

## **On Reading The Language of Statutes**

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### **ABSTRACT**

Linda D. Jellum reviews LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* (The University of Chicago Press, Chicago, 2010), ISBN-13: 978-0-226-76796-3.

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I. INTRODUCTION..... 186

II. ON READING THE LANGUAGE OF STATUTES ..... 189

    A. Laws and Judges ..... 189

    B. Why We Need to Interpret Statutes ..... 193

    C. Definitions, Ordinary Meaning, and Respect for the Legislature .. 197

    D. The Intent of the Legislature..... 207

    E. Stability, Dynamism, and Other Values..... 212

    F. Who Should Interpret Statutes? ..... 216

    G. Jurors as Statutory Interpreters ..... 224

    H. Legislature, Judges, and Statutory Interpretation..... 224

III. CONCLUSION ..... 226

## I. INTRODUCTION

Statutory interpretation is at the forefront of legal academia these days; witness the public and controversial debate between Justice Scalia and Judge Posner regarding Scalia's most recent text, *Reading Law*.<sup>1</sup> In a nutshell Justice Scalia explained, in as thorough manner as possible, why his beloved new textualism is the only correct way to approach statutory interpretation.<sup>2</sup> Judge Posner disagreed publically and pointed out the inconsistencies and flaws with Justice Scalia's approach.<sup>3</sup> Justice Scalia accused Posner of lying, and the debate turned ugly.<sup>4</sup>

Hidden behind this high profile and unprofessional debate is the contribution of another legal scholar in this area, Lawrence M. Solan, who recently published *The Language of Statutes*.<sup>5</sup> It is unlikely that Professor Solan's text will garner the degree and level of attention that Justice Scalia's text has. Yet, that may be a shame. While Justice Scalia and his co-author, Bryan Garner, have added little that is new to the intellectual debate and understanding of how people understand statutory language, Professor Solan has at least attempted to add something original.

In a relatively short read, only 230 pages excluding endnotes and appendices (compare that to Justice Scalia's 414-page tome), Professor Solan approaches statutory interpretation from a novel angle for this field, one that melds philosophy, linguistics, and psychology.<sup>6</sup> In his

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<sup>1</sup> See Richard A. Posner, *The Spirit Killeth, But the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012 at 18 (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012)).

<sup>2</sup> See generally SCALIA & GARNER, *supra* note 1.

<sup>3</sup> See generally Posner, *supra* note 1.

<sup>4</sup> Eileen Shim, *Yet Another Round of the Scalia-Posner Fight*, NEW REPUBLIC (Sept. 18, 2012, 3:31 PM), <http://www.tnr.com/blog/plank/107429/scalia-posner-fight-supreme-court> ("Scalia transformed his response from a defensive to an offensive one, calling Posner's accusation that he had an inconsistent judicial record, 'to put it bluntly, a lie.'"); Richard A. Posner, *Richard Posner Responds to Antonin Scalia's Accusation of Lying*, NEW REPUBLIC (Sept. 20, 2012, 1:55 PM), <http://www.tnr.com/blog/plank/107549/richard-posner-responds-antonin-scalias-accusation-lying>.

<sup>5</sup> LAWRENCE SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* (2010).

<sup>6</sup> For other book reviews of Solan's work, see Samuel Brunson, *Book Review: Solan's The Language of Statutes*, CONCURRING OPINIONS (Feb. 19, 2012, 10:54 PM), <http://www.concurringopinions.com/archives/2012/02/book-review->

text, Professor Solan attempts to explain to the legally trained mind how people naturally understand and approach language to help explain when the interpretation process works and when it does not work. He does not propose a new theory, nor, for the most part, strongly advocate for an existing theory. Rather, he attempts to show the strengths and weaknesses of all the theories in light of philosophy, linguistics, and psychology.

I looked forward to reading this text.<sup>7</sup> Professor Solan has, in addition to a J.D., a Ph.D. in linguistics.<sup>8</sup> With this unusual background, he stands in a unique position to help explain to lawyers and legal academics how we approach and understand language in a way that could help further the interpretation process.<sup>9</sup> His last book, *The Language of Judges*,<sup>10</sup> was relatively well received.<sup>11</sup> In this earlier text, Professor Solan used his linguistic expertise to explain how judges are not as faithful to the law as they proclaim.<sup>12</sup> According

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[solans-the-language-of-statutes.html](#); Brian Christopher Jones, *The Language of Statutes: Laws and Their Interpretation*, LAW AND POL. BOOK REV., <http://www.lpbr.net/2011/06/language-of-statues-laws-and-their.html>; Peter R.A. Gray, *The Language of Statutes: Laws and their Interpretation*, 19 INT'L J. SPEECH, LANGUAGE, & L. 135 (2012); Daniel Greenberg, *The Language of Statutes: Laws and their Interpretation*, 33 STATUTE L. REV. 93 (2011).

<sup>7</sup> Indeed, when I was contacted in September by the Editorial Board of the *University of Massachusetts Law Review* to provide an article for the inaugural edition of their new general journal, I wondered what I could possibly provide in just two months that would add anything of value to statutory interpretation discourse. Then I remembered that my dean had sent me an announcement of this text and suggested that I review it, given my background in this area. Because of his suggestion, the book was sitting unread on my bookshelf. I offered to write a book review for the journal. Little did I know how much I would benefit from this exercise.

<sup>8</sup> *Biography: Lawrence Solan*, BROOKLYN LAW SCHOOL, <https://www.brooklaw.edu/faculty/directory/facultymember/biography.aspx?id=larry.solan> (last visited Dec. 1, 2012).

<sup>9</sup> Indeed, "His scholarly works are largely devoted to exploring interdisciplinary issues related to law, language and psychology, especially in the areas of statutory and contractual interpretation, the attribution of liability and blame, and linguistic evidence." *Id.*

<sup>10</sup> LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993).

<sup>11</sup> See Craig Hoffman, *Commenting on The Language of Judges*, 2 J. LEGAL WRITING INST. 213 (1996); Terry Gordon, *Review: The Language of Judges*, LINGUIST LIST (Dec. 2, 1993, 2:18 PM), <http://linguistlist.org/issues/4/4-1028.html> (book review).

<sup>12</sup> See generally SOLAN, *supra* note 10. I did not read this text, though I would likely have a better understanding of this second text had I done so.

to Solan, judges need and desire to offer neutral reasoning for the decisions they make, and so they turn to linguistics to provide that seemingly neutral path.<sup>13</sup> Ultimately, he concludes that judges are less than honest in their decision-making processes, using, for example, linguistic reasoning to mask subjectiveness.<sup>14</sup> I doubt that his conclusion will surprise most lawyers today, especially those trained in legal realism.

I also looked forward to his text because statutory interpretation is a field that I am passionate about. However, if I am honest, I found reading and understanding this text to be a struggle for a number of reasons. There is no clear organization or structure in the text neither as a whole nor within each chapter. In addition, the text lacked a clear introduction. Because it lacked a clear focus and thesis,<sup>15</sup> I was never certain exactly what Solan was trying to accomplish or whom he was trying to reach. It is unclear whether this was a book written for law students, legal academics, linguists, judges, or all or a combination of these individuals.

What is clear is that Solan tries to reach two disparate audiences: lawyers and linguists.<sup>16</sup> On the one hand, he offers linguistic explanations to lawyers,<sup>17</sup> who likely have no training in linguistics. On the other hand, he offers legal explanations to linguists, who likely have no legal training. In both cases, his explanations assume a level of understanding that neither reader will have. In sum, Professor Solan has much to offer both audiences, but he would do well to consider writing for them separately in the future.

Because I found it difficult to understand Solan's overall purpose and thesis and to ascertain the organization of each chapter, I have tried to distill his ideas into coherent organizational framework; one that might be useful to those of you who would benefit from hearing

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<sup>13</sup> *See id.* at 186.

<sup>14</sup> *See id.* at 185 (“Armed with [an] enormous power, and faced with the responsibility of exercising it on a daily basis, judges will, at times, grab at any argument that the system accepts as legitimate in order to convince the parties and the community at large that the court did what it was supposed to do.”).

<sup>15</sup> For example, even the chapter titles lack coherence. *See e.g. infra* notes 20, 49, 185, and accompanying text. While the chapter titles could have provided organizational structure, Solan did not use them to this effect.

<sup>16</sup> *See, e.g., SOLAN, supra* note 5, at 13 (summarizing the problems that the book will address).

<sup>17</sup> *Id.* at 62–66 (providing a “psycholinguistic account” of the problem of reconciling definitional meaning and ordinary meaning).

about some of his novel contributions but who, perhaps, do not want to have to work so hard to understand his points. *The Language of Statutes* is divided into the following chapters: an introduction (which is not called an introduction), four chapters on the sources of meaning, two chapters on the interpreters, and a conclusion (which is not called a conclusion).<sup>18</sup> In each, there are pearls of wisdom, which I identify for you in a chapter-by-chapter review. Thus, this review summarizes what I think are Solan's key highlights in a fashion as organized and as clear as I can provide. Additionally, I offer comments in both the text and footnotes when I disagree with Solan's conclusions or believe a more nuanced approach may be appropriate.

## II. ON READING THE LANGUAGE OF STATUTES

### A. Laws and Judges

While there is no true introduction, chapter one<sup>19</sup> comes close. In it, Solan proclaims, "This book is about the relationship between lawmakers and judges. More specifically, it is about how judges judge disputes about laws."<sup>20</sup> He notes that, because law developed through the common law process, judges are used to playing the leading role in laws' formation.<sup>21</sup> With the proliferation of statutes, a debate has arisen in legal circles about the appropriate role for judges: some believe that judges should simply apply statutes according to their plain meaning, while others believe that judges should be a partner in the interpretive process.<sup>22</sup> Solan pushes aside the question of *whether* judges should play an active role in interpretation and concludes,

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<sup>18</sup> The chapter titles, along with the subsection titles of this article, are as follows: (1) Laws and Judges, at 1; (2) Why We Need to Interpret Statutes, at 16; (3) Definitions, Ordinary Meaning, and Respect for the Legislature, at 50; (4) The Intent of the Legislature, at 82; (5) Stability, Dynamism, and Other Values, at 120; (6) Who Should Interpret Statutes?, at 160; (7) Jurors as Statutory Interpreters, at 196; (8) Legislatures, Judges, and Statutory Interpretation, at 223.

<sup>19</sup> Chapter one begins at page 1.

<sup>20</sup> SOLAN, *supra* note 5, at 1. By "laws," I assume from the title of his text that he means statutes, though he does not say so.

<sup>21</sup> *Id.* at 1–2.

<sup>22</sup> *Id.* Solan states that some believe that, "judges attempt to legislate beyond their authority by imposing their own glosses and values on statutes that should simply be applied as the legislature wrote them." *Id.* at 2. Others, Solan notes, "believe that the common-law tradition provides a special opportunity for judges to continue to do justice, even though so much of the law is statutory." *Id.*

simply, that judges *do*.<sup>23</sup> Moreover, he notes that because statutory language will often leave uncertainty and discretion, the personal values of judges will inevitably seep into the statutory interpretation analysis.<sup>24</sup> But I disagree that the question can be so easily dismissed, especially given recent attempts by legislatures, both state and federal, to curtail perceived judicial activism.<sup>25</sup>

Building on the thesis of his last text,<sup>26</sup> Solan specifically acknowledges that judges' political views play a role because judges care about the ramifications of their decisions and "cannot help but steer the legal system in a direction they believe to be the best course when more than one outcome is licensed by a statute whose application is not sufficiently clear in a particular case."<sup>27</sup> He does not seem overly bothered about his conclusion because "laws work . . . most of the time" without judicial intervention.<sup>28</sup> Judges are involved only some of the time, and when they are, he believes that judicial discretion is suitably constrained.<sup>29</sup> I found this latter point profoundly interesting and surprisingly simple—laws work most of the time. By focusing on the hard cases, academics and scholars have forgotten that statutes work more often than they do not.<sup>30</sup> Solan provides a fresh reason for this: laws mirror "ordinary social norms."<sup>31</sup> Few of us need statutes telling us not to lie, cheat, steal, or kill. Such statutes require us to do what we would do anyway. Were there not outliers, thrill seekers, or sociopaths, society would not have to enact statutes that say that certain behavior is unacceptable and therefore punishable.<sup>32</sup> Further, the similarity of statutes to morality helps explain the intuitive appeal of the plain meaning canon: when controversy arises under these types of statutes, Solan suggests that application of the plain meaning canon resolves the controversy most

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<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.*

<sup>25</sup> *See infra* text accompanying notes 247–65.

<sup>26</sup> *See supra* notes 10–14 and accompanying text.

<sup>27</sup> SOLAN, *supra* note 5, at 5.

<sup>28</sup> *Id.* 4–5.

<sup>29</sup> *Id.* It is only the hard cases that reach the courts, and only a small handful that reach the Supreme Court. *Id.*

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *See id.* at 5–6.

of the time.<sup>33</sup> The sheer number of the non-hard cases in which the plain meaning canon can resolve controversy gives this interpretive canon intuitive appeal for some legal theorists.<sup>34</sup>

Further, Solan notes, when statutes stray from socially expected norms, statutes work less well and thus are challenged more often.<sup>35</sup> For example, a statute that prohibits people from taking the life of another generates little controversy. But add in a “stand your ground” exception and suddenly, the results are less clear. When statutes try to regulate conduct that is less universally agreeable, the statutes need to be written more clearly and with the possibility of lawyering in mind. This concept may help explain why laws used to work better: laws used to be less detailed. When laws are less detailed, courts have more leeway to fill the gaps, while lawyers have less language to challenge. For example, compare the Sherman Act, which was enacted in 1890, with the Patient Protection and Affordable Care Act (known pejoratively as “Obamacare” or colloquially as “the Health Care Act”), which was enacted in 2010.<sup>36</sup> The Sherman Act is a comprehensive and expansive act regulating federal antitrust activity, and yet it fits onto a single page; Congress left significant room for judicial development. The Affordable Care Act is a comprehensive and expansive act regulating the finest minutia of the healthcare industry, and fits on almost 1000 pages; Congress left little room for judicial development. Statutes today are far more complex than in the past.

The tax code is another example that shows that statutes that stray from moral values must be more detailed and will be subject to increased challenges. Paying taxes to the government is not something most of us do willingly; hence, the tax code must be more detailed and will inevitably be challenged.<sup>37</sup> However, rather than use such legal-

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<sup>33</sup> *Id.* at 11.

<sup>34</sup> *Id.* at 13–14.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> Compare Act of July 2, 1890, Pub. L. No. 51-647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2006), with Patient Protection and Affordable Care Act of 2010 (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.).

<sup>37</sup> See SOLAN, *supra* note 5, at 11–12 (“[L]aws that attempt to regulate behavior in ways that are counterintuitive or in ways to which people would rather not conform . . . sometimes create a game of cat and mouse, where the legislature attempts to set standards and the [people being] regulated attempt to comply with the letter of the law but to thwart its intent by engaging in conduct that is largely equivalent to what is not allowed but is different enough in form to come outside the law. We see this in such areas as tax shelters . . .”).

based examples, Solan provides a very simplistic example: a New York City transit rule that prohibits people from walking between subway trains, even when the trains are stopped.<sup>38</sup> Perhaps, he thought that a simple example might be easier for his linguistic readers to grasp, though I think his example is more difficult to follow. Although the rule allowing riders to move between trains was changed in 2005, New Yorkers did not alter their behavior because moving amongst trains was a longstanding tradition.<sup>39</sup> Solan says, “[T]he legislature intend[ed] to convey a message imposing an obligation on members of society, but somehow that message [did] not come through.”<sup>40</sup> Solan notes that, if a New Yorker were to be prosecuted for violating this rule,<sup>41</sup> a judge would need to decide whether to interpret the law according to its definitional (or dictionary) meaning,<sup>42</sup> its ordinary meaning (which is different), its purpose, its enacting body’s intent, or some other value.<sup>43</sup> He claims that he will devote much of the remainder of the text to identifying the arguments and debate about which factor should be given priority.<sup>44</sup> He believes that judges should and do feel bound to decide cases within the “range of reasonable interpretations that the language of a statute affords or, in unusual situations, by articulating a good reason for not doing so (such as a legislative error or an obviously anomalous result) . . . .”<sup>45</sup>

In the concluding section of this chapter, Solan suggests that he will explore how our psychology leads to recurrent difficulties in statutory interpretation and why an approach using an “expansive

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<sup>38</sup> *Id.* at 6 (“It is a violation to move between end doors of a subway car whether or not train is in motion, except in an emergency or when directed by police officer or conductor.” (footnote and alterations omitted)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 9.

<sup>41</sup> After posing this question, Solan digresses to remind us that that the employees of the executive are the first to interpret statutes; if the offender did not know that the law had been changed, a police officer would be justified in letting the individual off with a warning. *Id.* at 7.

<sup>42</sup> Here, Solan actually said “plain meaning (when the language is unequivocal).” *Id.* at 11. He never discusses this idea in the text; however, he does explain definitional meaning. *See id.* at 53, 62.

<sup>43</sup> *Id.* at 11.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 4. Nevertheless, he explains that legislative primacy is essential for statutory legitimacy, stating that it is “an overarching value in the decision-making process.” *Id.*

array” of interpretive tools is preferable to one using a narrow array.<sup>46</sup> He concludes:

The basic argument of the book is that laws generally work well; when they fail to provide us with sufficient information to know our rights and obligations, it is usually (but by no means always) because of uncertainties in how well the concepts contained in a statute’s words match the events that are in dispute. That is, most problems of statutory interpretation, including most of the famous cases, are about problems of conceptualization.<sup>47</sup>

While the idea that “laws work well” may be foundational, it alone cannot be the thesis of his text, for he has already made this point in this chapter, and he made it well.<sup>48</sup> Thus, his introduction develops a topic that he will explore throughout his text but does not develop a thesis. He left the reader ignorant of his purpose.

### **B. Why We Need to Interpret Statutes**

If “laws work well,” one may wonder why does anyone need to interpret statutes at all. In chapter two,<sup>49</sup> with this provocative title, Solan offers another novel reason why laws work well: he proclaims that statutes are written like classical, dictionary definitions.<sup>50</sup> To make his point, and he does so very convincingly, he compares the dictionary definition of “lie”<sup>51</sup> with the federal perjury statute.<sup>52</sup> The similarities between the structure of the dictionary definition and the structure of the statute are hard to ignore.<sup>53</sup> The similarity of statutes to

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<sup>46</sup> *Id.* at 13.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 4 (“[A]s the argument of this book unfolds I hope to show that laws work fairly well.”).

<sup>49</sup> Chapter two begins at page 16.

<sup>50</sup> See SOLAN, *supra* note 5, at 18.

<sup>51</sup> *Id.* (“1. To present false information with the intention of deceiving. 2. To convey a false image or impression: *Appearances often lie.*” (citation omitted)).

<sup>52</sup> *Id.* at 18 (quoting 18 U.S.C. § 1621 (2009) (“Whoever . . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury.”)).

<sup>53</sup> See *id.* at 18–19. He then discusses cases interpreting the “very linguistically complex” federal bribery statute to explore the types of challenges that are made to complex statutes; this section is long and unfocused. *Id.* at 20–37.

dictionary definitions helps English readers understand statutes more readily.

After offering this comparison, Solan notes that psychologists divide language capacity into “word” capacity and “rule” capacity.<sup>54</sup> According to Solan, some legal language is “rulelike,” such as syntax canons and the perjury statute.<sup>55</sup> Other aspects of our legal language are “wordlike,” such as the use of words to express concepts.<sup>56</sup> While acknowledging that this theory is not without controversy, Solan nevertheless suggests that rulelike language issues generally involve ambiguity because the number of possible meanings is limited and the potential meanings are very different from one another, which makes it relatively easy for an interpreter to discern the intended word from the context.<sup>57</sup> Solan provides two classic examples here: “Flying planes can be dangerous” and “Visiting relatives can be annoying;” each sentence provides two options, only one of which is correct, and the correctness is discernible from textual context.<sup>58</sup> Solan could have added Justice Scalia’s famous statement: “If you tell me, ‘I took the boat out on the bay,’ I understand ‘bay’ to mean one thing; if you tell me, ‘I put the saddle on the bay,’ I understand it to mean something else.”<sup>59</sup> Thus, in each of these examples, there are a finite number of meanings and textual context resolves the ambiguity.

To understand wordlike confusion, we must jump ahead to a later discussion in which Solan convincingly suggests that people understand language in prototypes.<sup>60</sup> If I write the word “furniture,” likely a couch, bed, table, or chair entered your mind—more likely, a lamp or rug did not.<sup>61</sup> Similarly, if I write “bird,” you might have thought of a robin or bluebird, but not an ostrich—Solan calls the pictures that these words evoke in our minds “prototypes.”<sup>62</sup> Thus, it

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<sup>54</sup> *Id.* at 38 (citing STEVEN PINKER, WORDS AND RULES: THE INGREDIENTS OF LANGUAGE (1999)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 39–40 (quoting NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 21 (1965)).

<sup>59</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 26 (1997).

<sup>60</sup> SOLAN, *supra* note 5, at 65.

<sup>61</sup> *Id.* at 63.

<sup>62</sup> *Id.* at 64–65 (concluding, “What all this means for legal interpretation is that the choice between definitional and ordinary meaning is only natural.”). Solan uses

would seem that the more similar the issue before a court is to the evoked prototype (picture), the more likely the court will find that the language of the statute covers the issue. In other words, the more similar the issue is to the prototype, the less confusion that arises, and the less similar the issue is to the prototype, the more likely confusion will arise. Solan does not tie the prototype analysis into the wordlike discussion, but the two seem entwined. Wordlike confusion arises not because the language at issue is ambiguous (meaning it has more than one reasonable interpretation), but because the language at issue is “vague at the margins.”<sup>63</sup> For wordlike confusion, there are “innumerable possible meanings.”<sup>64</sup> And, unlike rulelike confusion, textual context does not readily resolve which meaning was intended,<sup>65</sup> because wordlike confusion “require[s] subtle judgments of line drawing to determine whether one interpretation or another fits a situation best.”<sup>66</sup> Solan suggests that many of the more famous statutory interpretation cases involved wordlike confusion: for example, does a minister’s work count as “labor;”<sup>67</sup> is an airplane a “vehicle;”<sup>68</sup> and does an individual “use” a gun when he barter it for drugs?<sup>69</sup> Solan says the issue of whether a minister’s work is “labor” is unclear only because the word “labor” “becomes vague at the margins, making it hard to tell whether we would consider it fair to equate

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the Paula Jones case as an example to show that people had a prototype of the words “lie” and “perjury.” *Id.* at 65. Most people had no doubt that former President Clinton lied, but because most people understood the basis for the lie, they did not consider his lie to be perjury. *Id.*

<sup>63</sup> *Id.* at 40.

<sup>64</sup> *Id.* at 38–39.

<sup>65</sup> *Id.* at 39.

<sup>66</sup> *Id.* at 39.

<sup>67</sup> See *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (holding that a minister’s work was not labor because the intent of congress was simply to stay the influx of this cheap, unskilled labor).

<sup>68</sup> See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.”).

<sup>69</sup> See *Smith v. United States*, 508 U.S. 223, 236–37 (1993) (“Because the phrase ‘uses . . . a firearm’ is broad enough in ordinary usage to cover use of a firearm as an item of barter or commerce . . . [W]e conclude that using a firearm in a guns-for-drugs trade may constitute ‘us[ing] a firearm[.]’”).

preaching and labor.”<sup>70</sup> I would add that it is unclear because of prototype. In other words, “labor” evokes a picture, for some of us that picture would include pastoring, but for many of us it would not. Regardless, the word is not ambiguous in a rulelike way.

Not surprisingly, the different theorists approach wordlike confusion differently. Adherents of textualism, a rulelike approach, would turn to a dictionary to see if ministering is included within the definition of the word “labor.”<sup>71</sup> Solan suggests that when interpreters approach wordlike confusion in a rulelike manner, they may well make a fortress of the dictionary.<sup>72</sup> Those who reject textualism and use a wordlike approach would eschew the dictionary and turn instead to legislative intent, wanting to know how closely the concept of “preaching” fits with the prototype of Congress’ laborer.<sup>73</sup>

Solan compares two cases that demonstrate the contrast between the rulelike and wordlike approaches. In *United States v. Wiltberger*, the Supreme Court addressed the issue of whether federal courts had jurisdiction over a defendant who committed manslaughter while on an American merchant marine vessel sailing on the Tigris River in China.<sup>74</sup> The relevant statute criminalized homicides committed “upon the high seas.”<sup>75</sup> The question for the Court was whether this statute should be interpreted to include homicides that occurred in rivers in foreign countries.<sup>76</sup> Likely, Congress would have so intended, but the language of the statute was very narrowly drafted.<sup>77</sup> Applying a wordlike approach and the rule of lenity, Chief Justice Marshall accepted that statutory language becomes “vague at the margins” and refused to interpret the statute broadly.<sup>78</sup> In this case, there was no

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<sup>70</sup> SOLAN, *supra* note 5, at 40 (introducing the cases of *Church of the Holy Trinity*, *McBoyle*, and *Smith*).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 77 (1820).

<sup>75</sup> *Id.* at 78 (quoting Act of April 30, 1790, ch. 9, § 12, 1 Stat. 112, 115).

<sup>76</sup> *Id.* at 99 (“It is observable, that this section, in its description of [jurisdiction], omits the words, ‘in any river, haven, basin, or bay,’ and uses the words ‘high seas’ only.”).

<sup>77</sup> SOLAN, *supra* note 5, at 42.

<sup>78</sup> *Id.* at 41–42.

ambiguity in the language, only a very narrowly drafted statute: rivers are not the high sea.<sup>79</sup>

In contrast, in *United States v. Winn*, Justice Story applied a rulelike approach in a criminal case.<sup>80</sup> In *Winn*, the issue for the Court was whether a ship's chief officer was a member of the ship's "crew."<sup>81</sup> Justice Story refused to apply the rule of lenity saying instead, "I know of no authority, which would justify the court in restricting [general words] to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them."<sup>82</sup> Turning to the dictionary, a rulelike approach, Justice Story concluded that the dictionary defined the word "crew" to include all the members of the ship.<sup>83</sup> These two examples help highlight the differences between the rulelike and wordlike approaches; both cases involved narrowly drawn criminal statutes, the rule of lenity, and wordlike confusion. Yet they came to opposite results.

### C. Definitions, Ordinary Meaning, and Respect for the Legislature

Years ago, Oliver Wendell Holmes said, "We do not inquire what the legislature meant; we ask only what the statute means."<sup>84</sup> Solan's next chapter, chapter three,<sup>85</sup> turns to the language of the statute. First, however, Solan debunks the notion that the various approaches to statutory interpretation differ significantly.<sup>86</sup> Comparing intentionalist-based approaches<sup>87</sup> with text-based approaches, he claims that both have more commonalities than differences.<sup>88</sup> One commonality he

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<sup>79</sup> *Id.* at 42.

<sup>80</sup> *Id.* at 43 (discussing *United States v. Winn*, 28 F. Cas. 733 (C.C.D. Mass. 1838)).

<sup>81</sup> *United States v. Winn*, 28 F. Cas. at 733–34.

<sup>82</sup> *Id.* at 734.

<sup>83</sup> *Id.*

<sup>84</sup> Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899), reprinted in OLIVER WENDELL HOLMES, JR., THE COLLECTED LEGAL PAPERS 203, 207 (1920).

<sup>85</sup> Chapter three begins at page 50.

<sup>86</sup> SOLAN, *supra* note 5, at 50–51.

<sup>87</sup> *Id.* at 50. Because Solan does not distinguish between intentionalists and purposivists, his analysis is less complete than it should be.

<sup>88</sup> *Id.* at 51.

notes is that for all theorists the text of a statute is paramount.<sup>89</sup> He notes that intentionalist-based theorists do not ignore text as is often claimed;<sup>90</sup> rather, intentionalists “take a pragmatic, eclectic approach to the interpretation of statutes, relying upon whatever information appears to provide an interpretation that is loyal to the language of the statute and the intent of its drafters and is coherent with the code in general.”<sup>91</sup>

A second commonality Solan notes is that all theorists consider context.<sup>92</sup> Text-based theorists are not blindly devoted to the text despite their strong rhetoric; text-based theorists abjure only one type of context: legislative history offered as evidence of legislative intent.<sup>93</sup> Textualists regularly turn to other types of context, such as earlier judicial interpretive decisions, background assumptions shared by the relevant community, constitutional considerations, and coherence with related statutes.<sup>94</sup> Thus, text-based theorists differ only in their willingness to consider one form of context: legislative history.<sup>95</sup>

A third commonality he notes is that both share a commitment to legislative primacy as the core value in statutory interpretation.<sup>96</sup> All theorists believe that once the legislature has enacted statutory

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<sup>89</sup> *Id.* at 50–51.

<sup>90</sup> *Id.* at 51. However, I am not so sure that it is often claimed that intentionalists ignore text completely; rather, sometimes intentionalists reject ambiguous text (rarely clear text) to further legislative intent.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 52–53.

<sup>93</sup> *Id.* at 52.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* Solan’s analysis is less nuanced than it should be. Only some textualists, notably Justices Scalia and Thomas and Judge Easterbrook, are so rigid. For a discussion of the various forms of textualism, see Linda D. Jellum, *The Art of Statutory Interpretation*, 49 U. LOUISVILLE L. REV. 59, 66–86 (2010). Most textualists are willing to consider legislative history at some point in the interpretation process, for example if the statutory ambiguity cannot be resolved with intrinsic sources. *Id.* These textualists use a linear approach to resolving ambiguity, checking each source in a prescribed hierarchical order and beginning with intrinsic sources and moving to policy-based sources. *Id.* For a discussion of the types of sources, see generally, LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 13–15 (2008).

<sup>96</sup> SOLAN, *supra* note 5, at 51 (“What the two sides share is a commitment to legislative primacy as the core value in statutory interpretation.”).

language, the common law court's ability to fashion a remedy is curtailed.<sup>97</sup>

Solan next returns to his rulelike/wordlike dichotomy to develop an interesting, and unusual, explanation for why interpreters come to opposite conclusions regarding a word's meaning when they apply the plain meaning canon.<sup>98</sup> Interpreters apply the plain meaning canon because they believe that legislatures likely meant to use words in their ordinary sense.<sup>99</sup> Solan distinguishes between a word's rulelike, or definitional, meaning—the meaning provided by a dictionary—with its wordlike, or ordinary, meaning—the meaning most people would ascribe to the word regardless of the dictionary.<sup>100</sup> He laments that the use of dictionaries is on the rise: “Without question . . . the biggest change in the search for word meaning is the almost obsessive attention courts now pay to dictionaries, using them as authority for ordinary meaning.”<sup>101</sup> He notes that, until the late twentieth century, Supreme Court Justices used dictionaries infrequently.<sup>102</sup> Indeed, in the 200 years preceding Justice Scalia's appointment, the Court referred to “ordinary meaning” in close proximity to the word dictionary just six times; in contrast, from the time of his appointment though 2008, the Court did so twenty-one times.<sup>103</sup> This significant increase is not necessarily a good one.

Dictionaries provide definitional meanings, not ordinary meanings.<sup>104</sup> They establish the outer boundaries of appropriate usage of words.<sup>105</sup> Yet, most of the time, the issue facing a court is not whether the legislature intended one meaning rather than another (a rulelike choice), but rather whether the legislature would have expected the statute to apply to the specific facts before the court (a wordlike, or prototype, choice).<sup>106</sup> “[D]ictionary definitions most often do little to aid in that inquiry,”<sup>107</sup> because most of the time it is not the

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 53.

<sup>99</sup> *Id.* at 103.

<sup>100</sup> *Id.* at 53, 62.

<sup>101</sup> *Id.* at 76.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* Solan notes that Justice Thomas has jumped on the bandwagon. *Id.*

<sup>104</sup> *See id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

outer boundaries of the words we are looking for but the similarity of the issue before the court to the prototype the legislature had in mind.<sup>108</sup> By using dictionaries, text-based theorists give themselves a broader range of apparently legitimate meanings to choose from, making it less necessary for them to consider anything beyond the text.<sup>109</sup>

Definitional meanings are rulelike, while ordinary meanings are wordlike. The different theorists often use different meanings when applying the plain meaning canon: text-based theorists typically use definitional meanings, although not always, and intentionalist-based theorists typically use ordinary meaning, although not always.<sup>110</sup> For example in *Church of the Holy Trinity*, Justice Brewer understood and acknowledged that the pastor's activities fell within the definitional meaning of the word "labor."<sup>111</sup> But that fact was irrelevant, pastoral activities were not within the ordinary meaning, or prototype, of that term, at least not at the time: ministers were not thought of as cheap, unskilled laborers.<sup>112</sup> Thus, Justice Brewer concluded that when the legislature chose to use the word "labor" in the context of this statute, the legislature most likely had in mind physical labor.<sup>113</sup> Hence, Justice Brewer chose the ordinary meaning, using a wordlike

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<sup>108</sup> *Id.* at 64–65, 76.

<sup>109</sup> *Id.* at 76. Additionally, as Solan notes, "Once judges begin to fight over which dictionary to consult, the use of dictionaries to determine ordinary meaning is virtually futile." *Id.*

<sup>110</sup> For example, in *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting), Justice Scalia, a textualist, used ordinary meaning to understand the meaning of the word "use," while, Justice O'Connor, an intentionalist, turned to dictionary meaning.

<sup>111</sup> *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (acknowledging that that the pastor's activities "may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.").

<sup>112</sup> *Id.* at 463 ("Obviously the thought expressed in [the word "labor"] reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms 'labor' and 'laborers' does not include preaching and preachers, and it is to be assumed that words and phrases are used in their ordinary meaning.").

<sup>113</sup> *Id.*

approach.<sup>114</sup> Those who criticize his decision prefer a rulelike, definitional approach.

Perhaps the classic example demonstrating the difference between the use of definitional meaning and ordinary meaning in interpretation is the classic dispute between Justices Scalia and O'Connor in a triumvirate of cases beginning in 1993 with *Smith v. United States*.<sup>115</sup> The dispute involved the meaning of the word “use” in a statute imposing a mandatory five-year prison term for using or carrying a firearm “during and in relation to . . . [a] drug trafficking crime.”<sup>116</sup> This example is particularly instructive because, Justice Scalia, a noted textualist, eloquently explains why he chooses the ordinary meaning, while Justice O'Connor, an intentionalist-based theorist, unpersuasively explains why the definitional meaning is appropriate.<sup>117</sup> In *Smith*, the issue was whether the defendant “use[d] or carr[ied] a firearm” in relation to a drug trafficking crime when he bartered an unloaded gun for drugs.<sup>118</sup> Writing for the majority, Justice O'Connor claimed that she was looking for the ordinary meaning of the word “use,” but instead turned directly to three dictionaries to prove that the word “use” was broad enough to include bartering.<sup>119</sup> Justice O'Connor confused dictionary meaning with ordinary meaning.

Dissenting, Justice Scalia quarreled with Justice O'Connor's claim that she had discerned the ordinary meaning:

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<sup>114</sup> SOLAN, *supra* note 5, at 54–55 (stating that *Church of the Holy Trinity* can be understood “as an example of a Court struggling between these two different notions of word meaning and choosing the ordinary-meaning approach over the definitional-meaning approach, much in the style of contemporary textualists.”). Similarly, in *McBoyle v. United States*, the Court used a wordlike approach to hold that the National Motor Vehicle Theft Act did not apply to airplanes. *Id.* at 55 (citing *McBoyle v. United States*, 283 U.S. 25, 26 (1931)). That statute applied to the following: “automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails.” *Id.* Justice Holmes applied the plain meaning canon and *ejusdem generis* and held airplanes were not covered because the ordinary meaning of “vehicles” included only things that run on land. *Id.* According to Solan, Justice Holmes used prototype terminology when he noted that the definition lead to a “picture of a thing moving on land.” *Id.*

<sup>115</sup> *Smith v. United States*, 508 U.S. 223 (1993).

<sup>116</sup> *Id.* at 225 (quoting 18 U.S.C. § 924(c)(1) (1990)).

<sup>117</sup> Compare *id.* at 228–38 (O'Connor, J., 6-3 majority), with *id.* at 242–43 (Scalia, J., dissenting).

<sup>118</sup> *Id.* at 228 (O'Connor, J.).

<sup>119</sup> *Id.* at 229.

To use an instrumentality ordinarily means to use it for its intended purpose. . . . The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used. It would, indeed, be “both reasonable and normal to say that petitioner ‘used’ his MAC-10 in his drug trafficking offense by trading it for cocaine.” It would also be reasonable and normal to say that he “used” it to scratch his head. When one wishes to describe the action of employing the instrument of a firearm for such unusual purposes, “use” is assuredly a verb one could select. But that says nothing about whether the *ordinary* meaning of the phrase “uses a firearm” embraces such extraordinary employments.<sup>120</sup>

What quickly becomes clear is that the two Justices were fighting about whether to use the definitional or ordinary meaning of the word “use.” They were not fighting about what the word “use” meant once that choice was made; indeed, both acknowledged and responded to each other’s argument that “use” meant what the other said it meant.<sup>121</sup> Solan equates Justice Scalia’s dissenting opinion to Justice Brewer’s opinion in *Holy Trinity*, likely to Justice Scalia’s horror, because in both cases the Justices chose the ordinary meaning rather than the definitional meaning.<sup>122</sup> As Justice Brewer so eloquently stated, “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>123</sup>

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<sup>120</sup> *Id.* at 242–43 (Scalia, J., dissenting) (citation omitted).

<sup>121</sup> Justice Scalia’s rejection of Justice O’Connor’s interpretation was included above. Justice O’Connor rejected the argument that the ordinary meaning of “using a firearm” was to use the firearm as a weapon and responded, “It is one thing to say that the ordinary meaning of ‘uses a firearm’ *includes* using a firearm as a weapon, since that is the intended purpose of a firearm and the example of ‘use’ that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use.” *Id.* at 230.

<sup>122</sup> SOLAN, *supra* note 5, at 57.

<sup>123</sup> *Church of the Holy Trinity*, 143 U.S. 457, 459 (1892). Solan also notes that application of definitional meaning could lead to absurdity. SOLAN, *supra* note 5, at 61. For example, in *United States v. Kirby*, a sheriff was prosecuted under a statute that made it illegal to “knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier . . . carrying the same” after the sheriff arrested a mail carrier who was wanted for murder. *Id.* (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 482 (1868)). While the sheriff’s conduct fit within the definitional meaning of “obstruct or retard the passage of mail, or of any driver or carrier . . . carrying the same,” the Court refused to uphold the conviction, claiming that this interpretation was not within the ordinary meaning of the statute. *Id.*

As Solan notes, Justice O'Connor's explanation falls flat: the word "use" has a range of dictionary definitions (it is vague and broad, not ambiguous) such that the word's meaning must be derived from textual context.<sup>124</sup> In other words, dictionary definitions of such a word are meant to be broad and cover all possible uses of the word, not to identify the ordinary use of the word in relationship to the item being used.

Of further note, the *Smith* Court did not address whether the defendant "carried" the gun.<sup>125</sup> In a subsequent case the Court held that defendants who knowingly possess and convey a firearm in a vehicle, including in a locked glove compartment or the trunk of a car, carry that firearm.<sup>126</sup> In this case, the Court again confused definitional meaning with ordinary meaning. Consider whether carrying a firearm in a glove compartment or in the trunk of a car falls within the ordinary meaning of "carry" in connection with a firearm. Solan argues that it does not.<sup>127</sup> The fact that the qualifier "in a glove compartment" or "in the trunk of a car" is added shows that the individual did not carry the firearm on his person.<sup>128</sup> One would not say, "He carried the gun on his person" to indicate that the gun was carried by hand. Rather, one might say, "He carried the gun in his pocket" to show *where* the gun was carried but not to show that gun was carried on the person. In the car example, the word "transport" would better convey the meaning of carrying a firearm in a glove compartment or in the trunk of a car.<sup>129</sup> But the Court missed this point. This distinction between ordinary meaning and definitional meaning is insightful, and Solan's example is fitting.

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<sup>124</sup> See SOLAN, *supra* note 5, at 57–58.

<sup>125</sup> In *Bailey v. United States*, 516 U.S. 137, 150 (1995), the Court addressed this question and held that a defendant who carried a gun in a car did not "use" a firearm within the meaning of the statute because "use" denoted active employment, not mere possession. The Court remanded the case to the lower court to determine whether the defendant "carried" the gun in relation to a drug trafficking crime. *Id.* at 151. And, while the Court confirmed that bartering a gun for drugs was active employment, the Court rejected the argument that receiving a gun in barter was active employment. *Watson v. United States*, 552 U.S. 74, 82–83 (2007).

<sup>126</sup> *Muscarello v. United States*, 524 U.S. 125, 126–27 (1998).

<sup>127</sup> SOLAN, *supra* note 5, at 77.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 77–78.

Ordinary meaning should not control in all cases. Solan suggests that judges should use ordinary meaning as a rule of thumb or starting point,<sup>130</sup> because the ordinary meaning is most likely what the legislature intended.<sup>131</sup> But he acknowledges that sometimes the legislature intended a different meaning.<sup>132</sup> Moreover, he admits that it is not always easy to tell what the ordinary meaning is.<sup>133</sup> While some

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<sup>130</sup> *Id.* at 69 (“Thus, the ordinary-meaning approach to statutory interpretation may act as a reasonable initial hypothesis for determining the intent of the legislature, but it is no more than a rule of thumb whose application is inappropriate in a wide range of situations.”).

<sup>131</sup> *Id.* at 66.

<sup>132</sup> *Id.* at 68. Solan provides the case of *Chisom v. Roemer* as an example. *Id.* at 67–68 (citing *Chisom v. Roemer*, 501 U.S. 380 (1991)). In *Chisom*, the Court had to determine whether section two of the Voting Rights Act, which protected individuals’ rights to elect “representatives,” applied to the election of state judges. *Chisom*, 501 U.S. at 384. The petitioners, black voters, alleged that Louisiana’s method of electing two Justices to the State Supreme Court at-large from the New Orleans area impermissibly diluted the minority vote; the state responded that the Act did not apply to the election of state judges because judges were not “representatives.” *Id.* at 384–85, 389. The state was simply noting the ordinary meaning and prototype: one would not picture judges when the word “representatives” was said.

The Court opted for the definitional meaning because the legislative history showed that Congress changed the term “legislators” to “representatives.” *Id.* at 389. Prior to its amendment, there was no question that judges were covered. *Id.* at 390. The amendment had responded to a judicial interpretation of the statute that had required proof of an intent to discriminate. *Id.* at 393. The amendment eliminated this intent requirement. *Id.* at 394. The majority concluded that had Congress intended, by using the word “representatives,” to exclude vote dilution claims involving judges, “Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment.” *Id.* at 396. Thus, because no legislator had ever suggested that judicial elections would no longer be covered, Congress must have meant to maintain the status quo in this regard. *Id.* at 404. Solan thinks this interpretation was appropriate, given that the legislature was trying to broaden the statute. SOLAN, *supra* note 5, at 67.

<sup>133</sup> SOLAN, *supra* note 5, at 70. How does a judge determine what ordinary meaning is? “The answer, somewhat to the embarrassment of the American legal system, is that courts find ordinary meaning anywhere they look, and judges are not restrained in deciding where they are willing to look.” *Id.* For example, in *Bailey v. United States*, 516 U.S. 137, 150–51 (1995), the Court held that having a gun in the trunk of a car was not “use” because active employment was required. Justice O’Connor said statutes should be interpreted in context. *Id.* at 143. And while she reaffirmed the holding in *Smith*, she did not use the definitional approach, likely because she would have reached the same result as in *Smith*. *Id.*

lexicographers do include information about how words are typically, or ordinarily, used, this practice is not systematic.<sup>134</sup> Finally, the definitional meaning approach is appealing because it is consistent with how judges think and with how we think rules, or laws, should work.<sup>135</sup> “[T]he definitional approach appears, at least superficially, to be the more ‘lawlike’ of the two [approaches]. . . . [L]aws are themselves structured as definitions.”<sup>136</sup> For these reasons, the definitional approach should not be abandoned entirely.<sup>137</sup> But Solan

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at 147–48 (citing *Smith*, 508 U.S. at 236). Instead, she said used a linguistic argument, saying, “I use a gun to protect my house, but I’ve never had to use it.” SOLAN, *supra* note 5, at 71 (citing *Bailey*, 508 U.S. at 143). Solan points out that this argument, indeed this exact example, had previously been made in a law review article jointly written by a law professor and a linguist, though Justice O’Connor did not cite to it. *Id.* at 71 (citing Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretation of “Use a Firearm,”* 73 WASH. U. L.Q. 1159 (1995)). Solan admits that reliance on linguists is unusual. *Id.* It is more common for judges to provide their own linguistic arguments. For example, in *Watson*, the Court rejected the government’s argument, saying that “[t]he Government may say that a person ‘uses’ a firearm simply by receiving it in a barter transaction, but no one else would.” *Id.* (citing *Watson v. United States*, 552 U.S. 74, 79 (2007)). And in *Muscarello*, in response to the defendant’s argument that “carry” meant on one’s person, both the majority and dissent turned to the bible, literature, newspapers, legal dictionaries, and ordinary dictionaries to show that their meaning was correct. *Id.* at 72–73 (citing *Muscarello v. United States*, 524 U.S. 125, 127–39 (1998)).

Where should courts look? *Id.* at 74. Solan states that the answer depends on what judges are looking for. If they are truly looking for ordinary meaning, then introspection may be sufficient. *Id.* Solan examined 122 cases from turn of century on (39% decided after 1980) discussing ordinary meaning. *Id.* at 75. The predominant method for determining ordinary meaning was introspection. *Id.* “Without fanfare, judges simply rely upon their own sense of how common words are typically used.” *Id.* For the most part, what judges say these words means makes sense. *Id.* After 1980, introspection declined in popularity, and was replaced by dictionaries, precedent, and the use of similar language in the same and in other statutes. *Id.* Solan suggests that Scalia’s textualism, so influential in American jurisprudence, is a departure from legal tradition. *Id.*

<sup>134</sup> SOLAN, *supra* note 5, at 76.

<sup>135</sup> *Id.* at 69. Justice Scalia bolstered the use of dictionaries; of all the Justices, he uses dictionaries the most frequently. *Id.*

<sup>136</sup> *Id.* at 66.

<sup>137</sup> *Id.* “Language, whether ordinary or plain, works well—but not that well.” *Id.* at 80. “[W]hile the problems that trigger difficult questions of statutory interpretation are often psychological and linguistic, decisions about how statutory interpretation should proceed are legal and political decisions . . . .” *Id.*

provides little guidance for when judges should favor definitional meaning over ordinary meaning. One possibility is that judges could apply the technical meaning rule:

Unless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar, and common usage. A word or phrase that has acquired a technical or particular meaning in a particular context has that meaning if it is used in that context.<sup>138</sup>

The critical inquiry then is audience.<sup>139</sup> In other words, let me suggest that definitional meaning is nothing more than a subcategory of technical meaning.

As he concludes this chapter, Solan simultaneously praises the text-based theorists for refocusing the search on ordinary meaning and the plain meaning canon, then chastises them for losing site of the difference between definitional and ordinary meaning.<sup>140</sup> One could say that the text-based theorists started a dictionary revolution, forcing the debate into a childhood fight with the bullies yelling all the while, “my dictionary is better than your dictionary.”<sup>141</sup> Or, as Solan so

<sup>138</sup> UNIF. STATUTE & RULE CONSTR. ACT, § 2 (1995).

<sup>139</sup> The quintessential technical meaning case is *Nix v. Heddon*, 149 U.S. 304 (1893), in which the Court had to determine whether a tomato was a fruit or vegetable. Lexicographers and botanists both define a tomato as a fruit, but the court rejected that interpretation and adopted the ordinary meaning. *Id.* at 306–07. However, most people think of tomatoes as vegetables. *Id.* at 306. The distinction between ordinary meaning and technical meaning is based on the audience and its relation to the speaker. SOLAN, *supra* note 5, at 79 (citing *Nix*, 149 U.S. at 307).

<sup>140</sup> See SOLAN, *supra* note 5, at 80.

<sup>141</sup> According to the Justices, not all dictionaries are equal. In *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225–28 (1994), Justice Scalia, for the majority, identified a number of different dictionaries with similar definitions of the word at issue: “modify.” While the majority of dictionaries suggested that modify meant a minor change, one dictionary, *Webster’s Third New International Dictionary*, suggested that modify could mean either a minor or a major change. *Id.* at 225–26. The Court rejected the latter definition and the appropriateness of that dictionary. *Id.* at 227. “Virtually every dictionary we are aware of says that ‘to modify’ means to change moderately or in minor fashion.” *Id.* at 225. Writing for the majority, Justice Scalia cited widespread criticism of this dictionary when it was published for its “portrayal of common error as proper usage.” *Id.* at 228 n.3. Apparently, *Webster’s Third* was too colloquial to be considered authoritative for this Court. But if the point of statutory interpretation is to find the meaning an audience member would likely ascribe to the language as textualists argue, why is colloquialism not a good thing? This dictionary fight seems reminiscent of the difference between definitional

eloquently says, “The argument resembles a food fight in a school for children with disciplinary problems more than a serious argument among distinguished jurists.”<sup>142</sup>

#### D. The Intent of the Legislature

In the last chapter, chapter three, Solan explained why disagreements about meaning arise when interpreters rely solely on the language of the statute and the plain meaning canon. In the next chapter, chapter four,<sup>143</sup> Solan turns to the question about “what it means to be faithful to the legislature,” and to the question of whether legislative history should be part of the interpretive process.<sup>144</sup> He suggests that the greatest controversy in statutory interpretation in the last two decades has revolved around the use of legislative history.<sup>145</sup> He notes that individuals are passionate about *how* to be faithful to the legislature, but there is no debate about *whether* to be faithful.<sup>146</sup>

Critics of the use of legislative history raise two primary objections:<sup>147</sup> first, legislative intent is not what interpreters should be

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meaning and ordinary meaning, yet the Justices simply did not see it. The ordinary meaning of modify is a modest change; while a definitional meaning of modify might include substantial change.

<sup>142</sup> SOLAN, *supra* note 5, at 74.

<sup>143</sup> Chapter four begins at page 82.

<sup>144</sup> SOLAN, *supra* note 5, at 82.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 120.

<sup>147</sup> Critics also argue that it is undemocratic to rely on legislative history because it is not enacted law, it is unreliable, and it is often incoherent. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1839 (1998). Importantly, the very idea of searching for legislative intent is under attack. *Id.* at 1896. Additionally, one might ask, whose intent matters: “the 51st senator, needed to pass the bill, or the 67th, needed to break the southern filibuster?” WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 227 (2d ed. 2006) (referring to passage of the Civil Rights Act of 1964). Justice Scalia says that he does not search for legislative intent, rather he searches for “the objective indication of the words . . . [because that] is what constitutes the law.” SOLAN, *supra* note 5, at 85 (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–30). Thus, legislative *history* is irrelevant to Justice Scalia precisely because legislative *intent* is irrelevant. *Id.* But Justice Scalia argues further that, in 99.99% of the statutory construction cases that reach the Court, there is no legislative intent—so even if you are looking for it, you will not find it. *Id.* at 85–86. “If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more

looking for; and second, even if legislative intent is what interpreters should be looking for, legislative history is not the best evidence of intent.<sup>148</sup> They ask, why should interpreters care what legislators intended when the statute provides proof of what they said?<sup>149</sup> Ultimately, Solan disagrees with those who eschew the use of legislative history entirely but agrees that some of their criticism has merit.<sup>150</sup> He concludes that looking for legislative intent is unavoidable and appropriate but suggests that the issue of “[w]hether legislative history is good evidence of legislative intent is another matter.”<sup>151</sup> He notes, somewhat surprisingly, that while judges may at times be sloppy or even wrong about reviewing legislative history, the error rarely matters.<sup>152</sup> He asks, “How often does a dissenting or concurring opinion, or a well-researched law review article, show that judges actually misuse legislative history in a way that seriously threatens a legal system based on acceptable legal values? It happens, but not very often.”<sup>153</sup> More often, judges are simply sloppy.<sup>154</sup> Further, he notes that, “Many of Justice Scalia’s opinions that disapprove of the use of legislative history are concurring opinions—not dissents. Even he,

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promising candidate than legislative history.” *Id.* at 86–87 (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring)).

<sup>148</sup> SOLAN, *supra* note 5, at 115.

<sup>149</sup> *Id.* at 82. As proof, the quote Oliver Wendell Holmes’ 1899 statement, “[w]e do not inquire what the legislature meant; we ask only what the statute means,” continues to be widely quoted today. *Id.* at 82 (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)).

<sup>150</sup> *Id.* at 83. Empirical research shows that Congress is far more likely to enact legislation to overrule judicial decisions based on a the plain meaning canon than it is to enact legislation to overrule judicial decisions based on a statute’s legislative history, purpose, and policy. *Id.* at 97 (citing William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 350 tbl.8 (1991)).

<sup>151</sup> *Id.* at 115. Solan defends uses that are compatible with the democratic process, but rejects uses that are not, such as the use of floor debate remarks. *Id.* at 83. Solan rejects floor debate remarks as evidence of legislative intent because they are “stray remarks from individual legislators” and do not generally reflect the intent of the legislature as a whole. *Id.* at 97. Floor debates are the least reliable type of legislative history because they are “laden with sales talk . . . to finesse the courts’ choices.” *Id.* In contrast, members of the subgroup of planners, whether legislators, agency personnel, or others, who have expressed their intentions about a bill provide “relevant context.” *Id.*

<sup>152</sup> *Id.* at 115–16.

<sup>153</sup> *Id.* at 115.

<sup>154</sup> *Id.*

then, usually agrees with the result that the Court reaches when it uses this information.”<sup>155</sup> Solan admits that, to make a better case for the use of legislative history, one must show “just how often it is demonstrably useful and, when it is, how often it does enough good to justify the cost of digging it up.”<sup>156</sup> Offering little new to the debate, however, he simply suggests that more research should be done in this area.<sup>157</sup>

Incorporating philosophy,<sup>158</sup> Solan responds to Max Radin’s now-famous 1930 observation about the problems with attributing intent to a group of legislators: “The chances that . . . several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given [statutory issue], are infinitesimally small.”<sup>159</sup> Using the very simplistic example of a married couple making vacation plans, Solan explains that there are groups that can and do have a unified intent and groups that do not.<sup>160</sup> Likely, one of the pair would make the plans, and the other would just tag along.<sup>161</sup> Yet, when asked where the *couple* intended to go for vacation, the response would be unified even though only one of the pair actually planned the vacation.<sup>162</sup> This group has a unified intent. Even though the individuals had different tasks—one planned while the other placidly tagged along—the tag-along committed himself as part of the couple to the vacation plan.<sup>163</sup> If at the last minute the tag-along said that he would be going golfing or fishing with his buddies rather than to Virginia with his wife, he would certainly cause consternation.<sup>164</sup> Solan’s example shows that we can and do speak of the intent of a group even though the members of the group do not know and plan

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<sup>155</sup> *Id.* at 189.

<sup>156</sup> *Id.* at 116.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 89 (turning to “plural subject theory” as explained by philosopher Margaret Gilbert (citing generally MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY* (2000))).

<sup>159</sup> *Id.* at 83–84 (quoting Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930)).

<sup>160</sup> *Id.* at 89–90.

<sup>161</sup> *Id.* at 89.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

every detail.<sup>165</sup> Solan's couple can intend to go to Virginia for their vacation without knowing where they will stay, when they will leave, when they will return, or what they will eat.<sup>166</sup> As Solan parallels:

“Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail. This model understands a statute as an on-going process (a voyage) in which both the shipbuilder and subsequent navigators play a role. The dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board.”<sup>167</sup>

Additionally, Solan says that groups need not share a common purpose to have a unified intent.<sup>168</sup> The vacation planner may have wished to see somewhere she has never been, while the tag-along may have wished to stay close to home or to keep the vacation costs down.<sup>169</sup> While their purposes in traveling to Virginia may vary, they share a unified intent: to go on vacation.<sup>170</sup> Like the intent of his

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<sup>165</sup> Legislators are busy and must rely on the “judgment of trusted colleagues” to complete the work. *Id.* at 95 (quoting *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 267–77 (1996) (Stevens, J., concurring)). Charles Tiefer calls this justification the “busy Congress model” and identifies cases in which the courts cite this rationale. *Id.* at 95 (citing Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 206, 209, 252–53 (2000)). Justices Stevens and Breyer use this justification regularly. *Id.* The idea that legislators may have different reasons for voting for a bill does not necessarily equate with the idea that they have different perspectives on the way the law should be enforced. *Id.* at 96. The reality is the legislators do not really think about the “small details,” knowing that others will work these things out. *Id.*

In addition, the legislators' reliance on committee members to work these things out is part of the constitutionally prescribed formal process: “Article I, section 5 of the Constitution states, ‘Each House may determine the Rules of its Proceedings.’” *Id.* (quoting U.S. CONST. art. I, § 5). Throughout our history, both chambers have operated via the committee structure. *Id.* Such a large body with such broad powers could not operate otherwise. *Id.*

<sup>166</sup> *Id.* at 90–91.

<sup>167</sup> *Id.* at 92 (quoting T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988)).

<sup>168</sup> *Id.* at 91.

<sup>169</sup> *Id.* at 91.

<sup>170</sup> *Id.* at 91. Solan provides a second example of a group having a unified intent: a group of homeowners who are opposed to a statute or a homeless shelter being located in their neighborhood. *Id.* at 90.

vacationing couple, Solan suggests that we can talk about the intent of a legislature even though each legislator might not share the purpose we attribute to the body as a whole.<sup>171</sup>

Solan suggests that we regularly explain peoples' behavior by presuming their intent.<sup>172</sup> For example, if an individual were to leave a room angry, we might say that the individual got mad at something that was said to him and left.<sup>173</sup> The more a group has individual-like qualities, the more we will attribute the group's behavior to a unified intent.<sup>174</sup> A group is capable of forming a unified intent when the group has similarity, proximity, formation of a symmetrical pattern,<sup>175</sup> and a "common fate."<sup>176</sup> The more of these factors the group has, the more it will seem like a person, with a unitary identity and personality.<sup>177</sup> Solan is clear that not every collection of people can be considered a group capable of forming a unified intent.<sup>178</sup> For example, a bunch of people standing at a bus stop would not have a unified intent; they are not members of a coherent group.<sup>179</sup> They have a common purpose—waiting for the buss—but no unified intent. "In contrast . . . the legislature is a group by virtue of a host of legal and social institutions, voting practices, and understandings about how its members' purpose is represented during the legislative process."<sup>180</sup>

After explaining how a group can have a unified intent, Solan suggests that the search for legislative intent "*is* a rule-of-law value."<sup>181</sup> Solan argues that even legislative history phobics talk in intentionalist terms, and he provides a few examples.<sup>182</sup> He believes

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<sup>171</sup> *Id.* at 90.

<sup>172</sup> *Id.* at 93 ("[W]e explain the behavior of other people in terms of their intent.").

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 94.

<sup>175</sup> *Id.* at 92–93. This terminology is not explained. But essentially, the more a group has a unitary identity, personality, a past, a present, and a future, the more we perceive that group as an entity or person. *Id.* at 93.

<sup>176</sup> *Id.* at 92–93.

<sup>177</sup> *Id.* at 93.

<sup>178</sup> *Id.* at 92.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 117.

<sup>182</sup> *Id.* at 102–04. In one such example, Solan notes that even Justice Scalia has referred to legislative intent:

that the “courts should indeed take legislative intent into account and then make a decision as to whether evidence of legislative intent that contradicts the ordinary [meaning] of the statute should be given priority over the language itself.”<sup>183</sup> “In most cases,” Solan says, “the language of the statute does lead to the conclusion that only one interpretation is possible.”<sup>184</sup>

### E. Stability, Dynamism, and Other Values

His next chapter, chapter five,<sup>185</sup> is a catchall chapter. He addresses the sources that he has not covered so far; however, he does so in a very conclusive manner. For the most part, he merely identifies other sources, which he calls “values,” that play a role in the interpretive process.<sup>186</sup> These values include fair notice and the rule of lenity,<sup>187</sup> stability and stare decisis,<sup>188</sup> dynamism,<sup>189</sup> remedial statutes,<sup>190</sup>

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Such a system of justice seems to me so arbitrary that *it is difficult to believe Congress intended it. Had Congress meant to cast its carjacking net so broadly it could have achieved that result—and eliminated the arbitrariness—by defining the crime as “carjacking under threat of death or serious bodily injury.”* Given the language here, I find it much more plausible that congress *meant to reach—* as it said—the carjacker who intended to kill.

*Id.* at 102 (quoting *Holloway v. United States*, 526 U.S. 1, 20 (1999) (Scalia, J., dissenting)). While Justice Scalia may have been responding to the majority’s argument, he still spoke in intentionalist terms. *Id.* at 103.

<sup>183</sup> *Id.* at 117. It does not seem to worry Solan that some people will not have access to legislative history.

<sup>184</sup> *Id.*

<sup>185</sup> Chapter five begins at page 120.

<sup>186</sup> SOLAN, *supra* note 5, at 120.

<sup>187</sup> Pursuant to the value of fair notice, judges are uncomfortable effecting the will of Congress when a statute is not clear to the ordinary citizen. *Id.* at 121. This concern has led to the doctrines of void for vagueness and the rule of lenity. *Id.* For example, in *Wiltberger*, the Court held that fair notice and the rule of lenity trumped the will of Congress. *Id.* at 122 (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 101 (1820)).

<sup>188</sup> Solan believes that law becomes “more stable over time even if pockets of uncertainty and conflict remain.” *Id.* at 123–24. The principle of *stare decisis* helps judges promote the value of stability, even when their prior interpretation appears incorrect with hindsight. *Id.* at 130. While Solan provides a few examples, perhaps the most famous case in exhibiting judicial obstinacy is *Flood v. Kuhn*. *Id.* at 129. In that case, the Court examined the issue of whether baseball should continue to be exempt from federal anti-trust laws. *Flood v. Kuhn*, 407 U.S. 258, 276–77 (1972). In two earlier cases, the Court had held that baseball was not an interstate trade or commerce. *Fed. Baseball Club of*

purpose,<sup>191</sup> the legislative process,<sup>192</sup> coherence,<sup>193</sup> constitutional stability,<sup>194</sup> law enforcement support,<sup>195</sup> and political ideology.<sup>196</sup> The

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Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953). In 1922, the Court may have been correct that baseball did not affect interstate commerce, but by 1972, it was clear that baseball did have such an effect. Yet, the majority in *Flood*, while acknowledging that these earlier cases were wrongly decided, refused to overturn them. 407 U.S. at 279. The majority reasoned that because of the long-standing nature of the opinions, change, if any, should be made by Congress. *Id.* at 283–84. The Court was concerned, in part, that baseball had developed during these fifty years under the assumption that it was exempt from the anti-trust laws, and to change the rules now would be unfair because judicial interpretations of statutes apply retroactively while legislative actions usually apply only prospectively. *Id.* at 275.

The dissent disagreed, arguing that the earlier cases were wrong and it was time to overturn them; “This is a difficult case because we are torn between the principle of *stare decisis* and the knowledge that the decisions in *Federal Baseball Club . . .* and *Toolson . . .* are totally at odds with more recent and better reasoned cases.” *Id.* at 290 (Marshall, J., dissenting). As Justice Marshall explained:

We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one’s ability as guaranteed by the antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here.

*Id.* at 292–93. In Justice Marshall’s opinion, it was enough that the prior decisions were wrong and that the holdings deprived a litigant of a “substantial federal right[.]” *Id.* at 292. His standard for reversing Supreme Court precedent is perhaps too light, while the majority’s unwillingness to reexamine and correct interpretations that are wrong and at odds with the rest of the Court’s jurisprudence also seems wrong. *Stare decisis* is important for many reasons, but it should yield when time proves the earlier decisions to be wrong under modern standards. But *stare decisis* is not an absolute rule. Typically, the Supreme Court overrules at least one statutory interpretation case each term. Eskridge et al., *supra* note 150, at 281.

<sup>189</sup> Dynamism is the notion that language acquires a new or different meaning with time. See SOLAN, *supra* note 5, at 130–31, 153–54.

<sup>190</sup> Interestingly, remedial statutes are interpreted broadly while criminal statutes are generally narrowly interpreted. *Id.* at 140. Solan posits the question, what if a statute is both, such as laws relating to antitrust, copyright, environmental laws, securities laws? *Id.* Solan develops the concept of statutory inflation: when one court interprets a statute broadly in a civil context, then a later court adopts that broad interpretation in the criminal context. *Id.* at 141.

<sup>191</sup> As a purposivist, I am surprised that purpose is addressed so briefly. *Id.* at 142–46 (addressing purpose as a value). Solan notes that Judge Posner thinks that

purposivism is in keeping with legal pragmatism. *Id.* at 143 (citing RICHARD POSNER, *HOW JUDGES THINK* 230–65 (2008)). Legislators should focus on the consequences of their decisions rather than be bogged down by formalistic considerations, such as minute differences in language. *Id.* Read literally, a statute criminalizing the possession of child pornography would apply to a prosecutor and court personnel pursuant. *Id.* at 143–44. But prosecuting these individuals would not further the purpose of the child porn statute. *Id.* at 144. Solan notes that Justice Scalia rarely mentions the purpose of the statute; however, dissenters regularly invoke purpose in response to Justice Scalia. *Id.* at 144. Solan believes that “[n]otwithstanding the fears Scalia expressed in *Knudson*, such reference to purpose should actually serve to constrain judges.” *Id.* at 145 (citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002)). In the *Knudson* case, the conservative Justices were able to use vague language to “further an agenda” without even mentioning it: namely limiting private lawsuits by civil litigants to enforce rights granted by regulatory statutes. *Id.* at 144–45. “Nonetheless,” Solan concludes:

when a statute is susceptible to more than one interpretation, a candid debate about what the law was intended to accomplish and how to best achieve that result does not appear to be any more of a threat to rule-of-law values than pretending that the law is clear and avoiding the substantive issues.

*Id.* at 146.

<sup>192</sup> Solan says that sometimes the legislature gets the legislative facts wrong and then writes a law based on these erroneous findings. *Id.* at 146. When this happens, courts are reluctant to correct such errors because they respect the legislative process over fulfilling the law’s intended purpose. *Id.* Solan illustrates this phenomenon in a case where Congress enacted a statute that set minimum sentences for the distribution of drugs based on the weight of the drugs; however, Congress completely misunderstood that LSD is sold on blotter paper, which weighs much more than the drug. *Id.* at 148 (citing *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990), *aff’d sub nom. Chapman v. United States*, 500 U.S. 453 (1991)). Judge Posner wanted to correct the statute, but the majority led by Judge Easterbrook refused. *Id.* at 148–49. The statute communicated its intent, no error there; rather, the error was in misunderstanding the underlying facts (or not knowing them) that led Congress to decide on this legislation. *Id.* at 149. Indeed, the language in the statute was very clear. *Id.* In cases like this, most judges will not “fix” the perceived error; courts take seriously the obligation to respect the legislative process, and will not put purpose over process in order to fix a poorly drafted law. *Id.*

<sup>193</sup> Coherence is a surrogate for legislative intent because interpreters assume that “legislatures intend to write laws that work in harmony with each other.” *Id.* at 149. Solan points to the case of *Green v. Bock Laundry Mach. Co.* as an example. In *Green*, Justice Scalia said:

The meaning of terms on the statute books out to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with

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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.

*Id.* (quoting *Green*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring)). Solan adds, “coherence must serve some purpose for it to be justified.” *Id.* at 150. Some interpreters justify coherence as reflecting legislative intent, but Justice Scalia disagrees; Scalia justifies the practice as good judicial lawmaking, regardless of what the legislature might have intended. *Id.* (quoting *West Va. Univ. Hospitals v. Casey*, 499 U.S. 83, 100–01 (1991) (“We do so not because that precise accommodative meaning is what the lawmakers must have had in mind . . . , but because it is our role to make sense rather than nonsense out of the *corpus juris*.”)). Solan believes that coherence cannot overcome legislative intent, but it can serve as a proxy for intent and a default rule for interpretation. *Id.* at 152.

<sup>194</sup> Solan says that the constitutional avoidance doctrine is often stated in intentionalist terms, that Congress would not intend to enact an unconstitutional statute. *Id.* But Solan is a little off on this point. The doctrine is about avoiding the constitutional question to begin with, not deciding the issue by picking the constitutional interpretation. An example of a constitutional avoidance case is *N.L.R.B. v. Catholic Bishop of Chicago Catholic Bishops*, 440 U.S. 490 (1979), in which the Court ignored the fact that Congress specifically considered an amendment to exempt religious schools from the labor laws, but rejected that amendment. *Id.* at 152–53.

<sup>195</sup> Here, Solan says that judges allow words to take on meanings that may have differed from when a statute was originally written to help law enforcement address obviously bad behavior. *Id.* at 154. He refers to *Moskal v. United States*, to support his claim. *Id.* at 153–54 (citing 498 U.S. 103 (1990) (holding that “falsely made securities” included documents that were not “counterfeit”)).

<sup>196</sup> Solan says that there is no question that politics influence judicial interpretation. Solan, *supra* note 5, at 155. For example, in a case where a woman employee sued her employer because she was paid less than men for same work, and the statute required her to file a claim within 180 days of the discriminatory act, the employee argued that each paycheck was a discriminatory act while the employer argued that only the original employment contract counted. *Id.* at 155 (citing *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007)). Justice Alito wrote the majority opinion for the conservatives (siding with the employer), while Justice Ginsburg wrote the dissenting opinion for liberals. *Id.* at 156. Solan notes that he would have sided with the liberal, dissenting Justices because he believes not only that it would better further the legislative will, but also because he also would feel good about advancing his own political view that it is better for society to have this result. *Id.* (“doing so helps further values that I consider important”). He notes that the conservative Justices would have thought that clearly identifying a company’s litigations risks was a fair concern and would have felt okay about their choice too. *Id.* Solan notes that in 2009

sheer number of topics might have suggested to the author that more time and individual attention would have been appropriate. Instead, Solan examines each value to see if it should trump clear text and then concludes that while each of these values is important, none should surpass clear text or legislative intent because “fidelity to the will of the legislature” should control when there is a conflict among any of them.<sup>197</sup>

#### F. Who Should Interpret Statutes?

In the next chapter, chapter six,<sup>198</sup> Solan moves away from sources of meaning to the appropriate role for interpreters. He notes that branches other than the judiciary interpret law.<sup>199</sup> Explaining, Solan states that:

All three branches get into the act: the executive, through the actions of agencies, prosecutors, and presidential statements; the legislature through its enacting laws that tell judges what they must consider, what they may consider, and what they may not consider; and the judiciary, whose job it has traditionally been to interpret statutes.<sup>200</sup>

Solan’s conclusion in chapter six is that the judicial branch “should remain the principal institution engaged in statutory interpretation[,]” and that “[s]tripping judges of the power to make bad decisions almost always strips them of the ability to make good ones.”<sup>201</sup>

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Congress amended the law precisely as the dissenters wanted. *Id.* Thus, Solan suggests that the question is not whether politics play a role, but whether they play too much of one. *Id.* at 157. He cites a study showing that liberals generally use the linguistic canons to further liberal results, and conservatives to further conservative outcomes; thus, the canons are not neutral. *Id.* (citing James J. Brudney & Corey Ditsler, *Canons of Construction and the Elusive Search for Neutral Reasoning*, 58 VAND. L. REV. 1, 55–56 (2005)). Solan says that there is simply no way to remove politics from the decision-making without sacrificing our common-law tradition and stability, but he is not concerned because so few questions reach the courts and most are decided at the appellate level. *Id.* at 158. For this reason, he believes that the political interference is not so tremendous that we should be moved to stop it. *Id.* Simply put, “Our ability to make laws is simply not so crisp as to avoid [politics].” *Id.*

<sup>197</sup> *Id.* at 120.

<sup>198</sup> Chapter six begins at page 160.

<sup>199</sup> SOLAN, *supra* note 5, at 160.

<sup>200</sup> *Id.* at 195.

<sup>201</sup> *Id.* at 160–61.

Solan addresses the executive first. The executive interprets statutes in a number of ways, including through judicial deference to agency interpretations and through signing statements.<sup>202</sup> Solan describes how the executive decided to use signing statements to “shift interpretive power” from the judiciary to itself.<sup>203</sup> According to Solan, Attorney General Edwin Meese suggested to President Reagan that he enhance the executive’s influence of statutory interpretation by using signing statements.<sup>204</sup> Assistant Attorney General Samuel Alito, now Justice Alito, authored a memorandum entitled “Using Presidential Signing Statement to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law.”<sup>205</sup> Alito argued that, because a bill requires approval by the president and each house to become law, “it seems to follow that the President’s understanding of the bill should be just as important as that of Congress.”<sup>206</sup>

In general, Solan has few concerns about signing statements because presidents have historically used them to explain how they understand the structure of an act and how they would interpret it consistently with the U.S. Constitution.<sup>207</sup> But he suggests that these statements have recently been used to undermine the political compromises that were reached during the legislative process.<sup>208</sup> For example, former President George W. Bush issued a signing statement for the 2005 Detainee Treatment Act, which outlaws torture.<sup>209</sup> Solan writes, “[I]n this instance, [President Bush] actually agreed to a

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<sup>202</sup> *Id.* at 169. As to deference, Solan claims that “it was the failure to regulate that brought down the Bush administration’s efforts and the attempt to regulate too aggressively that doomed the Clinton policy” in the area of environmental changes. *Id.* at 164.

<sup>203</sup> *Id.* at 169.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* (citing Memorandum from Samuel A. Alito Jr., Deputy Assistant Atty. General, Office of Legal Counsel, to The Litigation Strategy Working Group, Using Presidential Signing Statement to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law, 1 (Feb. 5, 1986), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 170. (“I agree with defenders of signing statements that there is nothing unconstitutional and, for that matter, nothing at all improper about their issuance.”).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

compromise on a bill and then, at least arguably, undermined that compromise by disclaiming his obligation to abide by the terms that he did not like.”<sup>210</sup> When presidents ignore the bargain that was struck, they ignore the legislative process leading to that bargain.<sup>211</sup> Regardless, Solan rightly concludes that signing statements rarely affect the interpretive process.<sup>212</sup> Either a president has the power claimed in a signing statement, or not; but simply stating that one has the power does not make it so.<sup>213</sup>

Another reason signing statements should play no role in interpretation is that signing statements are not issued during the legislative process; rather, they are issued after it.<sup>214</sup> Thus, they are similar to post-enactment statements from congress members: largely irrelevant.<sup>215</sup> When a president issues a statement after the enactment process solely to influence interpretation, such a “statement does not yield credible evidence of what the law was intended to accomplish.”<sup>216</sup> Solan suggests that if presidents were to issue statements to influence the political bargaining during the legislative process, these statements would be more relevant to interpretation.<sup>217</sup> He notes that the president’s power in the legislative bargaining process is the veto threat: a president can shape a bill and influence bargaining by threatening to veto a bill that is not to his or her liking.<sup>218</sup> For example, in *United States v. Yermian*, the Court took account of that fact that President Roosevelt vetoed an earlier version of the law and “inferred that Congress’s redrafting of the law prior to resubmission to the president was intended to reconcile the earlier

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 170–71.

<sup>212</sup> *Id.* at 170–71. Despite the press wringing of hands, the courts have largely ignored signing statements. *Id.* at 171.

<sup>213</sup> *Id.* at 171.

<sup>214</sup> *Id.* (“Most importantly, Presidential Signing Statements are issued *after* a bill is signed into law. Therefore, they cannot possibly have influenced the enactment process.”).

<sup>215</sup> *Id.* (describing each as “suffer[ing] from the same problem of timing.”).

<sup>216</sup> *Id.* at 172.

<sup>217</sup> *Id.* (“Were presidents to issue their statements in advance as a warning to legislators before they cast their final votes, the situation might be entirely different.”).

<sup>218</sup> *Id.*

difference and thus construed the statute accordingly.”<sup>219</sup> Such pre-enactment intent *is* relevant.<sup>220</sup>

The executive also influences interpretation in another way: agencies interpret the statutes they are charged with administering.<sup>221</sup> Agencies receive varying degrees of deference when they interpret statutes.<sup>222</sup> Solan groups each of the deference standards into one discussion about *Chevron* deference.<sup>223</sup> Here, Solan’s lack of in-depth knowledge of administrative law hinders his analysis. *Chevron* has become increasingly complex and muddled over the years.<sup>224</sup> As a non-administrative law scholar, Solan’s understanding of *Chevron* is undeveloped, and as such his analysis in this section is incomplete.<sup>225</sup> Solan explains why he believes that agencies should have deference when they interpret statutes: *Chevron* fosters the dynamic order by making agency interpretations impervious to judicial review and by allowing agencies to be more responsive to the nuances of the statutes’ domain without fear of court interference.<sup>226</sup> Deference also leads to a more unified set of regulatory regimes because agencies, rather than a patchwork of appellate courts, decide the issues.<sup>227</sup> Solan makes the incorrect suggestion—which is somewhat fatal to his argument—that

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<sup>219</sup> *Id.* (citing generally *United States v. Yermian*, 468 U.S. 63 (1984)).

<sup>220</sup> *Id.* at 172.

<sup>221</sup> *Id.* at 161.

<sup>222</sup> See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

<sup>223</sup> SOLAN, *supra* note 5, at 161–69 (discussing *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

<sup>224</sup> See generally Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141 (2012) (describing *Chevron*’s complexity).

<sup>225</sup> For example, he describes *Chevron*’s first step as follows: “[F]irst, the court must decide ‘whether Congress has directly spoken to the precise question at issue,’ including an inquiry into whether the congressional delegation to the agency is clear and unambiguous.” SOLAN, *supra* note 5, at 161 (citation omitted). But this description conflates two separate inquiries; first, whether Congress delegated to the agency at all, and second whether Congress has directly spoken to the precise issue before the court—these are two different inquiries. See generally Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has it Mastered Chevron’s Step Zero?*, 3 VETERANS L. REV. 67 (2011).

<sup>226</sup> SOLAN, *supra* note 5, at 162.

<sup>227</sup> *Id.*

*Chevron* allows courts to defer to an agency's interpretation even when the legislative intent suggests that the agency's choice is not what *Congress* would have wanted.<sup>228</sup> Rather, *Chevron* allows courts to defer to an agency's interpretation even when the agency's choice is not what the *Court* would have wanted.<sup>229</sup>

Solan recounts the research showing that politics influences judicial opinions.<sup>230</sup> Citing Professors Thomas Miles and Cass Sunstein's famous empirical research showing that conservative judges more consistently rule in favor of conservative agency decisions while liberal judges more consistently rule in favor of liberal

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<sup>228</sup> *Id.* at 166. *Chevron*'s first step is to determine whether the legislature has directly spoken to the precise question at issue; legislative intent is relevant at this step, and an agency must take that intent into account when formulating its interpretation. *Chevron*, 467 U.S. 843 n.9.

<sup>229</sup> *Chevron*, 467 U.S. at 843. It is only when Congress has no specific intent that the agency can impose its own reasonable interpretation under *Chevron*'s second step. *Id.*

<sup>230</sup> The case of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), is illustrative. See SOLAN, *supra* note 5, at 164. In *Brown & Williamson*, the majority rejected the Food and Drug Administration's (FDA) decision to regulate tobacco. *Brown*, 529 U.S. at 161. The FDA was authorized to regulate "drugs," "devices," and "combination products." 529 U.S. at 126 (citing 21 U.S.C. § 321(g)–(h) (1994 and Supp. III)). The statute defined these terms as "article[s] . . . intended to affect the structure or any function of the body." *Id.* (quoting 21 U.S.C. § 321(h)). The FDA interpreted this language as allowing it to regulate tobacco and cigarettes. *Id.* at 125. Despite the fact that the language of the statute alone was broad enough to support the agency's interpretation, the conservative majority concluded "that Congress ha[d] directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products." *Id.* at 133. The majority supported its holding by noting that Congress had: (1) created a distinct regulatory scheme for tobacco products, (2) squarely rejected proposals to give the FDA jurisdiction over tobacco, and (3) acted repeatedly to preclude other agencies from exercising authority in this area. *Id.* at 155–56. In this case then, the majority held that while Congress may not have spoken to the precise issue, it had spoken broadly enough on related questions to prevent the agency from acting at all. *Id.* No deference whatsoever was accorded the agency's interpretation, even though the agency used force-of-law procedures. The liberal dissent noted that the language of the statute was clear enough to cover cigarettes. *Id.* at 180–81 (Breyer, J., dissenting). Solan argues that *Chevron* should have taken this choice away from the court once made by the agency. SOLAN, *supra* note 5, at 169–70. He says that the Court's liberal Justices ignored legislative intent for a wooden application of *Chevron* while the majority's concerns for legislative intent trumped both *Chevron* and the text of the statute. *Id.* at 169. The outcome and alignment of the Justices can only be explained by politics. *Id.*

agency decisions, Solan concludes that one thing is very clear: “[P]olitics matter in predicting whether and when a justice defers to an agency interpretation.”<sup>231</sup>

The last area in which the executive has power to interpret statutes is with prosecutorial discretion.<sup>232</sup> Solan suggests that by not prosecuting all cases, prosecutors “simulate the rule of lenity.”<sup>233</sup> To him, this simulation is good because when law officials bring only the clear cases to court, there is “less controversy and more respect for legal institutions.”<sup>234</sup>

Next, Solan moved to legislatures (state and federal) and their recent attempts to curtail the judicial interpretation process. This subject seems out of place in a chapter about interpreters. In any event, in the chapter, Solan borrows heavily from my article, “*Which is to be Master, The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, to explore the question of whether the legislature should tell the judiciary how to interpret laws.”<sup>235</sup> While Professor Nicholas Quinn Rosenkranz suggested that the legislature

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<sup>231</sup> SOLAN, *supra* note 5, at 167 (citing Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825–26 (2006) (“The most conservative judges are 30 percentage points more likely to vote to validate agency interpretations that are coded as conservative than to validates agency interpretations coded as liberal. By contrast, the more liberal Justices are 27 percentage points more likely to vote to validate agency interpretations coded as liberal than to validate those coded as conservative.”)).

<sup>232</sup> *Id.* at 173.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* He also mentions that prosecutors sometimes choose not to enforce laws that are still on the books but that are no longer relevant, like laws preventing sodomy and interracial marriage. *Id.* at 174. Prosecutorial discretion is good when used for good reasons, but sometimes prosecutorial discretion is exercised for the wrong reasons. *Id.* He cites the example of the Government Accountability Office’s report accusing the Wage and Hours Division of the Department of Labor of not investigating cases regarding unpaid final paychecks and of closing these cases with just the employer’s word. *Id.* (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-973T, DEP’T OF LABOR: CASE STUDIES FROM ONGOING WORK SHOW EXAMPLES IN WHICH WAGE AND HOUR DIVISION DID NOT ADEQUATELY PURSUE LABOR VIOLATIONS (2008)). He believes that this type of activity diminishes the rule of law. *Id.*

<sup>235</sup> *Id.* at 182 (citing Linda D. Jellum, “*Which Is to Be Master, the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009)).

should do so in his article, *Federal Rules of Statutory Interpretation*,<sup>236</sup> I disagreed, arguing that such directives violate separation of powers.<sup>237</sup>

Solan has a slightly different focus. First, he equates legislative attempts to limit judicial review of legislative history with evidentiary rules and concludes that because the rules of evidence do not preclude much, legislatures should not preclude legislative history.<sup>238</sup> This argument was a little unclear. Further, Solan thinks legislatures should not ban the use of legislative history because it is useful and judges know how to use it wisely.<sup>239</sup> While he says he is not deciding whether such directives would be constitutional,<sup>240</sup> he suggests that when a legislature in a specific statute tells courts not to consider legislative history when interpreting that statute, “it does not usurp the judicial function. It merely makes its intent clearer.”<sup>241</sup> But, he counters, were a legislature to tell courts to *never* look at legislative history, the legislature would intrude on the judicial function.<sup>242</sup>

Solan ends this chapter with a section called “Courts Fight Back.”<sup>243</sup> I enjoyed this section, which identifies the many ways that the judiciary has reclaimed some of the interpretive power that the other branches have taken.<sup>244</sup> Regarding the executive, Solan notes that the Supreme Court has retreated from *Chevron*’s broad deference approach and has repossessed some of its interpretive power in this area.<sup>245</sup> I would go further: the Court’s willingness to defer to agency interpretations of ambiguous statutes has vacillated over the last sixty years. With this vacillation, the Court dramatically, and likely unintentionally, altered executive lawmaking and interpretive power. Before *Chevron*, the executive was an expert advisor, not a lawmaker or law interpreter. When the Court decided *Chevron*, the executive

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<sup>236</sup> See generally 115 HARV. L. REV. 2085 (2002).

<sup>237</sup> Jellum, *supra* note 235, at 897–98.

<sup>238</sup> SOLAN, *supra* note 5, at 184.

<sup>239</sup> *Id.* at 189.

<sup>240</sup> *Id.* at 188 (“Whether or not [legislatures] can legally [prohibit courts from considering legislative history], given constitutional separation of powers, it would be a bad idea in any event.”)

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 189.

<sup>244</sup> *Id.* at 189–95.

<sup>245</sup> *Id.* at 194–95.

moved from expert advisor to quasi-law maker and law interpreter. Given that this impact likely was unintended, it might come as no surprise that the Court has begun to reclaim this power. With two important changes to *Chevron's* application—restricting the types of agency interpretations entitled to deference and curbing the implied delegation rationale—the Court regained some of the interpretive power it ceded and re-conveyed some of the lawmaking power it shifted with the rise and fall of *Chevron*.<sup>246</sup>

Regarding the legislature, Solan identifies a few ways by which courts have curtailed legislative power. First, beginning in the late Nineteenth Century, a number of state legislatures, such as New York and California, tried to eliminate the rule of lenity by statute to correct perceived judicial activism.<sup>247</sup> As Solan notes, these statutes have had little impact because the rule of lenity respects constitutional fair notice.<sup>248</sup> Second, just as legislatures write directives for courts to follow, the Court has issued directives for Congress to follow, known as clear statement rules.<sup>249</sup> Pursuant to clear statement rules, if Congress wants to alter an important federal right, the Court requires Congress to do so clearly.<sup>250</sup> One might question whether the Court has the power to require clear statements when the U.S. Constitution does not require Congress to write laws in this way.<sup>251</sup> Indeed, it would

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<sup>246</sup> See Jellum, *supra* note 224 (explaining how the Court reclaimed the interpretive power it ceded when it decided *Chevron*).

<sup>247</sup> SOLAN, *supra* note 5, at 189–91.

<sup>248</sup> *Id.* at 190. Thus, in *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970), the California Supreme Court applied the rule of lenity, despite a statute from 1871 directing the court not to construe criminal statutes narrowly, to a case in which the defendant kicked his wife in stomach after learning she was pregnant. *Id.* at 191 (citing *Keeler*, 470 P.2d at 623). The court refused to interpret “human being” to include fetus. *Id.* Solan also notes the legislative supremacy is also deeply embedded in our system and leads to the rejection of rules eliminating the rule of lenity, but this value seems to contradict his conclusion that the courts are ignoring the legislative choice to eliminate the rule of lenity. *Id.* at 192.

<sup>249</sup> *Id.* at 193.

<sup>250</sup> For example, in *Gregory v. Ashcroft*, the Court addressed whether a statute setting the mandatory retirement for state judges violated the Federal Age Discrimination Act. *Id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991)). The Court rejected the argument and required Congress to provide a clear statement if “intends to preempt the historic powers of the states.” *Id.*

<sup>251</sup> *Id.*

seem that the Court's requirement sets impermissible conditions on Congress' power to legislate.

### G. Jurors as Statutory Interpreters

In his next chapter about interpreters, chapter seven,<sup>252</sup> Solan moves to a discussion of jurors as interpreters and explores the question of which legal issues judges should decide and which issues should be left to jurors.<sup>253</sup> Solan notes that the line between judges and juries—judges apply law and jurors find facts, as it is oft articulated—is simply more blurred than this truism would suggest.<sup>254</sup> In truth, this chapter added little to my understanding of this topic.<sup>255</sup>

### H. Legislature, Judges, and Statutory Interpretation

Solan's final chapter, chapter eight,<sup>256</sup> reads like a conclusion with some suggestions. Solan's conclusions are contained in a numbered list.<sup>257</sup> These six paragraphs, which are too wordy to repeat here, could be a very long thesis. Perhaps, Solan could have provided these conclusions at the beginning of his book, which might have offered his readers a structure and thesis. Solan argues again that statutory interpretation works well most of the time and admits that there are a few areas of concern.<sup>258</sup> He offers suggestions for how the branches could address these concerns,<sup>259</sup> which seem unlikely to be implemented.

First, he suggests that federal judges should be more honest and less timid about admitting “that they sometimes must exercise discretion in deciding a statutory dispute.”<sup>260</sup> He offers the case of *Circuit City Stores v. Adams* as an example.<sup>261</sup> In that case, the

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<sup>252</sup> Chapter seven begins at page 196.

<sup>253</sup> SOLAN, *supra* note 5, at 196.

<sup>254</sup> *Id.* at 197.

<sup>255</sup> To be honest, I merely skimmed it. But I did learn that the interpretive role of a jury initially was much larger because the founders were concerned about oppressive laws, and by placing twelve citizens as a buffer between a parliament and the justice system, oppression was minimized. *Id.* at 196. Today, jurors do play a smaller role in interpreting statutes.

<sup>256</sup> Chapter eight begins at page 223.

<sup>257</sup> SOLAN, *supra* note 5, at 223–24.

<sup>258</sup> *Id.* at 224.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 225.

<sup>261</sup> *Id.* (citing *Circuit City Stores v. Adams*, 532 U.S. 105 (2001)).

Supreme Court decided along political viewpoints that § 1 of the Federal Arbitration Act should be narrowly interpreted to apply only to transportation workers pursuant to the statutory canon *ejusdem generis*.<sup>262</sup> Section 1 excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from the Act’s coverage.<sup>263</sup> Solan suggests that the conservative Justices should have acknowledged that part of their goal has been to move litigation towards arbitration.<sup>264</sup> Had they done so, the Court could have discussed the relative merits of arbitration in a useful and more truthful manner.<sup>265</sup> While he admits such an approach may look like legislating from the bench, he argues that the Justices did so anyway; they just did not admit it.<sup>266</sup> He also suggests that the more judges simplify statutory language for jurors, the more jurors will be unable to implement the legislative will, which is important in the criminal context.<sup>267</sup> Judges should be more faithful to the text, while at the same time maintaining comprehensibility.<sup>268</sup> I find it highly unlikely that, in this climate against judicial activism, judges will heed his suggestion.

Second, he turns to the legislature and suggests that Congress can do more to help judges reach decisions in hard cases.<sup>269</sup> Congress should provide more information about what it is trying to accomplish by including findings, intent, and purpose clauses.<sup>270</sup> Solan acknowledges that it is often difficult for legislators to agree on a statement of purpose after a long, drawn out battle resulting in compromise legislation,<sup>271</sup> but he suggests that the facts that give rise

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<sup>262</sup> *Circuit City*, 532 U.S. at 114–15.

<sup>263</sup> *Id.* at 113 (quoting 9 U.S.C. § 1 (2001)).

<sup>264</sup> SOLAN, *supra* note 5, at 225 Solan also suggests that the liberal Justices should have acknowledged that their goal was to move litigation away from arbitration. *Id.*

<sup>265</sup> *Id.* at 225.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 226.

<sup>268</sup> *Id.* Mostly, he wants to comfort judges about the difficulty of their task and let them know that legislatures simply cannot make “laws that are at once crisp and flexible” due to human’s cognitive capacities. *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 227.

<sup>271</sup> *Id.*

to the legislation may be easier to include.<sup>272</sup> Notably, Solan mentions, but fails to take into account, the small role that purpose actually plays in interpretation even when included within an act.<sup>273</sup>

### III. CONCLUSION

At bottom, there are things to both love and hate about Solan's latest text, *THE LANGUAGE OF STATUTES*. I believe that Professor Solan wants lawyers to understand how our psychological and linguistic capabilities affect statutory interpretation; however, the linguistic and philosophical discussions are hard to follow for those without a background in philosophy or linguistics.<sup>274</sup> Also, the text lacks a clear organization and identified audience: this is not a book for students or lawyers, although I think Professor Solan hoped to appeal to the both. Rather, I believe it is a text for those who teach and study this subject.

Despite these weaknesses, this book has nuggets of wisdom for those who persevere, most of which I have tried to organize and identify above. As someone relatively proficient in this field, I learned new things from this text. Indeed, I was in the middle of revising one of my own texts on statutory interpretation and incorporated many of these ideas. For example, I will be sure to remind my future students of Solan's simple and profound premise that language works most of the time and is hard only at the margins. Also, I found instructive his description of the ordinary versus the definitional meaning of words. In the classroom, I struggle to understand why some students cling so perniciously to their dictionaries (or at least their iPhone dictionary applications). It makes sense that a search for definitional meaning would appeal to those who favor a rulelike approach to interpretation

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<sup>272</sup> *Id.* at 229. Courts are somewhat more likely to refer to findings than to purpose clauses. *Id.* at 228. For example, in *United States v. Lopez*, 514 U.S. 549, 565–66 (1995), the Court encouraged Congress to include them to demonstrate that laws enacted pursuant to the commerce clause of the Constitution have a sufficient connection to the regulation of interstate commerce to be constitutional. Solan says these clauses also help interpretation. SOLAN, *supra* note 5, at 228.

<sup>273</sup> See generally LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 124 (2008) (describing the role that these clauses play in interpretation and stating “generally, the preamble and findings and purpose clauses cannot control clear, enacted text”).

<sup>274</sup> And, while I majored in psychology in undergrad, my background there seemed to do me no good either.

and would be rejected by those favoring a wordlike approach. Further, Solan's explanation of the role of dictionaries offers a compelling reason why the dictionary does not provide ordinary meaning in most cases. In addition, Solan explains better than any other scholar I have read to date how a group can form a unified intent by providing examples of groups that can and cannot have such intent. Finally, Professor Solan offers a rich panoply of examples for his many ideas.<sup>275</sup> In the end, I significantly benefitted from reading his text, even if I did not always enjoy it.

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<sup>275</sup> For example, he provides the following absurdity example: no one would arrest a prosecutor for having child pornography when the only reason for having the contraband was to prosecute someone else. SOLAN, *supra* note 5, at 3 (citing RICHARD POSNER, HOW JUDGES THINK 214–15 (2008)).