration to text and ignore reliable indicia of the parties' manifest intent, the result will be inefficient: public policies that would otherwise be enacted because they have the requisite democratic political support will not be effectuated because legislators are unwilling to either take the risk that the courts will misconstrue their intent or to engage in the costly effort to reduce this uncertainty through further negotiation about textual provisions that anticipate and countermand feared judicial interpretations. *See id.* at 709.

103. *See id.* at 736, 738 (use of legislative history and other extrinsic aids identifying the prevailing coalition behind successful legislation can "reduce the potential for arbitrariness and allow courts to play a valuable role in interpreting statutes by relying on indicia to gain evidence of a statute's meaning").

104. *See* Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History*, 98 COLUM. L. REV. 242, 248 (1998) (writing that the use of legislative history is one of the means that post-*Lochner* judges show their acceptance of the primacy of the legislature and that law's legitimacy derives from politics, not judicial reasoning from abstract premises).

Significant similarities are also apparent in the rationales for using external aids to interpret both types of text. Such aids provide a context that helps the factfinder understand the significance the parties may have attached to the writing. In contract interpretation, the context is often found in the oral statements the parties made during the negotiations leading to the formation of the contract. Likewise, in statutory construction, context can be found by examining the legislative history leading to the passage of the statute. Legislative history is thus properly understood as a form of parol evidence that documents the creation of the writing and can be used to explain and aid in its interpretation.

There are also obvious parallels between the textualist modes of interpretation in both contract and statute interpretation. Williston and Justice Scalia both rely on a judge's characterization of the structure and logic of the text at issue and on a judge's view of the plain meaning of the text and dictionary definitions. When those avenues fail, each will resort to interpretive canons to provide insight into the meaning of the text. Finally, each rejects extrinsic manifestations of the parties' subjective intent in favor of other interpretive tools.

There are also similarities in the rationales proffered to exclude this extrinsic evidence. Those who would exclude parol evidence in contract interpretation raise the following concerns: (1) the fear of perjured testimony and faded memories; (2) distrust of juries, who, it is feared, will be improperly swayed by unreliable parol evidence in contradiction to the agreed upon text; and (3) the need to insulate writings protected by the statute of frauds from oral testimony, which is not so protected.[105] Somewhat similarly, the reasons for refusing to rely on legislative history include distrust of judges, a desire to insulate statutes from outside influences perceived to be untrustworthy, and the need to ensure that oral agreements not included in the text do not become law. (In this view, the constitutional process for passing legislation is analogous to the Statute of Frauds.) In both instances, the written word is viewed as having paramount significance by the proponents of exclusion.[106] On the other hand, in each context, those who defend the use of extrinsic aids have insisted that careful use of this evidence is preferred to its exclusion and the inevitable use of even less reliable means of interpretation.

In this Part, we first identify various factors that make the case for using extrinsic evidence stronger in interpreting statutes than in the contract law area. The case for the use of legislative history, we suggest, is even more compelling than Corbin's argument for parol evidence because: (1) legislative history can be employed by a court without the need for a jury trial to resolve disputed oral

105. For a complete commentary, see McCormick, *supra* note 36.

106. For example, Judge Alex Kozinski shares our view that contract and statutory interpretation are analogous, although he reaches completely opposite conclusions as to how the analogy should be applied. Kozinski is a noted critic of Justice Traynor's liberalization of the parol evidence. *See supra* note 36. He also challenged the use of legislative history in *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring). Kozinski complained that legislative history can be cited to support almost any proposition and frequently is. He went on to announce that the potential for abuse is great and that judges should heed Justice Scalia's warnings about the use of legislative reports.

testimony; (2) legislative history is necessary to protect legislative prerogatives from the increasing use of presumptions generated by judges out of their own philosophies; and, (3) as a default rule, the use of legislative history for legislative drafting is more desirable for facilitating democratic policymaking than the use of textualism as a default. We next examine some superficial differences between contracts and legislation—multiplicity of parties, the role of the President, and fair notice to affected parties—concluding that these differences do not justify a textualist approach. Nor, we conclude, is the goal of effectuating the drafters' intent more important in contract law. Finally, we consider formalist objections to legislative history. Whatever their merit, we conclude that they require a remarkable degree of judicial activism that is inconsistent with Justice Scalia's stated goal of restraining judicial discretion.

A. INSTANCES IN WHICH THE CASE FOR THE USE OF EXTRINSIC EVIDENCE IS STRONGER IN STATUTORY INTERPRETATION

There are, of course, significant differences between contracts and statutes. In a number of respects, however, these differences make the textualist position even weaker in the statutory realm than it is in the contract area, where Corbin and his allies have prevailed.

1. Oral Versus Written Extrinsic Evidence and Resolution Through Summary Judgment

Williston was extremely concerned that the actual agreement of the contracting parties could be frustrated if either perjured or mistaken testimony of a verbal understanding led to a different conclusion from that which would be reached by a judge limited to the four corners of the contract.[107] This concern is alleviated in the statutory realm because the sources of legislative history traditionally relied upon—committee hearings and debates, reports, floor debates[108]—are all written, and therefore do not raise the specter of distorted or faded memory. Moreover, the courts have demonstrated an ability to discount legislative history that is simply unreliable.[109]

Because parties engaged in contract litigation will often disagree about the

---

107. *See* WILLISTON, *supra* note 11, § 633, at 1819-22.

108. We exclude from this discussion the reliance on post-enactment affidavits of legislators averring as to their intent. We agree that this practice raises significant reliability problems. *See* Covalt v. Carey Canada Inc., 860 F.2d 1434, 1439 (7th Cir. 1988) (Easterbrook, J.).

109. *See, e.g.*, Continental Can Co.v. Chicago Truck Drivers, Helpers and Warehouse Workers U. (Indep.) Pension Fund, 916 F.2d 1154 (7th Cir. 1990) (discussed in detail *infra* note 138); Monterey Coal Co. v. Federal Mine Safety & Health Rev. Comm'n, 743 F.2d 589 (7th Cir. 1984) (rejecting clear and express floor statement by House manager of conference report, where textual provision at issue originated in Senate, whose conferees insisted on its inclusion in final bill, and Senators had already passed bill and had no opportunity to respond to comments). Modern technology inhibits the ability of legislators to effectively abuse the legislative record. *See, e.g.*, Ross, *supra* note 82, at 423-24 n.136 (recounting an attempt by House conferee to misstate intent of Conference Committee refuted in Senate debate by Senate conferee after staff attorney watched House debate on C-SPAN).

content of any oral agreements or representations, a party might find it easy to avoid summary judgment by pointing to a disputed issue of fact concerning the interpretation of a contract. Indeed, this seems to be the principal basis of modern criticisms of the liberal parol evidence rule.[110] These criticisms are undercut in the statutory realm because even complicated disputes about the significance of the phrasing of a committee report or a statement made during the floor debates are susceptible of judgment without trial.

2. Judge Versus Jury

Disputes that arise in interpreting contracts are often deemed to be issues of fact to be resolved by the jury,[111] whereas statutory interpretation is a matter of law. This distinction has several implications for the relative validity of the textualist position. As a matter of accuracy, there is arguably a greater need for extrinsic evidence to aid a judge's interpretation than a jury's interpretation. A jury that is conscientiously trying to effectuate the parties' manifest intent is less likely to be biased, given that the jury is composed of a number of participants who bring many different perspectives to the interpretive process. Meanwhile, the likelihood that a judge will simply fall back on her own subjective views[112] is enhanced because there is no other interpreter to challenge the perspective she brings to the case.

Admittedly, this view is counter-conventional: many judges and commentators fear that juries will deliberately or subconsciously seize upon unreliable parol evidence in order to find for the more sympathetic party.[113] But we suspect that this concern is largely due to the oral nature of much parol evidence. The paradigmatic case is one in which a large corporation sues a sympathetic buyer of goods and the buyer provides unsubstantiated testimony of an oral agreement that excuses her failure to pay. Juryphobes, we suggest, are (or at least should be) less concerned that a jury will misconstrue what the

110. *See, e.g.*, Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564 (9th Cir. 1988); FARNSWORTH, *supra* note 13, at 520; Olivia W. Karlin & Louis W. Karlin, *The California Parol Evidence Rule*, 21 SW. U. L. REV. 1361 (1992).

111. *See* WILLISTON, *supra* note 11, at 616.

112. *See* CORBIN, *supra* note 15, § 542, at 111.

113. *See* Zell v. American Seating Co., 138 F.2d 641, 644-45 (2d Cir. 1943) (Frank, J.) (holding that parol evidence of alleged contract admissible, noting that the "most important reason for the perpetuation of the [parol evidence] rule is distrust of juries") (citing McCormick, *supra* note 36), *rev'd per curiam*, 322 U.S. 709 (1944). The Supreme Court reversed without opinion. Four justices found that testimony concerning the contract was barred by the parol evidence rule, two justices agreed with Judge Frank on this point, and three justices found the contract to obtain war supplies orders for the defendant on commission, even if proven, was void as contrary to public policy. *Id.*

Whether or not these fears are justified, *cf.* Mooney, *supra* note 44, at 1147 ("judging by reported decisions at least, the parol evidence rule seemed actually to assist more dissemblers than it thwarted"), the perceived hostility of juries to large businesses may lead those businesses to utilize standard written contracts that reflect the firm's desire to fully incorporate the bargain in a written document. To the extent that the firm insists that a complete written integration is the only way it will do business, barring parol evidence effectuates the actual intent of the parties. In contrast, it appears that Congress does not usually intend that courts exclude legislative history from their consideration.

parties meant by, for example, a letter written by the corporation's agent to the buyer explaining the meaning of clause 157 in the contract. For us, the paradigmatic case is *Gianni v. R. Russel & Co.*, in which the judges found that a written contract between a landlord and an unsophisticated tenant was the sort that reasonable people would find to be complete; a jury would be much more likely to believe that the parties had indeed reached a separate oral understanding concerning the exclusive nature of the rights conferred upon the tenant.[114]

3. Use of Normative Versus Descriptive Canons [115]

In both contract and statutory contexts, textualists advocate the use of canons or maxims as a methodology for resolving otherwise difficult interpretive problems. These canons fall into two categories: descriptive canons and normative canons. Descriptive canons are based on the way ordinary people express themselves in English. They attempt, through generalizations, to approximate the probable intent of the drafters.[116] Many contract rules that imply terms omitted by the parties (so-called "default rules") represent efforts to provide the parties to a contract with "what they would have contracted for."[117] Several important canons in contract law resolve interpretive questions against the party responsible for creating the interpretive difficulty in the first place. For example, where a written contract was entirely drafted by one party, courts will often resolve ambiguities against the drafter.[118] Courts will also construe terms against the party that acted less reasonably—for example, the seller who knew the buyer had a contrary interpretation of a term but did nothing to clarify the ambiguity.[119] Although these descriptive canons can certainly be misused, their

---

114. The case is discussed in detail in *supra* text accompanying note 36.

115. For an explanation and differentiation of normative and descriptive canons, see Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992).

116. *See, e.g.*, FARNSWORTH, *supra* note 13, § 7.11 at 518; JAMES WILLARD HURST, DEALING WITH STATUTES 56 (1982).

117. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989). Many of those who more aggressively advocate default rules that are economically efficient still couch their argument in terms of "what arrangements would *most* bargainers prefer?" *Id.* at 92 (quoting Charles Goertz & Robert Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983)).

118. *See* FARNSWORTH, *supra* note 13, § 7.11, at 518.

119. Most law students recall the famous case of *Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (1960), in which the court found that the term "chicken" in the contract was objectively unclear and held that the plaintiff could not prevail on its interpretation because its own understanding "may not have been sufficiently brought home" to the defendant. *Id.* at 121.

Professor Corbin criticized a portion of the court's reasoning, in which Judge Friendly first found that the word "chicken" standing alone was ambiguous, and then found the word in the context of the entire written contract to be similarly unclear. *See id.* at 118. In Corbin's view, the "word chicken did not stand alone; and whatever meanings (if any) it might have standing alone, do not determine the issue" because the word was used in context of other words. Corbin, *supra* note 12, at 165. Moreover, the case for admissibility of parol evidence is demonstrated because, according to Corbin, the contract text might well have seemed plain were Corbin the judge. Corbin had spent ten years on a Kansas farm feeding chickens, and recalled the famous 1928 presidential campaign slogan "a chicken in every pot"

focus on grammar and context is designed to inhibit a judge's personal bias in the interpretive process. Most significantly, under the Corbin approach, parol evidence of the parties' manifest intent is admissible and, if deemed reliable, will prevail over these interpretive canons.[120] Similarly, only the most rigid statutory textualists refuse to consult legislative history that demonstrates that the empirical generalizations underlying a descriptive canon were not operative in the case at hand.[121]

The second group of canons, referred to as "substantive," "policy," or "normative" canons, resolve interpretive difficulties based on how the canon's creator (whether legislator or judge) believes the matter *ought to have been resolved by the drafters, regardless of their actual intent.* For example, various provisions of the Uniform Commercial Code assign the risk of loss, if not specifically addressed by the parties, to the party most capable of avoiding the loss or most able to distribute the risk of loss efficiently.[122] Similarly, courts have historically given narrow interpretations to statutes in derogation of the common law, even though there is no basis for supposing that legislators necessarily had a particularly high regard for the common law.[123] Today, the Supreme Court requires Congress to speak with utmost clarity before it will interpret a federal statute in a way that limits state prerogatives, refusing to consider even crystalline nontextual indicia of what Congress actually intended.[124]

---

and therefore did not attribute the narrow meaning (poultry capable of broiling or frying) asserted by the buyer. Nonetheless, Corbin wrote, his own background would not have justified the exclusion of other extrinsic evidence. *See id.* at 166.

120. *See, e.g.*, Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc., 844 P.2d 428 (Wash. 1993) (rules of construction should not be applied except where the intent of the parties cannot be discerned from the circumstances and considerations of the case, including parol evidence).

121. For example, in Llewellyn's classic article on the canons, *supra* note 79, the alternative to a descriptive canon is frequently an interpretive rule that requires examination of the legislative history for evidence of actual intent or purpose. Even a leading textualist, Judge Frank Easterbrook, acknowledges the need to consult legislative history to ensure that the *expresio unius* canon is being applied accurately. *See In re* American Reserve Corp., 840 F.2d 487, 492 (7th Cir. 1988).

122. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 215 (3d ed. 1988). To be sure, these are "default" rules that parties can alter. *Id.* at 212 (citing U.C.C. § 2-504). However, courts are often reluctant to disturb the code-specified risk allocations. *See id.*

Corbin took pains to distinguish the application of these canons, which he called "construction," from "contract interpretation." He wrote, "[w]hen a court is filling gaps in the terms of an agreement with respect to matters that the parties did not have in contemplation and as to which they had no intention to be expressed, the judicial process should not be called interpretation." CORBIN, *supra* note 15, § 534, at 11 (1960).

123. Justice Scalia notes that this canon "seems like a sheer judicial power grab." SCALIA, *supra* note 1, at 29. *See also* FREDERICK POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS 85 (1882) (stating that some canons "cannot well be accounted for except upon the theory that Parliament generally changes law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds").

124. *See, e.g.*, Dellmuth v. Muth, 491 U.S. 223 (1989) (refusing to find that Congress abrogated state sovereign immunity, despite explicit legislative history showing intent to so abrogate, and despite fact that Supreme Court decision announcing "clear statement rule" for abrogation of sovereign immunity not established until 1985, twelve years after passage of relevant statute).

These normative canons are somewhat more prevalent in modern contract law than in the traditional world that followed Williston's lead. In cases where there was no textual evidence of agreement on key terms and provisions, Williston was much more likely to find that there was no meeting of the minds and thus no contract.[125] Llewellyn, in particular, successfully advocated the enforcement of contracts with a minimum number of agreed-upon terms, at the same time that he and others were liberalizing the parol evidence rule to facilitate the admission of extrinsic evidence to prove that the parties actually had a "meeting of the minds" on the relevant issue. Thus, absent evidence that the parties intended to limit the terms of their agreement to a written contract, courts applying the UCC would not insist upon the use of a statutory "gap-filler" when reliable extrinsic evidence existed that the parties had actually agreed on a resolution of a particular issue, but had neglected to include that resolution in the written contract.[126] As Judge Posner wrote:

> A completely intractable issue of contract interpretation can be resolved only by the application of some default rule—a burden of persuasion, a clear-meaning rule, a presumption based on the authorship of the contract. But the time to throw up one's hands and apply such a rule is after extrinsic evidence has been considered. For until then, we do not know whether we have an intractable interpretive issue or merely an issue that cannot be resolved without testimony or other evidence besides the language and logic . . . of the contract.[127]

The increased use of normative canons to interpret statutes makes it more, rather than less, important that judges consider extrinsic evidence of the manifest intent of legislative drafters. The problematic use of normative canons by

---

125. For example, in *Sun Printing & Publishing v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923) (Cardozo, J.), the court found that an agreement to agree later on price was too indefinite to be enforced. Williston cited the case with approval, 1 WILLISTON, *supra* note 11, § 41, at 116. White and Summers cite the case to illustrate how the UCC validates such agreements. *See* WHITE & SUMMERS, *supra* note 122, §§ 3-7, at 145.

126. To illustrate, consider the various provisions of Article 2 that identify the party that should bear the risk of loss of the goods subsequent to the signing of the contract.

Although the Code makes clear that these terms may be varied by the parties, U.C.C. § 2-504, where the parties have agreed that the written contract is the complete integration of their agreement, and that contract is silent on terms of risk of loss, courts are likely to reject parol evidence of a "side agreement" on risk of loss. Rather, courts are going to assume that, by agreeing to a fully integrated written contract silent on risk of loss provisions, the parties manifested a shared intent to have their dealings governed by the UCC gap fillers.

However, this shared intention must be proven; the Code presumes, absent evidence to the contrary, that the parties do *not* intend a written contract to be the complete integration of their agreement, and thus terms that do not vary or contradict written terms are admissible. In such a case, since the written contract is silent, courts would admit parol evidence that the parties agreed to allocate the risk of loss in a manner different than that provided under the code. Indeed, even Professor Williston would, contrary to some cited cases, admit parol evidence where it appeared that the parties had not considered the omitted term in the written contract. WILLISTON, *supra* note 11, § 640, at 1839-41.

127. Bidlack v. Wheelabrator Corp., 993 F.2d 603, 609 (7th Cir. 1993) (en banc).

those claiming to be dedicated to reducing judicial interference with democratic policymaking has been noted elsewhere.[128] It is particularly ironic when legislative history is compared to contract interpretation. At the same time that New Textualist judges are increasingly relying on normative canons,[129] and also on descriptive canons that often do not accurately describe legislative drafting practices,[130] many of these same judges are ignoring evidence that makes it clear that Congress did not intend the result generated from these canons. This practice is hardly consistent with an interpretive method designed to limit the implementation of the "objectives and desires" of the judiciary.[131]

4. Insights from Theories of Contract Default Rules

All of the approaches to extrinsic aids discussed in this article—Williston's strict parol evidence rule, Corbin/Llewellyn's liberalized parol evidence rule, the conventional reliance on legislative history in statutory interpretation, and the New Textualism—are "default rules" in the sense that the relevant parties can change the practice by explicit agreement. Even Williston would have permitted parties to explicitly provide that their written document was not a fully integrated contract and that any prior or contemporaneous written or oral[132] agreements were incorporated therein. The UCC, of course, retains a parol evidence rule that permits the parties to exclude *any* extrinsic evidence. Although Justice Scalia has found few true followers among his colleagues on the Supreme Court, we suspect that they all would give effect to an explicit statutory provision that directed the courts to disregard legislative history in interpreting the statute. Even Justice Scalia would accept "snippets" from the *Congressional Record* if, for example, the text of the statute explicitly declared that the floor manager's interpretive remarks were authoritative.

One might ask, then, what the fuss is all about. If reliance on legislative history promotes legislative supremacy (because legislators favor its authoritative use by courts),[133] facilitates the effectuation of legislative policy preferences (by making it easier to reach bargains since the terms of the bargains can be explained in detail in the legislative history),[134] and, as this article has argued, inhibits judges from interpreting statutes based on their own background and policy preferences, it should be a simple enough matter for Congress to enact legislation instructing the courts to use legislative history.

---

128. *See* SCALIA, *supra* note 1, at 28; Ross, *supra* note 115, at 563-66 (1992).

129. *See e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

130. *See supra* text accompanying notes 96-99. Illuminating empirical research has found that Congress is much more likely to override plain meaning decisions of the Supreme Court than any other type of statutory decision. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 348 (1991).

131. *Cf.* SCALIA, *supra* note 1, at 18.

132. Of course, oral agreements are subject to the Statute of Frauds.

133. *See* Correia, *supra* note 82.

134. *See* Brudney, *supra* note 81, at 20-40. *Cf.* McNollgast, *supra* note 16, at 710.

Recent scholarship has studied the significance of the selection of particular default rules in contract and corporate law. Professor Ian Ayres, for example, has argued that complex standards (his example is the duty of care corporate managers owe shareholders) are more difficult to draft than clear rules (that corporate managers owe no duty of care to anyone). In his words, "it may be cheaper for corporations to contract for crystals than mud."[135] Ayres concludes that it will be more efficient to make the "muddy" standard the default rule, because corporations that prefer no duty of care can simply say so in their incorporating articles, whereas it is much more difficult to ask a corporation to craft a complex standard fully contingent on future events.[136]

As applied to statutory interpretation, Ayres' insights suggest that the validity of Justice Scalia's views is not a matter of indifference. It is not difficult to draft a statutory provision stating that nothing in the legislative record should have any interpretive significance, or that only some particular item should. Indeed, in one notable case, Congress did precisely that.[137] On the other hand, courts cannot be directed simply to give effect to "legislative history," given the breadth of that term and the possibility that, to cite the most obvious example, the statements of individual legislators may well not reflect the legislature's collective intent.[138] Trying to draft statutory language that accurately specifies

---

135. Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 51 U. CHI. L. REV. 1391, 1405 (1992) (reviewing FRANK H. EASTERBROOK & DANIEL R. FISHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991)). These artful metaphors are borrowed from Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

136. Ayres, *supra* note 135, at 1405.

137. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), § 105(b), discussed at *supra* note 87 and accompanying text.

138. Although some suggest that statements by individual participants in the legislative process "should be accorded no weight," McNollgast, *supra* note 16, at 726, we believe that the issue is a bit more complex, which exemplifies our point in the text that drafting a statute telling courts to use "reliable" legislative history is much "muddier" than telling courts not to use any legislative history if that is Congress's preference. A thoughtful opinion by Judge Easterbrook, *Continental Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers U. (Indep.) Pension Fund*, 916 F.2d 1154 (7th Cir. 1990), is illustrative. In that case, Continental claimed it was eligible to be covered by a special ERISA provision, 29 U.S.C. § 1383(d)(2) (1980), which was available only if "substantially all of the contributions required under the [pension] plan are made by employers primarily engaged in the long and short haul trucking industry." The court disagreed, finding that "substantially all" meant 85%, a threshold Continental did not meet. In so holding, the court relied on the consistent application of the 85% threshold to give meaning to the same phrase in most tax statutes. Significantly, the court also relied on an "individual statement" made on the House floor by the House manager of the bill (Rep. Thompson), urging acceptance of the Senate amendment that contained this exception, noting that he intended "substantially all" to mean 85%, and observing that this was the common use of the phrase by the IRS. *See Continental Can*, 916 F.2d at 1156. The court rejected, however, a *subsequent* statement, inserted into the *Congressional Record* but not stated on the Senate floor, by an individual Senator (Sen. Durenberger), indicating his view that the provision applied if a majority of the assets were contributed by trucking companies. Judge Easterbrook explained:

> Although Senator Durenberger was "amazed" that anyone would dare to interpret language he had not written, we do not view Representative Thompson's speech as an exercise in temerity. The Senate amended H.R. 3904 and wanted the House to accept its revisions. Members of the House were entitled to form their own understanding of the language before

which portions of the legislative history accurately reflect the legislators' intent is much more difficult than language that excludes all history.

To be sure, a legislature could respond to Ayres' concerns by simply drafting a provision instructing the courts to enforce "mud." Returning to Ayres' example, crafting a duty of care may be difficult, but a provision could easily be added to the articles of incorporation providing that directors "exercise that duty of care found reasonable by the courts under past and future Delaware legal precedents." Applying this standard to statutes, Congress could simply add a general or bill-specific provision directing courts to interpret statutes "based on the manifest intention of the legislators as revealed in both the statute's text and those portions of the legislative record that appear to reliably reflect congressional intent."

A recent work by Professor Russell Korobkin explains, however, why this response is inadequate. Korobkin demonstrates that parties tend to develop a preference for whatever default rule is adopted, simply because it is the status quo.[139] He suggests several reasons for this phenomenon. First, the party that seeks to displace the default rule may be viewed by the opposing party as behaving strategically, thus creating distrust in the negotiation process. Second, people are generally risk-averse; they tend to worry about the adverse consequences of their positive actions rather than the potential consequences of inaction.

Consider these insights in the context of a hypothetical drafting session where

---

> deciding whether to enact it. Words do not have meanings given by natural law. You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities.... If Senator Durenberger wanted to see whether his colleagues would agree to an amendment exempting funds the majority of which came from the trucking industry, he had only to propose words such as "majority" or "50.1%" or "more than half" or "most". Instead he chose a formula with a known meaning and tipped into the Congressional Record a novel interpretation.

Id. at 1157-58.

In contrast, floor colloquies reflected a shared understanding of legislation by known opponents is a particularly reliable form of legislative history. *See, e.g.*, Hatch, *supra* note 8, at 48 (stating that "whenever Senator Metzenbaum and Senator Thurmond agree, the statement probably has the support of the rest of the body as well"). One of us (Ross) can confirm Senator Hatch's conclusion from first-hand experience (as Judiciary Committee counsel to Sen. Metzenbaum). In 1984, Senators Metzenbaum and Thurmond had indeed agreed on the outlines of compromise legislation concerning liability of municipalities for violations of the Sherman Act and the Federal Trade Commission Act. Proposed legislation, with a host of drafting problems, was provided at Sen. Thurmond's request by the Justice Department. Sen. Thurmond's aide persuasively argued that, in light of the extraordinary compromise between two usual antagonists, Sen. Metzenbaum should acquiesce in the draft, and he did so. When attorneys working for other Judiciary Committee members identified these drafting errors, they were encouraged to have their employers raise these issues. Invariably, as soon as these other senators were informed that the draft in question had been agreed to by Thurmond and Metzenbaum, the discussion was ended and no further action was taken. (Eventually, the Local Government Antitrust Act of 1984 more closely resembled the bill that was drafted by counsel for the House Judiciary Committee.).

139. *See* Russell B. Korobkin, *The Status Quo Bias and Contractual Default Rules*, 83 CORNELL L. REV. 608 (1998).

staff counsel to Senators Edward Kennedy and Strom Thurmond are drafting legislation to reflect a compromise to which these prominent and ideologically opposed senators have agreed. Assume that neither of them has any particular reason to object to the courts' subsequent use of the legislative history; indeed, virtually every staffer has had the experience of facilitating a legislative bargain by drafting a paragraph for the committee report that clearly explains the meaning of a statutory provision to the satisfaction of all concerned parties.[140] Now assume, instead, that Kennedy and Thurmond instruct their staffers to assume that the New Textualist method of interpretation will govern.[141] After a while, suppose that the Thurmond staffer suggests that the text of the statute contain a provision that specifically instructs the courts to look to the legislative history in interpreting the statute. Korobkin's thesis would predict (correctly, in our view) that this suggestion would have two effects. First, Kennedy's staffer would wonder what parts of the legislative history Thurmond's lawyer was so interested in, and would begin to suspect some opportunistic behavior on Thurmond's part. Second, the Kennedy staffer might well reject Thurmond's proposal, and insist that no legislative history be used, for fear that some portion of the committee report she had written might be used against Kennedy's ideological position in later litigation, even though she would have considered the use of legislative history unobjectionable had the default rule been the opposite.

Professor Ayres has also suggested that, in order to promote both equity and efficiency in contracting, default rules be established to facilitate the sharing of information by the parties.[142] In a sense, this proposal is an elaboration of the general contract law principle that resolves ambiguities against the party that has acted less reasonably in creating or failing to resolve the ambiguity during the negotiation process,[143] and at first glance it may appear to support excluding extrinsic evidence as a means of encouraging the parties to manifest their agreement in the plain words of the written text.[144] In the contract context, combining a host of specific default rules with the parol evidence rule means that parties content to abide by the operative default rules can remain silent; if both parties are satisfied with these rules, they can then comfortably agree to exclude parol evidence with some confidence about how judges will fill in any gaps in the contract. Thus, the parol evidence rule arguably serves the desirable

140. *See supra* note 138 (reliability of floor colloquies between opposing leaders on issue); *supra* note 81 (deliberate legislative choice to use broad statutory language with narrative explanation of text's meaning in committee report).

141. During House Judiciary Committee negotiations on a 1991 anticrime bill, Rep. Barney Frank warned colleagues not to resolve a dispute by putting explanatory language in a committee report. He used just two words: "Justice Scalia," then said the committee report might ultimately be judged irrelevant. *See* Joan Biskupic, *Scalia Sees No Justice in Trying to Judge Intent of Congress on a Law*, WASH. POST, May 11, 1993, at A4.

142. *See* Ayres & Gertner, *supra* note 117.

143. *See, e.g.*, Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (1960).

144. *See* Mooney, *supra* note 44, at 1146.

function of encouraging parties to incorporate into the contract's text all understandings that are not consistent with operative gap-fillers.[145] However, there are no such universal gapfilling default rules for statutes. Permitting legislators to rely on narrative explanations of the meaning of complex textual provisions seems to best facilitate the sharing of information.

Barring courts from examining the bargaining history of a contract or a statute has costs and benefits. Most obviously, the exclusion of extrinsic evidence increases the risk that the court will not interpret the text in the way that the parties intended, and that the parties will have to engage in more costly and time-consuming negotiation over the text to minimize this risk. The benefit of exclusion is that this costly exercise may reduce the likelihood of erroneous interpretation, both because the text will be more precise and because the courts will not be misled by unreliable extrinsic evidence, and reduce the costs incurred by lawyers and judges who will be freed from the need to research legislative history.[146] The goals of preserving free markets and democratic legislating suggests that the parties ought to be able to determine for themselves when the cost-benefit analysis tips in favor of the exclusion of extrinsic evidence.[147]

Taken together, the insights of these default rule theorists suggest that the

---

145. Thanks to Marie Reilly for this insight.

146. *See* Movsesian, *supra* note 81, at 1185-88. In a general critique of the analogy made in this part, Professor Movsesian highlights the difficulties in the task of discovering reliable legislative history. Movsesian develops a dichotomy between the hard-to-discover "intended meaning" of a statute and the easy-for-judges-to-identify "actual meaning" or "objective" reading of the statutory text. *Id.* at 1149, 1182. As this article suggests, how judges will interpret the "actual" or "objective" reading is often more unreliable than extrinsic evidence, a point that Corbin developed and that legislators today recognize.

147. A recent work that analyzes the costs and benefits of textualist and non-textualist approaches implies that, at least in the contract setting, most parties prefer the exclusion of extrinsic evidence based on the observation that parties rarely include anti-merger clauses in contracts negotiated in those jurisdictions with a strict parol evidence rule. Eric A. Posner, *The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 571 (1998). Professor Posner does not assert that the use of merger clauses is significantly higher in states that routinely admit extrinsic evidence. In any event, Professor Korobkin's work, *supra* note 139, casts doubt on the significance of this empirical inquiry, because of the disruptive effect on negotiations of a party's request to insert anti-merger clauses where the default rule provides for the exclusion of extrinsic evidence.

Professor Posner suggests that the parol evidence rule should be strictly applied in categories of cases where the transaction costs of including prior or contemporaneous agreements in the written contract are low and where the risk of judicial error is high. *See* Posner, *supra*, at 550. However, if the parties are aware that the transaction costs are low and judicial error is likely, it is not clear why they cannot be relied upon to include in the written contract a clear manifestation of their agreement that extrinsic evidence should be excluded, a manifestation that Corbin, Llewellyn, and other proponents of extrinsic evidence would enforce. To the extent that the parties might seek to exclude extrinsic evidence concerning some terms, but not others, *see id.* at 551, this too could be provided for in a negotiated merger clause. Posner's claim that Corbin "mistakenly assumes that the parties' intentions cannot also include a preference against judicial evaluation of extrinsic evidence," *see id.* at 570 n.69, is only true in the sense that Corbin would always review extrinsic evidence of that alleged exclusionary preference.

case for a rebuttable presumption in favor of using legislative history in statutory interpretation is even stronger than it is in the case of using parol evidence in contract interpretation. In both the contract and the statutory context, a textual ban on the use of extrinsic evidence is more crystalline, and thus Ayres' insights suggest that the default rule should permit reliance on extrinsic evidence. This is especially true in the statutory area. A contract clause expressly incorporating prior or contemporaneous agreements or understandings is easier to draft than a clause effectuating Congress's "muddy" desire to have the courts use reliable legislative history. In addition, contract negotiations will more frequently center on the insertion or exclusion of standard clauses; the parties have a very clear understanding of the meaning judges are likely to give to those clauses, and are primarily haggling over rival clauses that benefit one side or another. Although this is a generalization, legislative negotiations more frequently involve individually drafted statutory provisions, where it is harder to predict what meaning the courts will give to the text and thus more need for use of explanatory narrative.

B. SUPERFICIAL DIFFERENCES THAT DO NOT DISTINGUISH STATUTORY INTERPRETATION SUFFICIENTLY TO JUSTIFY NEW TEXTUALISM

There are other important ways in which the negotiation, implementation, and interpretation of contracts differ from the statutory context. However, on close analysis, these differences do nothing to weaken the analogy between contract and statutory interpretation; they do not lessen the applicability of the consensus in contract law that the exclusion of extrinsic evidence facilitates judicial discretion, often resulting in the substitution of the judgment of the judge for that of the drafters, and making it difficult for drafters to accomplish their purposes.

1. Multiplicity of Parties

Most contracts involve only two parties, and the type of extrinsic evidence that manifests these parties' intent is often relatively straightforward. Conversely, statutes typically require the assent of a majority of Congress as well as the President. Thus, it could be argued that extrinsic evidence indicating the views of a committee or a bill's sponsor does not provide the same sort of reliable indicia of intent.[148]

Admittedly, the task of reviewing a statute's legislative history to ensure that it reliably reflects the collective legislative intent adds a level of complexity to the interpretive process that is not present in many contract cases. However, this complexity should not be exaggerated. Multiparty contracts are not uncommon—collective bargaining agreements between management and labor unions are a classic example. In construing these contracts, bargaining history is often

148. *See* the discussion of this point at *supra* text accompanying notes 55-56 (citing SCALIA, *supra* note 1, at 32 and Radin, *supra* note 55, at 870).

critical.[149] Over sixty years ago, Dean Landis responded to Professor Radin's attack on the notion of collective intent by conceding that

> even in a large representative assembly the debate on statutes passed by it will not call forward external utterances or significant behavior on the part of 'hundreds of men.' Rarely does a debate evoke more than a handful, and the yea and nay votes of the non-participants by every reasonable intendment must be taken to adopt their views.[150]

Moreover, the critical role played by committees and floor sponsors in shaping and determining the meaning of a statute's text is well established in the political science literature.[151]

2. The Role of the President

The role of the President in the statutory process may appear to have no equivalent in the contract law arena. Arguably, legislative history cannot reflect the collective intent of the relevant "parties" because the President is unlikely to have had any real say in that legislative history. But this characterization of the legislative process is not entirely valid. While the President may not formally create legislative history, he or she has the ability to influence the legislative process by eliciting the support of a legislator to make specific arguments during the floor debates or by using a representative of an executive branch agency to testify about a bill during congressional hearings.[152] In addition, the administration's interpretation of a bill's language can easily be distributed to legislators and inserted into the *Congressional Record* by the President's legislative allies. In extreme cases, the President can threaten to or actually veto legislation if the legislative history suggests that Congress intends a result the President finds unacceptable. As a result, the President can and does contribute to the creation of legislative history, and the legislative process is correctly analogized to a three-party contract negotiation.

3. Notice to Affected Parties

For years, critics of the use of legislative history in statutory interpretation have argued that reliance on committee reports and floor debates available for publication only in libraries that are government depositories is not fair to a

149. *See* James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283, 307 (1995).

150. Landis, *supra* note 14, at 888-89 n.7 (internal citations omitted). Landis recognized that no such assumption could be made about representatives of the other legislative body, *see id.*, but this did not detract from the principal point.

151. *See, e.g.*, McNollgast, *supra* note 16.

152. *See, e.g.*, Bankamerica Corp. v. United States, 462 U.S. 122, 135-36 (1983) (relying on testimony at committee hearings by President Wilson's adviser, Louis Brandeis); Kathryn Marie Dessayer, Note, *The First Word: The President's Place in "Legislative History"*, 89 MICH. L. REV. 399 (1990).

citizenry that is supposed to rely on the "rule of law."[153] These critics would presumably be unimpressed with the insights of Corbin and others concerning the need for extrinsic evidence in contract interpretation because the parties bound by the contract are obviously familiar with that evidence.

The principal problem with this critique is that it assumes a world that no longer exists, if it ever did. Very few statutes outside the criminal area operate directly on uninformed individuals. Modern statutes are enormously complex and cannot be interpreted or complied with without the assistance of a lawyer who is likely to have relatively easy access to either the actual legislative history or to treatises written by experts intimately familiar with that history. Moreover, most statutes are mediated by implementing agencies. Surely the agency lawyers and the firms whose work is directly affected by the agency have similar access to and familiarity with legislative materials.[154]

Indeed, the recognition that most of those who are actually affected by a statute have ready access to—and often participated in creating—the legislative record actually strengthens the argument for the use of extrinsic aids. In contract negotiations, many thorny interpretive issues are left unresolved because neither party wants to signal that it is considering, or worried about, having a business relationship end up in litigation.[155] In contrast, committee counsel and lawyer-lobbyists constantly engage in careful negotiations concerning the exact wording of a statute and its legislative history precisely because they anticipate litigation over the meaning of the statute.[156] Thus, reliable indicia of how the drafters intended specific interpretive problems to be resolved is more likely to exist in the record of legislative negotiations than contract negotiations. Significantly, in one prominent example of a contract negotiation process that is conducted with the expectation of future litigation—collective bargaining agreements between unions and management that will be enforced through arbitration—bargaining history is commonly used as a tool for contract interpretation.[157]

When contracts create rights in nonparties (third party beneficiaries), these parties are, like nonlegislators in relation to statutes, not immediately privy to extrinsic evidence. Here, the focus of the Restatement is on whether it would be "reasonable" for the third party to rely on the contract "as manifesting an intention to confer a right upon him."[158] Although it has been suggested that

153. *See, e.g.*, United States v. Public Util. Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., dissenting); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396-97 (1951) (Jackson, J., dissenting). For a detailed discussion of this issue and response to prominent critics like Justice Jackson, see DICKERSON, *supra* note 25, at 147-51.

154. *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989). For an expanded discussion of this point, see Ross, *supra* note 82, at 1061-63 (1995).

155. *See* Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 70-71 (1993); Korobkin, *supra* note 139.

156. Consider the example of the National Cooperative Research Act, discussed *supra* note 81.

157. *See* Westbrook, *supra* note 149.

158. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d.

this analogy counsels against the use of extrinsic evidence,[159] it appears that where, as is usually the case, a reasonable third party would itself, or through counsel, be familiar with the legislative history, that the manifest intent of the legislature, as expressed in that history, would be binding on the outside party.

4. Anti-intentionalism in Statutory Interpretation

Text is arguably a more essential part of a statute than a contract. A written contract memorializes an agreement, rather than constituting it.[160] Thus, extrinsic evidence of what the parties' contractual agreement really was is arguably more compelling than evidence of legislative intent.

This argument is not without force. However, if the actual intent of the legislature (or, to be precise, the leading legislators who were directly involved in passage of the legislation and whose views were likely shared, or acquiesced in, by the majority that supported the bill) is to be jettisoned as an interpretive anchor, the question becomes what replaces that anchor. Certainly if the goal of statutory interpretation is to prevent judges from pursuing their "own objectives and desires," "under the guise or even the self-delusion of perusing unexpressed legislative intents,"[161] it is difficult to justify the refusal to use extrinsic aids to guide and limit judicial discretion.

Clearly, Corbin's insights are most relevant for those who would substitute the "objective meaning" of statutory text for the actual intent of the legislature. Judges left to their own devices are far too likely to reach interpretive results in accord with their own backgrounds and prejudices.[162] A well-meaning judge

159. *See* Movsesian, *supra* note 81, at 1175. To be precise, Movsesian says this analogy counsels against "importing intentionalism wholesale into statutory interpretation." This passage again reveals Movsesian's erroneous equation of the use of extrinsic aids with subjective intentionalism. *See id.*

160. Special thanks to Dan Farber for his excellent phrasing of this argument.

161. SCALIA, *supra* note 1, at 17-18.

162. *See, e.g.*, Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 59 (1989) (suggesting that the conservative Court in the 1988 term used whatever justification was necessary to achieve preferred outcomes); Pierce, *supra* note 82, at 780-81 (analysis of textualist administrative law decisions during recent term shows almost all to reach conservative ideological results); Ross, *supra* note 82, at 422-23 (noting four examples of recent cases where justices' view of plain meaning corresponded to predicted ideological view of desired result in the case *sub judice*); Wald, *supra* note 70, at 304-05 (rejection of legislative history resulted in attribution of intent to Congress "without apparent source other than the writing judge's mindset"); Nicholas S. Zeppos, *Chief Justice Rehnquist, the Two Faces of Ultra-Pluralism, and the Originalist Fallacy*, 25 RUTGERS L.J. 679, 679 (1994) (arguing that Chief Justice Rehnquist's statutory interpretation decisions coincide with his political preferences).

Corbin complained of cases where a majority held that words were "plain and clear" even though dissenting colleagues found the text ambiguous or even attached a different "plain and clear" meaning. CORBIN, *supra* note 15, § 542, at 122. For a stark example, see *Regan v. Wald*, 468 U.S. 222 (1984) (five-justice majority finds plain language of statute to support challenged Presidential authority; four dissenting justices and three court of appeals justices found plain language demonstrated Presidential authority improper). *See also* Pierce, *supra* note 82, at 752 (criticizing textualist adoption of a plain meaning at odds with contrary view held by many other judges for years). Remarkably, few justices reach the conclusion that language that they believed to be clear at first glance is in fact ambiguous because of the views of their judicial colleagues. *But see* Nedlloyd Lines B.V. v. Superior Ct., 834 P.2d

who adopted Corbin's skepticism of "plain meaning" might then move to the second step in Justice Scalia's proposed method of textual analysis—determining the meaning "most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind."[163] It is by no means self-evident that it is benign for judges to determine for themselves, unanchored to any evidence of the legislature's policy preferences, what meaning results in the most coherent *corpus juris*. What is clear is that such an approach is a fiction. There is no evidence that Congress intends for the *corpus juris* to be coherent.[164] Public policy is about compromises, about resolving conflicting interests, about achieving desired policy to some extent, without unduly sacrificing some other goal.[165]

Although a number of academic commentators and some textualist judges view statutes as contractual deals or bargains to be enforced by disinterested judges,[166] this view is sharply criticized by those who believe that many statutes are public-spirited and that judges should act as partners with the legislature in effectuating the public purposes of legislation.[167] While the public-regarding approach weakens the analogy to contracts, it necessarily requires use of legislative materials in order to permit judges to fully participate in this "repub-

---

1148, 1170 (Cal. 1992) (Kennard, J., dissenting) ("the very fact that [two other dissenting justices] disagree with the majority regarding the meaning of the clause, and that both the majority and these two justices find the clause clear, but conclude it has opposite meanings, ironically and convincingly demonstrates that the clause is ambiguous").

163. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

164. We therefore distinguish these "benign fictions" from contract law concepts like trade usage. Although in any particular commercial case it is possible that the parties were unfamiliar with trade practices about which a judge thinks they should have been familiar, the interpretive weight given to trade usage necessarily includes the factual assumption that in most cases, merchants in an industry will actually be familiar with these common practices. No equivalent empirical generalization is possible for the notion that the statutory *corpus juris* should be coherent.

165. *See* Heath v. Varity Corp., 71 F.3d 256, 258 (7th Cir. 1995) (Easterbrook, J.) (reversing district court effort to interpret a statute in a coherent manner, noting that "[t]ensions among statutory provisions are common. Legislation reflects compromise among competing interests"); Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1158–59 (D.C. Cir. 1988) (Mikva, J., dissenting) (castigating majority for failing to recognize inherent tension between two antitrust statutes, suggesting majority "mistakenly equates clearheadedness with singlemindedness," noting that Congress often enacts inconsistent statutes and judicial role is not to "legislate a consistency that Congress did not enact").

166. *See, e.g.*, MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981); William Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). Then-Professor Frank Easterbrook allowed that not all statutes were like contracts, but advocated a contract-like approach for those that bear the markings of special interest deals. *See The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984). *Cf.* Chicago Prof. Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667, 671-72 (7th Cir. 1992) (Easterbrook, J.) (courts should read antitrust exemptions with "beady eyes and green eyeshades"). For a nice summary of this perspective, see William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 702-10 (1987).

167. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Macey, *supra* note 82; Strauss, *supra* note 82.

lican dialogue."[168]

C. FORMALIST OBJECTIONS

Finally, the New Textualists have raised a formidable constitutional objection to reliance on external evidence in interpreting statutes: the use of legislative history effectively allows participants in committee hearings, members of committees, and individual legislators to enact "law" without going through the constitutionally mandated legislative process requiring a majority vote in both houses and presentment to the President.[169]

At first glance, this argument appears to be a canard. Few nontextualists suggest that extrinsic aids be given the force of law—rather, legislative history is simply offered to explain what the law that *was* passed through the constitutional process means.[170] Moreover, this argument fails to explain why dictionaries, whose contents obviously have not satisfied the presentment clause, can be considered authoritative.[171] Finally, Corbin's realistic insights show that interpretation necessarily depends upon the judge's own background and biases, which of course have not benefited from bicameralism or presentment either.

To illustrate these points, consider variations on the facts of *Nix v. Hedden*.[172] The case raised the question whether a statute that imposed a tariff on imported West Indian vegetables, but not fruits, applied to tomatoes. The Supreme Court

---

168. *See* Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 895 (1991) (criticizing lack of cooperation between common law judges and legislators and calling for a "touch of republican dialogue between Congress and the court"). *Cf.* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 626 (1993) (describing view that ideal "republican dialogue" would reach uniquely correct political outcomes and that judges should interpret statutes as if such a dialogue had taken place).

The leading proponents of a public-spirited legislative-judicial partnership, while unlikely to be persuaded by a private-law oriented contract model, nonetheless are strong advocates of the use of legislative history in statutory interpretation. *See, e.g.*, Eskridge, *supra* note 101, at 633 ("Legislative history and statutory precedents provide instruction about what the statute is all about and are formal means by which the text's horizon connects with that of the interpreter"); Macey, *supra* note 82, at 262 (legislative history should be used by judges to identify public interest underlying legislation and to hold statute's sponsors to their words, even if insincere, about how statute promotes public interest); Strauss, *supra* note 82, at 535 (consultation with political history of legislation necessary "to improve the chances that the judges' inevitable resolution of 'policy in the gap of ambiguity' would conform to society's wishes and thus tend toward 'peace in the community' ") (quoting from EDWARD LEVI, INTRODUCTION TO LEGAL REASONING 1 (1948)). Because this article accepts an intentionalist perspective on statutory interpretation, a discussion of issues involved with the use of legislative history that does not explain textual provisions but rather provides insight into the broader legislative purposes that originally lay behind the statutory enactment is beyond its scope.

169. *See, e.g.*, Bank One Chicago, N.A. v. Midwest Bank & Trust Co. 116 S. Ct. 637, 645 (1996) (Scalia, J., concurring in part and concurring in the judgment); SCALIA, *supra* note 1, at 35; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 445 (1990); Manning, *supra* note 5, at 696-97.

170. *See, e.g.*, Breyer, *supra* note 15, at 862-63; Brudney, *supra* note 81, at 42–45; Eskridge, *supra* note 1, at 671-72.

171. *See* Manning, *supra* note 5, at 702-05.

172. 149 U.S. 304 (1893).

applied the canon that statutes should be given their ordinary meaning, and then held without citation that "in the common language of the people" tomatoes were considered vegetables, even though botanists viewed them as "fruits of the vine."[173] This case is a classic example of the point that judges necessarily bring in the extrinsic evidence of their own backgrounds. Suppose, however, that the committee reports had clearly stated that all terms in the text were intended to be understood in accordance with their scientific or technical meaning. One presumes that the Court would have reached the opposite result. Would it be unconstitutional for the Court to do so?

What makes legislative history reliable evidence of statutory meaning is the accurate generalization that busy members of Congress defer the crafting of specific bills to sponsors and committees, and acquiesce in the meaning these experts attach to the legislation. In a recent article, Professor John Manning reshapes the New Textualist argument with more precision, arguing that what distinguishes legislative history from other forms of extrinsic aids (like dictionaries, and, perhaps, although Manning does not address this, like the judges' own personal background and biases) is that the Constitution prevents "delegation" of the legislative function to subunits of Congress. Manning's reasoning suggests the following: Congress may properly outlaw "unreasonable" restraints of trade and may allow judges, using common law techniques, to define reasonableness; they may allow broadcast licenses to be granted "in the public interest" and allow the Federal Communications Commission to define that term; but Congress may not allow the Commerce Committee to do either of these things.[174]

To be sure, the contract analogy may not be persuasive to those who accept this constitutional argument. The UCC does not prevent courts from examining the reasons why the parties chose to include particular language in a written contract; to the contrary, modern contract law permits and enforces oral arguments (subject to the Statute of Frauds). But the concept that judges called upon to interpret statutes are constitutionally prohibited from considering legislative history is just as remarkable as the concept that judges interpreting contracts could *never* consider the parties' oral statements.

To continue the contract analogy for one moment, consider the constitutional argument that the presentment clause effectively prescribes a "statute of frauds" for all legislation. (This is a narrower argument than the one Manning makes, but effectively illustrates the breadth and difficulty of his argument.) Assume a written contract for the sale of goods, signed by both parties, that contains no merger clause or any other manifestation of the parties' intent that the written contract constitutes a complete integration. Although the statute of frauds would generally bar parol evidence suggesting that there was an additional or side agreement relating to the sale of other goods valued at more than $500, judges

173. *Id.* at 307.

174. *See* Manning, *supra* note 5.

would certainly admit parol evidence concerning the meaning the parties attached to a particular term. Suppose the contract included a clause providing that, in the event of a contract dispute leading to litigation, the prevailing party will receive "reasonable" attorneys fees, and that the plaintiff wished to introduce into evidence a letter the defendant wrote prior to signing the contract, which acknowledges that the parties have agreed to be bound by three federal district court opinions that define reasonable attorneys fees. Surely, a court would find this evidence admissible.[175]

Professor Manning's thesis, therefore, leaps from the unremarkable proposition that neither congressional committees (via reports) nor legislative leaders (via floor colloquies) can make law, to the proposition that legislators cannot legislate on the assumption that the meanings attached to the text by those most involved in the legislation are the meanings in which they all acquiesce.

The proposition that Congress can delegate the implementation of its policies to courts, agencies, or even private parties but not to congressional committees is controversial enough;[176] the suggestion that Congress can permit judges to attach their own meaning to text, or can insist that judges defer to the meaning set by an agency, but that a member of Congress cannot rely on an explanation of the text's meaning contained in a committee report or provided by the bill's sponsor is highly problematic. In particular, this constitutional argument runs into significant difficulty for those starting from the premise that, subject to specified substantive constitutional constraints, legislation ought to effectuate the public policy established by elected legislators, and not unelected judges. Manning's argument is almost overwhelmed by irony—we discover that virtually all the great Justices throughout our history have not only been acting unwisely but unconstitutionally by resorting to legislative history, based on a completely atextual reading of the Constitution relying solely on Manning's own views of its "structure."[177]

Judges and commentators determined to implement their own vision of society and government's role in society should be comfortable with Manning's thesis. The formalist bar on extrinsic evidence, requiring legislators to solve every imaginable interpretive problem in the text or leave it up to judges or agency heads (who may well be from a different political party), obviously reflects the New Textualist view of the way the legislative process *should* work. The discretion that it gives judges to interpret words according to their own background and biases will mean that many statutes will be implemented in a

175. Justice Scalia, of course, found that this precise sort of extrinsic evidence should be inadmissible in interpreting statutes. *See* Blanchard v. Bergeron, 489 U.S. 87, 97 (1989) (Scalia, J., concurring), discussed *supra* note 70.

176. *See* INS v. Chadha, 462 U.S. 919, 985-88 (White, J., dissenting).

177. *See* Strauss, *supra* note 82, at 532 (stating that the "idea of instructing or teaching Congress suggests a hierarchical view quite inappropriate to a government of co-equal branches"); Strauss, *supra* note 104, at 255 (indicating that interpretive rules requiring judges to act in ignorance of the context in which Congress operates are "grounded in disdain for the internal procedures of a coordinate branch").

way that reflects the policy preferences of the judiciary more so than the enacting Congress. Whether one finds the end result desirable depends on the extent to which the federal judiciary is composed at any given time of men and women who share one's policy preferences. Whatever the result, it is clearly one of judicial activism.[178]

CONCLUSION: WHAT CORBIN'S VICTORY MEANS FOR THE NEW TEXTUALISTS

The successful efforts of Professors Arthur Corbin, Karl Llewellyn, and others to liberalize the parol evidence rule in interpreting contracts has real significance in the contemporary debate about the use of legislative history in statutory interpretation. Starting from a consensus that supports free markets where parties can effectuate enforceable promises, courts, commentators, and legislatures adopting the UCC have accepted Corbin's argument that the process of interpretation must go beyond the words found in any particular writing, and that the so called "plain meaning" of words cannot be established through judicially created objective tests. The modern contract law consensus rejects the view of Professor Samuel Williston that the plain meaning of a writing can and should be ascertained by the interpreter of that writing without going beyond the text itself. Without information about the intent of those who authored the writing, interpretation will necessarily rest upon the subjective views of individual judges.

This article suggests that statutory interpretation is analogous to contract interpretation. Beginning with the paradigm that in a democratic republic, elected legislators ought to be able to effectuate their policy preferences through legislation, analysis of the parol evidence rule leads to the conclusion that judges interpreting statutes without the benefit of legislative history are *more likely* to weave their own biases and background into their interpretation than if they were required to examine and consider reliable evidence of legislative intent contained in the legislative history. This result is precisely the opposite from that claimed by New Textualists, and forces judges and commentators who believe in judicial restraint to carefully reconsider the validity of textualism.

178. *See* Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1815 (1991) (whatever Justice Scalia's protestations, his jurisprudential world is not one of judicial restraint or legislative supremacy); Strauss, *supra* note 104, at 264-66 (use of political history to discern legislative purpose that should be basis of most interpretation "is a useful safeguard against *judicial* aggrandizement").