

The Legacy of Anglo-American Textualism

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Summary:

Textualism is the doctrine of statutory interpretation propounded by a small group of US federal court judges, including the late Justice Antonin Scalia. Whilst the doctrine has attracted a great deal of scholarly attention, few have considered its historical development. In this dissertation, textualism is analysed in order to uncover the core principles and sets of rules from which it is comprised. Then, the development of these principles and sets of rules is traced back through the treatises on statutory interpretation published in England and America in the Victorian era, which were well-known to and frequently cited by Justice Scalia. Textualism is revealed to be an Anglo-American doctrine that emerged over the course of the nineteenth century; and it was made explicit in the treatises on statutory interpretation, which developed via a transatlantic scholarly dialogue. The doctrine fell out of favour in the US as the nineteenth century drew to a close; and around the same time, the rule prohibiting recourse to legislative history, a core feature of textualism, became subject to significant judicial challenge in England. The matter was resolved by a landmark decision in 1906, after which time the doctrine became firmly entrenched in England until approximately the 1980s. Textualism's long tenure in England demonstrates how a doctrinal common law theory typical of the late Victorian era persisted for more than a century despite variations in judicial application of the rules from which the doctrine is comprised, criticism from within the legal community, and significant social change over time. The modern US revival of this doctrine is further testament to textualism's tenacity. Whilst many scholars have found the doctrine to be problematic, it has remained attractive to common law judges from the time of its emergence in the middle of the nineteenth century through to the present. This is so because textualism was developed and refined through doctrinal legal scholarship, and as a result, it is consistent with traditional common law modes of reasoning, and it is tailor-made to meet the needs of judges deciding cases.

Preface

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution. No substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution. It does not exceed the prescribed word limit for the relevant Degree Committee.

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Chapter 1

What is Textualism?

1.1 Introduction

The objective of this work is to defend the following claim: textualism, as it has been propounded by the prominent judges at the US federal courts who self-identify as textualists over the past three decades, emerged as a doctrine of statutory interpretation within the Anglo-American legal communities in the Victorian era, and its development can be observed in a series of treatises on statutory interpretation published in England and America during that time. Whilst the doctrine fell out of favour around the turn of the twentieth century in America, the doctrine became entrenched in England and remained entrenched until the 1980s, approximately.

This is a controversial claim. Textualism, as it appears in the scholarly literature, is generally regarded as a modern American phenomenon. Its genesis is widely attributed to US Supreme Court bencher, the late Justice Antonin Scalia. Although Justice Posner had used the term “textualist” to describe the approach of Justice Easterbrook in 1986, William Eskridge Jr. is often credited with initiating scholarly discourse about textualism with his now famous article, *The New Textualism*, which drew attention to the practices of Justice Scalia in 1989.¹ Following publication of this article, textualism became a subject of intensive scholarly debate. The term “textualism” has appeared in thousands of American law journal articles over the past 25 years: it has rarely appeared in legal scholarship elsewhere.²

Within the vast quantity of literature devoted to the topic, the word “textualism” is typically used to denote approaches to statutory interpretation that emphasize the binding

1 Richard A Posner, ‘Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution’ (1986) 37 Case W Res L Rev. 179; William N Eskridge, ‘The New Textualism’ (1990) 37 UCLA L Rev 621. Nelson credits Eskridge for “definitively popularizing the term.” Caleb Nelson, ‘What Is Textualism?’ (2005) 91 Virg L Rev 347, 347 fn3.

2 A keyword search for “textualism” in HeinOnline’s Law Journal catalogue yielded 3,877 articles on 12 Feb 2014, and 8201 articles on 2 May 2018. In the University of Cambridge library system, this search yielded 2,981 results, including 1,667 journal articles, 730 books, 216 dissertations and 29 book chapters on 17 August 2016. More than 50% were relevant to statutory interpretation. Most were authored by US scholars and published in the US. (The Cambridge search system changed in 2017 and more recent comparable data could not be obtained.)

nature of statutory text, and it is often used as shorthand for strict literalism.³ The term has most often been discussed in relation to Justice Scalia's approach to statutory interpretation.

There is a tendency for the scholarship to take a position either in favour of, or in opposition to textualism. Those who argue in favour of textualism typically regard it as a rigid (and noble) adherence to statutory text.⁴ From this perspective, textualism is generally praised for its ability to prevent judges from misconstruing laws duly enacted by the legislature. Judges, including Justice Scalia, are then praised or criticised for following or violating this approach.⁵ The scholars who take a dim view of textualism regard it as rigid to a fault, overly simplistic and intellectually dishonest.⁶ Such scholarship often purports to show that Justice Scalia himself did not, or could not, live up to his own ideals.⁷

Within the many avenues of analysis that have been pursued, few scholars have examined how textualism came into being—where the ideas which comprise it originated—and where else the doctrine has had carriage. This is the central concern of this research project, and for this reason it fills a significant gap in the literature.

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- 3 See for example Stephanos Bibas, 'The Limits of Textualism in Interpreting the Confrontation Clause' (2014) 37 *Harv J L & Pub Pol'y* 737; Michael P Healy, 'Attraction and Limits of Textualism: The Supreme Court Decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*' (1996) 5 *NYU Envir LJ* 382.
 - 4 See for example Autumn Fox and Stephen R McAllister, 'An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia' (1996) 19 *Campbell L Rev* 223; John F Manning, 'Textualism and Legislative Intent' (2005) 91 *Virg L Rev* 419.
 - 5 See for example Frank H Easterbrook, 'Text, History, and Structure in Statutory Interpretation' (1994) 17 *Harv JL & Pub Pol'y* 61; Fox and McAllister (n 4); Bradley C Karkkainen, 'Plain Meaning: Justice Scalia's Jurisprudence of Strict Statutory Construction' (1994) 17 *Harv J L & Pub Pol'y* 401; John F Manning, 'Textualism as a Nondelegation Doctrine' (1997) 97 *Col L Rev* 673; John F Manning, 'Second-Generation Textualism' (2010) 98 *Cal L Rev* 1287; John F Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Col L Rev* 1; Manning, 'Textualism and Legislative Intent' (n 4); Nelson (n 1); Abner S Greene, 'The Missing Step of Textualism' (2005) 74 *Ford L Rev* 1913.
 - 6 See for example Ronald Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' (1996) 65 *Ford L Rev* 1249; Miranda McGowan, 'Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation' (2008) 78 *Miss LJ* 129; John David Ohlendorf, 'Textualism and the Problem of Scrivener's Error' (2011) 64 *Maine L Rev* 119; Stephen A Plass, 'The Illusion and Allure of Textualism' (1995) 40 *Vill L Rev* 93; Erik J Rose, 'A Triumph for Textualism over Common Sense: *Deal v. United States*' (1994) 2 *San Diego Just J* 531; William Michael Treanor, 'Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of *Amar's Bill of Rights*' (2007) 106 *Mich L Rev* 487; William Michael Treanor, 'Against Textualism' (2009) 103 *Nw UL Rev* 983; Andrei Marmor, 'The Immorality of Textualism' (2004) 38 *Loy LA L Rev* 2063.
 - 7 See for example Plass (n 6); McGowan (n 6); William D Popkin, 'An Internal Critique of Justice Scalia's Theory of Statutory Interpretation' (1991) 76 *Minn L Rev* 1133; Mark V Tushnet, 'Scalia and the Dormant Commerce Clause: A Foolish Formalism' (1990) 12 *Cardozo L Rev* 1717; Marmor (n 6).

1.2 The Nature of Textualism

Whenever the mission is to criticize or praise textualism, it is held out as some sort of normative ideal, whether good or ill. However, if the American judges who self-identify as textualists can fairly be called textualist judges, then textualism can also be used to denote an identifiable approach towards adjudication, rather than a theoretical ideal. If used in this context, the word “textualism” should be understood in a manner that encompasses the judicial values and judicial practices actually exhibited by the self-described textualist judges, rather than something that is perhaps unobtainable in practice despite being desirable in theory. This is how Eskridge used the term in his article from 1989, and this is the meaning of the term that will be used for the purpose of understanding textualism in the analysis that follows. Textualism, for the purpose of this dissertation, is an approach to statutory interpretation that has core principles and a determinate set of common-law developed rules and presumptions of interpretation by which it can be identified.

A potential methodological problem arises because the values that textualist judges themselves propound and claim to abide by are, in part, aspirational and unachievable. In the foreword to *Reading Law*, a treatise on statutory interpretation co-authored by Justice Scalia, which summarises the rules and underlying principles of interpretation of the modern American textualist, Justice Scalia said the following:

Your judicial author knows that there are some, and fears that there may be many, opinions that he has joined or written of the past 30 years that contradict what is written here—whether because of the demands of *stare decisis* or because wisdom has come late. Worse still, your judicial author does not swear that the opinions that he joins or writes in the future will comply with what is written here—whether because of *stare decisis*, because wisdom continues to come late, or because a judge must remain open to persuasion by counsel.⁸

Justice Scalia admitted that he was not entirely capable of complying with his own interpretive regime. Thus to fairly understand a textualist judge, or a textualist jurisdiction, one must accept that the doctrine might be contradicted by a particular case from time to time. To require strict compliance within the cases would be to ask for something that the father of modern American textualism could not achieve.

Furthermore, unlike the many works that have considered textualism as a normative enterprise and assessed it in that light, the objective here is to understand the phenomenon

⁸ Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012) xxx.

from a practical, or functionalist point of view. Note, that to understand textualism, a certain amount of qualitative and normative analysis is required. Some consideration will be given to the issue of whether or not the doctrine achieves what proponents regard as textualism's central purpose—to curtail the ability of judges to interpret legislation in light of personal policy preferences. The research also sheds some light on the relationship between textualism and political ideology. In order to engage with this issue, some attention will be directed towards the strong affiliation with right-wing political ideology that the doctrine exhibits in the US. As a result, there is a socio-legal contextual component to the research.

Within this work, textualism will be referred to as a *doctrine* of statutory interpretation. Textualism relies on judge-made rules and presumptions, and it is predicated on the belief that these judge-made rules ought to be binding on judges. Textualism asserts that judging ought to be governed by common law rules. Furthermore, textualism is regarded by adherents as an overarching theory of statutory interpretation. Given that it is a collection of common law rules bounded by a theory, it fits within the meaning of “legal doctrine” as enunciated by scholars such as Hutchinson and Duncan, who explicitly accept that doctrine includes “synthesis of various rules, principles, norms, interpretive guidelines and values ... [which] explains, makes coherent or justifies a segment of the law as part of a larger system of law.”⁹

Although textualism is a doctrine of statutory interpretation, it should not be regarded as a method of statutory interpretation; or it should not be regarded as a method insofar as “method” implies a rigorous process that verges on being mechanical in nature. Such an implication would be misleading. In practice, textualist judging is quite flexible. Whilst the doctrine presents itself as a relatively strict system of rules (and underlying principles), the rules do not inevitably lead to uniform outcomes. Textualist judges can, and do, disagree with each other about the correct outcome in any particular case.¹⁰

9 Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 Deakin L Rev 83, 84. This can be contrasted with scholars such as Cotterrell, who take a narrower view of “doctrine” as encompassing only “the rules, regulations, principles and concepts set out in law books and authoritatively stated in legislation or deduced from judicial decisions.” Roger Cotterrell, *Law's Community* (OUP 1997) 50.

10 For example, Thomas and Scalia JJ disagreed in *Muscarello v United States* 524 US 125 (1998); *Branch v Smith* 155 L Ed 2d 407 (2003); *Adoptive Couple v Baby Girl* 186 L Ed 2d 729 (2013); *Navarette v California* 188 L Ed 2d 680 (2014); *Zivotofsky v Secretary of State* 135 S Ct 2076 (2015); and *Elonis v United States* 575 US (2015) slip op.

Textualist adjudication is also not as different from non-textualist approaches to judging as textualist rhetoric would suggest. Despite the tendency of legal scholars to use the word “textualism” as a shorthand for literalism, literalism is not a central feature of the doctrine. If one conflates the popular, superficial understanding of textualism as literalism with the doctrine of textualism as defined in Section 1.4 of this chapter, one will find this entire effort to uncover the history of textualism to be unconvincing and ill-conceived.

1.3 Structure and Methodology

Before proceeding to define textualism, some methodological issues will be considered. For the sake of clarity, the central claim of this dissertation will be repeated: textualism, as it has been propounded by the iconic textualist judges at the US federal courts who self-identify as textualist, emerged within the Anglo-American legal community in the nineteenth century. This emergence can be observed within the treatises on statutory interpretation published around that time in England and America. Whilst textualism was rejected by the legal communities in America in the twentieth century, it became entrenched as the orthodox approach to statutory interpretation in England until the 1980s, approximately.

For the most part, the claims being defended are doctrinal in nature. Their veracity will be borne out in the relevant primary and secondary literature. However, this claim is comprised of several sub-claims, each of which require their own unique strategy to arrive at a well-supported justification. I will provide a brief summary of the sub-claims and the method deployed for each of them here. However, it is a brief summary only. As each sub-claim is dealt with in detail within the subsequent chapters of this work, the details of the methodology will be elaborated upon, as necessary.

The first step required to defend the central claim of this work is to arrive at a clear definition of textualism: what it is, and what it is not. This will be accomplished by examining the essays and judicial opinions of the judges in the US who are widely recognised as the judges who propounded modern American textualism; and also by examining scholarly literature about the jurisprudence of these judges. Because Justice Scalia was the most notorious and most prolific of the modern American textualist judges, it is his jurisprudence that will be considered primarily (but not exclusively). The volume of the available literature

renders this inevitable. The objective will be to demonstrate that the core features of the doctrine are shared by the three iconic textualist judges.

It will be argued that textualism is comprised of four elements, which together form the doctrine. The definition is important to render the doctrine identifiable. Whilst one will find evidence of the various components that comprise the doctrine in cases, any particular case will not be sufficient to reveal the whole of the doctrine. Cases are anecdotal instances evidencing particular rules and principles which collectively comprise a larger doctrine. The doctrine is more readily observed in secondary literature. As a result, in order to justify the core principles and the rules that comprise textualism, the emphasis will be on the secondary literature. Nonetheless, passages from cases will be recited in order to provide additional support for claims in secondary literature, and also to provide examples of how the doctrine works its way into cases. The emphasis is on the secondary literature but not to the exclusion of cases. Textualism is about adjudication and cases are relevant.

There will be some consideration of a socio-legal matter—the relationship between textualism and political ideology. This will occupy only a modest portion of the chapter, but the issue is important because a central claim of textualists is that their doctrine is apolitical. The circumstances surrounding textualism’s persistence in England sheds further light on this relationship.

After arriving at a concise definition of textualism, Chapter 2 will seek to show that the treatises on statutory interpretation published in the Victorian era were highly influential on the modern American textualists. It will be shown that Justice Scalia in particular had extensive knowledge of the contents of these treatises, and that the doctrine as set out in the definition, was identical in substance to the doctrine of interpretation propounded in the Victorian treatises but for a few relatively minor innovations. The evidence is drawn from Scalia’s citations and quotes from these prior works, but also by noting the similarities between claims in the treatise he co-authored and the claims in the treatises from the nineteenth century.

In Chapter 2 it will also be shown that the authors of subsequent treatises on statutory interpretation were influenced by the prior treatises. The authors were engaged in a transatlantic dialogue of sorts. In order to justify this claim, consideration will be given towards citations, quotes and structural elements which provide evidence of scholarly engagement. One cannot simply assert that textualism was developed in these treatises.

However, the doctrine was made explicit in these treatises; and it will be argued that the development of the explicit description occurred via a transatlantic dialogue.

Chapters 3 and 4 will examine how the four core components of textualism developed. Each of the components will be examined separately to show how they evolved from a prior state and developed into the textualist position as the nineteenth century progressed. This is a doctrinal matter. The relevant passages and the authorities relied upon in the treatises will be considered in light of the relevant antecedent scholarship, and relevant cases not cited by the treatises, in order to reveal the development. Chapter 3 will examine the development of three of the four components—the faithful agent view of judging, the separation of powers and the sophisticated plain meaning approach to text. The fourth core feature, the exclusionary rule, which prohibits reliance on government documents and deliberations in the legislature prior to enactment when interpreting statutes, will be dealt with separately in Chapter 4. It will be considered in greater detail than the other components because it is the most distinctive feature of textualism, and because the generally accepted claims about the genesis of this rule will be contested. It will also be argued that the rule experienced significant judicial challenges in the final decades of the nineteenth century which resulted in divergence within the Anglo-American legal communities. As a result of these challenges, the US legal communities came to reject the rule, and in England the rule became entrenched.

Chapter 5 will examine textualism in England in the twentieth century. This is the time when the doctrine was entrenched, and essentially dogma. It will be referred to as the era of high English textualism. This chapter examines how the core principles and collections of rules comprising textualism remained in place despite contrary historical precedents, despite judges who sought to challenge the rules and principles of textualism, and despite ongoing scholarly criticism. This chapter will also examine the decline of textualism in England—how the legal community came to embrace contrary points of view and non-textualist approaches to interpretation in the canonical treatises on statutory interpretation and in court in the latter decades of the twentieth century. These are predominantly doctrinal issues. The matter will be dealt with by considering relevant cases and secondary literature. However, there will be some consideration of the political context in order to shed some light on the relationship between textualism and political ideology.

Chapter 6 will seek to arrive at a more considered understanding of textualism by examining certain issues that are tangential to the prior chapters and issues that arise out of a synthesis of the information provided in the prior chapters. The larger geographical extent of the doctrine beyond England and America will be examined. The relationship between the doctrinal methods deployed by the treatise writers to develop the theory and the ability of the doctrine to persist will also be considered. Some important differences between modern American textualism and English textualism will be examined, and finally, the relationship between textualism and political ideology will be revisited. Some of these issues are doctrinal, whilst others are socio-legal. Each issue requires its own methodological approach. An effort was made to rely on appropriate literature for each issue.

1.4 The Core Components of Textualism

Textualism consists of a coherent set of fundamental principles and rules of interpretation. The principles justify the collection of rules. The rules consist of legacy common law rules and presumptions of interpretation that are binding on judges in textualist jurisdictions, and in non-textualist jurisdictions; and in non-textualist jurisdictions, the rules and presumptions ought to bind judges, according to textualists. As Justice Scalia is the archetype, it is the principles and rules that he relied on and advocated for that will be considered, primarily (but not exclusively). Efforts will be made to demonstrate that his fellow textualists—Justices Easterbrook and Thomas—abide by the same principles and rules.

There are a number of reasons for focusing on Justice Scalia. He is the most widely known of the textualist judges in America over the past 30 years, and he was among the first to publicly adopt the term “textualism”. He was more outspoken in his judgments than his fellow textualists, and he earned a reputation for his very colourful and occasionally uncollegial dissents.¹¹ As a result, far more has been written about the judicial behaviour of Justice Scalia than the other American textualist judges. He also wrote far more about textualism than the other textualist judges.

¹¹ See for example *Obergefell v Hodges* 576 US slip op 7 fn 22 (2015): “If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: ‘The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,’ I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.” Also see Kevin A Ring, *Scalia Dissents: Writings of the Supreme Court’s Wittiest, Most Outspoken Justice* (Regnery Publishing 2004).

Whilst evidence of Scalia's beliefs and practices can be found scattered throughout his judicial opinions, there are also a number of studies that have attempted to quantitatively ascertain the types of arguments and information upon which Justice Scalia relies in his opinions.¹² Some are more appropriate than others due to the various objectives of the studies and the various methodological approaches deployed. There are also some scholars such as Manning, for example, who have set out to defend Scalia's approach on theoretical grounds.

The book *Reading Law*, which was mentioned earlier, is significant. It could fairly be regarded as a textualist manifesto. It does not purport to be exhaustive, but *Reading Law* does claim to enumerate the fundamental rules of interpretation for modern American textualists. *Reading Law* is the primary source relied upon for the rules and canons of interpretation that textualists follow. However, the work that provides the clearest insight into the principles and values that underpin textualism is a speech that was published as an essay called "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws".¹³ In this essay, Justice Scalia explains what textualism is, and why he is an adherent. It provides a logical starting point because it emphasises the underlying principles of textualism.

1.4.1 The Faithful Agent View of Judging

The essay *Common Law Courts* begins with a powerful rhetorical critique of modern American legal culture. For those unfamiliar with Scalia's opinions, this may seem an odd way to commence a defence of a judging style noted for claims about adhering to the text of the statute, but the underlying premise is quite simple: the emphasis on judge-made law in law school and popular culture in America is inappropriate given that most of the law, particularly in the US federal courts, is imposed by statute. Despite the fact that statutes govern the majority of issues adjudicated in appellate court cases, lawyers and the public at large are presented with the glorified image of the common law judge deciding cases based on reason, the narrowing and expanding of *ratio decidendi*, and "legislative intent divorced

12 McGowan (n 6); Gary Lawson, 'An Empirical Test of Justice Scalia's Commitment to the Rule of Law' (2003) 26 Harv J L & Pub Pol'y 803; Karkkainen (n 5); Elizabeth A Liess, 'Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation' (1993) 72 Neb L Rev 568; Youngsik Lim, 'An Empirical Analysis of Supreme Court Justices' Decision Making' (2000) 29 J Leg Stud 721.

13 Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law', *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997). [*Common-Law Courts*].

from [the statutory] text”.¹⁴ Scalia draws attention to this popular misunderstanding to make the central claim about his philosophy of judging: “[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.”¹⁵

Textualism is very much concerned with the primacy of statutory text. However, the emphasis, for Scalia, is on the democratic source of the authority of the text and the proper role of the judge in the adjudicative process:

To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.¹⁶

This statement reveals the integrated nature of Justice Scalia’s belief system. The primacy of statutory text is expressed as the absence of judicial authority to make law. For Scalia, they amount to the same thing. Textualism is not so much about adhering to the text, as it is about why judges ought to adhere to the text. In the words of Justice Easterbrook, “for the textualist a theory of political legitimacy comes first, followed by a theory of interpretation that is appropriate to that obligation.”¹⁷

This is a normative matter: in a democracy, the legislature enacts the statutory text via the agreed-upon process, and judges are obligated to respect and follow the text. It is immoral to violate the text of duly enacted statutes. Such a transgression would impose a judicial dictatorship on the law, something that is morally offensive to citizens steeped in the culture and the related belief systems of the modern democratic state. It is expressed as a categorical principle, and justifies what Eskridge calls the “faithful agent” view of judging.¹⁸ Judges are duty-bound to be faithful agents of the law, interpreting and applying the law in good faith, and not making their own law based on personal values and personal policy preferences. The faithful agent view of judging is a central feature of textualism.

For textualists, the emphasis is on the normative cause of constraining judicial interpretation. This emphasis is driven by the fear of the “desire for freedom from the text,

14 *ibid* 22.

15 *ibid*.

16 *ibid* 16.

17 Frank H Easterbrook, ‘Textualism and the Dead Hand’ (1997) 66 *Geo Wash L Rev* 1119, 1119.

18 Eskridge (n 1).

which enables judges to do what they want.”¹⁹ The mission of textualism is to limit and contain judicial discretion with rules. That there is a great deal of room within the meanings of words for differences of opinion is acknowledged by textualist judges, but this room for differences of opinion—this domain of discretion—is not emphasised. Justice Easterbrook has admitted that textualism will not prevent judges from disagreeing with each other;²⁰ and Scalia and Thomas have disagreed with each other in a number of significant cases.²¹ Yet, Scalia’s opinions often contain scathing rhetorical criticisms of judicial opinions that differ from his own.²² Justice Scalia feels justified in making such criticisms because of the normative basis of textualism as a doctrine rooted in democratic fidelity. However, for the purpose of identifying textualism, the rhetoric is potentially misleading. The faithful agent view of judging is the hallmark, and it is justified by democratic ideology. This is the first of the core principles of textualism. It is best understood as negative principle—that judges ought not to make law when interpreting statutes because they lack the legitimate authority to do so.

1.4.2 The Separation of Powers

Another core feature of Justice Scalia’s approach to statutory interpretation is a constitutional issue: an equally principle-based belief in the doctrine of separation of powers. Several scholars have noted this. Leiss, for example, pointed out that “[t]hroughout Justice Scalia’s jurisprudence, one finds the theme of a strict interpretation of separation of powers.”²³ When explaining his views on the matter in *Common Law Courts*, Scalia quotes Madison quoting Montesquieu: “[w]ere the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary controul, for the judge would be

19 Scalia and Garner (n 8) 9. Also see the Foreword by Easterbrook, xxi–xxiv. Also see Scalia, ‘Common-Law Courts’ (n 13).

20 Scalia and Garner (n 8) xxiv–xxvi.

21 (n 139).

22 See for example *National Labor Relations Board v Noel Canning* 189 L Ed 2d 538, 592 (2014): “the majority casts aside the plain, original meaning of the constitutional text in deference to late-arising practices that are ambiguous at best.” Also see *Abramski v United States* 189 L Ed 2d 262, 288 (2014): “The contrary interpretation provided by the Government and the majority founders on the plain language of the Act.”

23 Leiss (n 12) 584. Gluck said that “structurally, textualists’ strong conceptions of separation of powers lead them to advocate a very limited judicial role in statutory interpretation, in which judicial discretion must be cabined through clear rules, as judges strive to ‘interpret’ but not ‘make’ law.” Abbe R Gluck, ‘The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism’ (2010) 119 Yale LJ 1750, 1763. Also see M David Gelfand and Keith Werhan, ‘Federalism and Separation of Powers on a Conservative Court: Currents and Cross-Currents from Justices O’Connor and Scalia’ (1989) 64 Tul L Rev 1443, 1467.

the legislator.”²⁴ A similar passage from Montesquieu was quoted by Scalia in *Talk America Inc v Michigan Bell Telephone Co*: “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”²⁵ The importance of the separation of powers has also been addressed by Scalia in other opinions and essays.²⁶ This issue has been fleshed out in much greater depth by Manning, a former clerk to Justice Scalia, whose ideas were endorsed by Scalia.²⁷

The textualist conception of separation of powers is derived from a popular misunderstanding of Montesquieu which has become entrenched in both English and US jurisprudence. Montesquieu’s concept of the executive concerned the branch of government (ie. the institutions) that enforced the law.²⁸ Montesquieu would not have understood the concept of the executive as a subcommittee of elected people under a president or prime minister with a privileged role in the law-making process.²⁹ Despite this misunderstanding, textualists rely on the necessity of separation of powers (and Montesquieu’s enunciation of it, in particular) as a justification for the faithful agent role of the judge as a constitutional matter. According to Manning:

the sharp demarcation of the legislative and judicial powers coincided with the adoption of a carefully designed legislative process—bicameralism and presentment. By dividing authority among three largely independent institutions, bicameralism and presentment were designed to harness the influence of faction. ... [B]y imposing an effective supermajority requirement for legislation ... [p]olitical minorities thereby gain extraordinary power to block legislation, or

24 The Federalist No. 47, at 326 (James Madison) (Jacob E. Cooke ed, 1961). The footnote cites the reference to Montesquieu *The Spirit of the Laws* (Vol 1, Thomas Nugent trans, Hafner, 1949) 152.

25 564 US 50 (2011), 68. Cited to “Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949).”

26 See for example Scalia’s opinions in *Mistretta v United States* 488 US 361, 414 (1989); *National Labor Relations Board v Noel Canning*, (n 119), 593; *Utility Air Regulatory Group v Environmental Protection Agency* 573 US slip op, 23 (2014); and *McQuiggin v Perkins* 185 L Ed 2D 1019, 1041 (2013). Also see Antonin Scalia, ‘The Doctrine of Standing as an Essential Element of the Separation of Powers’ (1983) 17 *Suffolk UL Rev* 881..

27 See Manning, ‘Textualism as a Nondelegation Doctrine’ (n 5); John F Manning, ‘Putting Legislative History to a Vote: A Response to Professor Siegel’ (2000) 53 *Vand L Rev* 1529. Scalia endorsed Manning’s views on the separation of powers in *McQuiggin v Perkins*, *ibid* 1041; and *Decker v Northwest Environmental Defense Center* 568 US 447, 466 (2013).

28 See for example HF Jolowicz, *Lectures On Jurisprudence* (Athlone Press 1963) 336–37; Howard Schweber, ‘The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education’ (1999) 17 *L & Hist Rev* 421, 430; Robert Shackleton, ‘Montesquieu, Bolingbroke, and The Separation of Powers’ (1949) III *French Studies* 25, 25.

29 See for example Jolowicz (n 28) 336–37; Schweber (n 28) 430; Shackleton (n 28) 25.

more importantly ... to insist upon compromise as the price of assent.³⁰

Note that Manning is concerned primarily with the separation between legislating and adjudication. This is the separation that is relevant to textualism as a doctrine of statutory interpretation. What matters is the absolute nature of judicial authority to interpret the statutes enacted by the legislature. Thus the separation is between legislation and interpretation: the legislature determines the text, and judges alone get to say what the text means. Only judges have the authority to interpret.

1.4.3 The Exclusionary Rule

Manning's explanation shows the democratic basis of the belief in separation of powers, and on the face of it, this concept appears to be one more aspect of a single concept of democratic fidelity to statutory text, or in the very least, a more refined argument for democratic fidelity. However, separation of powers has another aspect to it which reveals it to be something more than simple fidelity to the text. For textualists, an essential aspect of respect for the compromise reached in Congress concerns the rejection of all legislative history when pondering the meaning of statutory text.

“Legislative history” refers to records of statements made by elected officials in Congress, committee reports, changes made to a bill, and all records and materials generated as a bill is pushed through the bicameral process prior to enactment.

The rejection of these materials as aids to the interpretation of statutes is relevant to the separation of powers for two reasons; or put another way, by rejecting such materials the protection afforded to the branches of government operates in two directions. First, the judiciary is protected from the potentially anti-democratic influence of elected members and lobbyists, who may seek to influence interpretation by deliberately planting self-serving information in the Congressional Record. Second, Congress is protected from self-serving judges who may cherry-pick from the Record to support an interpretation that violates the official compromise reached by the official law-making process.³¹

30 John F Manning, ‘Deriving Rules of Statutory Interpretation from the Constitution’ (2001) 101 Col L Rev 1648, 1650–51.

31 These arguments are central to the core doctrine of Scalia’s textualism. Other arguments have been put forward for eschewing legislative history. See for example, Scalia, ‘Common-Law Courts’ (n 13) 32–42. Also see Law Commission, *The Interpretation of Statutes* (Law Comm No 21, 1969) paras 53–62; and The Law Reform Commission of Hong Kong, *Extrinsic Materials as an Aid to Statutory Interpretation* (Report, 1997) <<http://www.hkreform.gov.hk/en/publications/rstatutory.htm>> accessed 16 November 2016, 37–43.

Whilst Justice Scalia recognises both forms of protection, the emphasis is on the latter. When defending his belief that legislative history should be rejected, he quotes Chief Justice Taney:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself[.]³²

Once again, the holistic nature of the belief is revealed. The need for separating law-making from judging is about respecting the ordained democratic process, and the compromise it compels, which is set out in the text of the statute.

An alternate way that Scalia makes this same point is by criticizing judicial reliance upon legislative intent: “I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of law.”³³

Thus far, the textualist claims have been absolutist in nature. However the textualist conception of legislative intent is more nuanced. Elsewhere in his essay, Scalia felt it necessary to note that legislative intent “divorced from text” was the problem rather than legislative intent as a stand-alone concept. For Justice Scalia, the text of an enactment has an intent, and he describes the nature of this intent as follows:

we do not look for subjective legislative intent. We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. As Bishop’s old treatise nicely put it, elaborating on the usual formulation: ‘[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended.’³⁴

Thus the earlier quote where Scalia claims to reject the concept of “intent of the legislature” should be understood in this light. The text does have an intent. When seeking to determine that intent, one should not look to the materials before the legislature, nor should one look at the records generated by the legislature.

In *Green v Bock Laundry Mach Co* Justice Scalia suggested that it is reasonable for courts to consult such materials when statutory provisions appear to bring about absurd

32 *Aldridge v Williams* 44 US (3 How) 9 (1845) 24.

33 Scalia, ‘Common-Law Courts’ (n 13) 31.

34 *ibid* 17: *emphasis* added by Scalia.

results.³⁵ However, he did not glean any useful information from these materials in that case, and in the remainder of his opinions, and in any essay that addressed the topic, Justice Scalia has been resolute in his insistence that the rule should be followed strictly and that such materials should *never* be considered or relied upon in a judicial opinion for any purpose whatsoever. He criticised the use of such materials in his opinions throughout his judicial career.³⁶ When concurring with opinions, he would include a note explaining that he explicitly refused to concur with the parts of an opinion referring to legislative history.³⁷ In *Reading Law*, the chapter defending the exclusionary rule consumes 27 pages of strenuous argument in favour of the rule.³⁸ His explanation of most other canons of interpretation is confined to 3–8 pages. He also argued for the rule on *Common-Law Courts*.³⁹ Whilst McGowan criticised Justice Scalia for not practising what he preached in most other respects, when it comes to citing legislative history, she asserted that “Justice Scalia does just what he says he does.”⁴⁰

Justice Scalia did not act alone with respect to the exclusionary rule. Justice Thomas has also followed the rule.⁴¹ The collective impact of Scalia and Thomas JJ on this issue has brought about a quantitatively measurable decline in reliance on legislative history in judgments at the Supreme Court of the United States.⁴²

Thomas J considered legislative history in *Commissioner of Internal Revenue v Lundy*,⁴³ and it is tempting to conclude that, for him, legislative history has a limited last

35 490 US 504 (1989) “I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought-of, and thus to justify a departure from the ordinary meaning of the word ‘defendant’ in the Rule.”

36 See for example *Sable Communications v FCC* 109 S Ct 2829, 2840 (1989); *Hirschey v Federal Energy Regulatory Commission* 777 F 2d 1, 7–8 (DC Cir 1985); *HJ Inc v Northwestern Bell Tel* 109 S Ct 2893, 2907 (1989) (concurring); *Edwards v Aguillard* 482 US 579 619–36 (1987) (dissenting); *Pierce v Underwood* 487 US 552, 566–67 (1988); *Lawson v FMR LLC* 188 L Ed 2d 158 (2014);

37 In *Sebelius v Cloer* 183 L Ed 2D 450, 450 footnote “*” (2013), Justices Scalia and Thomas “joined all but Part II–B” of the opinion for the court by Justice Sotomayor; Also see *Octane Fitness LLC v ICON Health & Fitness Inc* 188 L Ed 2d 816 (2014); *Loughrin v United States* 189 L Ed 2d 411 (2014); *Jett v Dallas Independent School District* 109 491 US 701, 723 (1989); and *Blanchard v Bergeron* 489 US 87, 97 (1989).

38 Scalia and Garner (n 8) 369.

39 Scalia, ‘Common-Law Courts’ (n 13) 29–37.

40 In cases where Scalia cited legislative history, he used it to “contradict the majority’s reading” of it. McGowan (n 6) 170.

41 Thomas concurrence with leg hist *Shannon v United States* 512 US 573, 583–84 (1994); *United States v RLC* 503 US 291, 311–312 (1992).

42 McGowan (n 6) 170–71; Michael H Koby, ‘The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique’ (1999) 36 Harv J Legis 369.

43 516 US 235 (1996).

resort role.⁴⁴ Yet the materials were found to be unhelpful in that case. Justice Thomas was simply addressing arguments raised by counsel. As with Justice Scalia, he has rejected such materials regardless of the purpose for which they were submitted.⁴⁵

Justice Easterbrook also followed the rule and made several spirited critiques of judicial reliance on legislative history.⁴⁶ There is one judgment within which he makes a statement that could be misconstrued as suggesting that legislative history can be useful as in interpretive aid:⁴⁷

Legislative history may be invaluable in revealing ... the assumptions its authors entertained about how their words would be understood. ... [J]udges may learn from the legislative history even when the text is 'clear'. Clarity depends on context, which legislative history may illuminate.

Whilst this passage seems clear, the remainder of this judgement is highly critical of reliance on legislative history and his opinion rejects such reliance.⁴⁸

Section 302(c)(1) of the statute has an ascertainable meaning, a meaning not absurd or inconsistent with the structure of the remaining provisions. It says that Chapter 11 cases pending on the date the law went into force may not be converted to Chapter 12. No legislative history suggests any other meaning. ... Congress has done nothing to change § 302(c)(1), implying that the statement in the committee report may have been the error. It is easy to imagine opposing forces arriving at the conference armed with their own texts and legislative histories, and in the scramble at the end of session one version slipping into the bill and the other into the report. Whichever was the blunder, we know which one was enacted.

To quote the earlier passage suggesting that legislative history can be useful without qualification would be to take the statement out of context. Justice Easterbrook has been steadfast in his insistence that the exclusionary rule should be followed.

These three cases, one by each of the iconic textualist judges, are easily misunderstood. The potentially misleading statements are *obiter*, and in none of them do the judges actually rely on legislative history; and in all other cases and essays these judges

44 H Brent McKnight, 'The Emerging Contours of Justice Thomas's Textualism' (1999) 12 Regent UL Rev 365, 376–77.

45 See (n 37).

46 Easterbrook, 'Text, History, and Structure in Statutory Interpretation' (n 5); Frank H Easterbrook, 'The Absence of Method in Statutory Interpretation' (2017) 84 U Chic L Rev 81; Frank Easterbrook, 'The Role of Original Intent in Statutory Construction' (1988) 11 Harv J Law & Publ Pol'y 59; Frank H Easterbrook, 'Foreword: The Court and the Economic System' (1984) 98 Harv L Rev 4; *Premier Electric Construction Co v National Electrical Contractors Ass'n* 814 F 2d 358, 364—65 (7th Cir 1987).

47 *Re Sinclair* 870 F 2d 1340, 1342 (1989).

48 At 1344–45.

insisted that the exclusionary rule should be followed strictly without qualification. There is no “mischief” exception for illuminating the context. Furthermore, counsel should not be permitted to present such materials. Textualists believe that all such materials should be inadmissible as an aid to statutory interpretation. For Scalia and his fellow textualist judges, the rule against admissibility is what the law ought to be and not what the law is in the US. Such materials are admissible in the US federal courts, and judges are permitted to rely on such materials when justifying legal determinations.

The concept of inadmissibility and the strict rule against judicial reliance can be contrasted with the concept that legislative history cannot be allowed to control interpretation. If the rule in a particular jurisdiction is based on the principle that the materials cannot control interpretation, but they can be admitted in argumentation and relied upon when justifying legal determinations, then the material is not excluded. This is contrary to exclusionary rule. The distinction will become important in Chapter 4, when the development of the exclusionary rule in England and America is examined.

1.4.4 The Sophisticated Plain Meaning Approach to Statutory Text

Textualists have a clearly articulated set of rules for interpreting statutory language. It is set out in Reading Law as a collection of canons of interpretation that will be familiar to common law lawyers trained in England in the twentieth century. The statutory text is regarded as the paramount consideration. The words are to be understood in their ordinary sense unless the context implies that a technical sense is intended;⁴⁹ the words are to be understood in accordance with the rules of grammar,⁵⁰ and the provisions of a statute are to be read in the context of the whole statute, with due consideration of related areas of law,⁵¹ and relevant case law.⁵² “Nothing is to be added to what the texts states or reasonably implies (*casus omissus pro omisso habendus est*).”⁵³ Plain meaning is binding, and ambiguities are to be resolved through reliance on a varied collection of canons of interpretation that are textualist compliant. Among the presumptions, an interpretation that “furthers rather than obstructs the document’s purpose should be favoured.” There is a presumption in favour of

49 Scalia and Garner (n 13) 69: the “ordinary meaning canon”.

50 *ibid* 140: the “grammar canon”.

51 *ibid* 252: the “related-statutes canon”.

52 *ibid* 332: the “prior-construction canon”.

53 *ibid* 93: the “omitted-case canon”.

consistent usage and a presumption against surplusage.⁵⁴ There is a presumption against change in the common law, and a presumption against implied repeal.⁵⁵ The list of textualist-compliant canons also includes many of the Latin maxims, such as *noscitur a sociis* and *ejusdem generis*.⁵⁶ There are also some presumptions applicable to specific areas of law. For example, ambiguities in criminal statutes are to be resolved in favour of the accused.⁵⁷

Generally speaking, most canons that have been relied upon historically are acceptable so long as they do not posit some sort of spirit, intent or equitable principle which is in any way at variance with the letter of the law, with one significant exception for the rule against absurdity.⁵⁸

This rule-bounded approach towards statutory text will be referred to as the “sophisticated plain meaning approach”. As the label suggests, interpretation is not a simple or mechanical matter for the textualist. In Scalia’s own words:

[t]extualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist and no one ought to be⁵⁹

The plain meaning rule is central. Ambiguity must be found to justify reliance on the many textualist compliant presumptions and canons of interpretation.⁶⁰ One starts with plain meaning. However, plain meaning is not arrived at by reading the statutory provision in isolation. The words within a sentence must be understood within the context of the sentence, the sentences within the paragraph, within the whole statute, but also within the larger body of law, and with due consideration for the relevant body of case law. A large corpus of assumptions and cultural understandings come along with this. The approach also incorporates the history and evolution of the law.⁶¹

As a result, when one examines a broad sample of Scalia’s opinions, one finds that he is eclectic with respect to the type of reasoning that is determinative in any particular case.

54 *ibid* 170: the “presumptions of consistent usage”; and 174: the “surplusage canon”.

55 *ibid* 318, 55.

56 *ibid* 199, 214.

57 *ibid* 296; Scalia and Garner (n 8). Justice Scalia expressed scepticism about these kinds of presumptions in *Common-Law Courts*. Scalia, ‘Common-Law Courts’ (n 13) 28. However, he changed his opinion by the time *Reading Law* was written.

58 Scalia and Garner (n 8) 234: the “absurdity doctrine”.

59 Scalia, ‘Common-Law Courts’ (n 13) 23. Also see Scalia and Garner (n 8) 39: “‘strict constructionism’—a hyperliteral brand of textualism that we equally reject.”

60 Scalia, ‘Common-Law Courts’ (n 13) 27–28.

61 Chapter 3, 73–74 on the mischief rule.

McGowan’s research reveals that ordinary meaning settled only a modest portion of cases for Justice Scalia.⁶² In the majority of cases, he relied on a variety of factors including specialised meanings deduced from case law,⁶³ and often non-binding case law;⁶⁴ but also from purpose and consequential reasoning.⁶⁵ Scalia relied on secondary literature as often as other judges on the Supreme Court.⁶⁶ Furthermore:

Justice Scalia is not merely mining legal scholarship or treatises to find the text’s original public meaning. Instead, these sources support his arguments about statutory purpose and the incentives that a given interpretation would create.⁶⁷

McGowan found that no particular types of sources and no particular types of reasoning emerge as dominant.⁶⁸

The modern American textualists explicitly acknowledge the rich variety of factors considered when interpreting statutes. The very first “canon of interpretation” put forward in *Reading Law* is called the interpretation principle: “Every application of a text to particular circumstances entails interpretation.”⁶⁹ Scalia quotes Ricks to make his point: “if you seem to meet an utterance which doesn’t have to be interpreted, that is because you have interpreted it already.”⁷⁰

Textualism presents itself as a “bottom up” approach to interpretation that begins with the statutory text,⁷¹ then various contextual elements necessarily fall to be considered. As such, textualism can be distinguished from teleological approaches that are “top down”. However, in light of the interpretation principle, this distinction is probably not as sharp in practice as it is in theory.⁷²

62 “Seventy-two percent of the time Justice Scalia applies something besides the ‘ordinary’ meaning.” McGowan (n 6) 154.

63 This supplies a determinative justification in 1/3 of the cases in the sample. *ibid* 155.

64 In such cases, “Justice Scalia construed a statute against the backdrop of lower court glosses of the statute or in light of case law that construed predecessor statutes.” *ibid* 180.

65 Consequential reasoning was relied upon in 55% of the cases in the sample, and anomalous consequences were determinative in 39% of cases. Purpose was relied upon in 70% of the cases. *ibid* 175–77. Textualists admit that purpose and consequences are relevant considerations: Scalia and Garner (n 8) 34–39.

66 In 28% of the cases in the sample. McGowan (n 6) 175–77.

67 *ibid* 169–70.

68 *ibid* 154.

69 Scalia and Garner (n 8) 53.

70 *ibid*. Quoting Christopher Ricks ‘Stanley Fish: Is There a Text in This Class?’ in *Reviewery* (Penguin 2002) 192, 196.

71 “[W]e turn first, as always, to the text of the statute.” *Shannon v United States* 512 US 573, 580 (1994), per Thomas J. “This is a philosophical and methodological commitment.” McKnight (n 44) 365.

72 Many scholars have noted that the process does not occur in discrete steps but occurs in a more holistic fashion. See for example Oliver Jones and FAR Bennion, *Bennion on Statutory Interpretation: A Code* (6th

For textualist judges there is an implicit quest to limit the context under consideration when justifying interpretations. There will be rhetoric concerning the plain or ordinary meaning of words, and when such rhetoric is deployed, it is implicit that consideration of the larger context is unnecessary. This is not to say that textualist judges will not engage with further argumentation when they deem a statutory provision to have a plain or ordinary meaning that settles the legal dispute at issue to their satisfaction. Corroborating and opposing arguments will be discussed in order to address arguments raised by counsel and to engage with the other judges on the panel. Textualist judges tend to be thorough in their opinions.

It must be kept in mind that plain meaning and ordinary meaning were not synonymous for Justice Scalia.⁷³ Plain meaning denotes a phrase or sentence that admits of only one clear meaning (when read in context). Ordinary meaning is the meaning that people would ordinarily impute to a phrase or sentence that has other possible meanings. The rule that the words of a statute are to be understood according to their ordinary grammatical meaning can be regarded as a canon of interpretation that comes into play because of ambiguity.

1.5 The Four Pillars of Textualism

The foregoing analysis described four essential or core elements of textualism. This includes two core principles and a set of rules governing interpretation, one rule of which is sufficiently important and distinctive that it is a core feature on its own:

1. the faithful agent view of judging—judges have no authority to make law when statutes are at issue.
2. the separation of powers—interpretation must be separated from legislating as a constitutional necessity;
3. the rejection of legislative history as an aid to statutory interpretation—the exclusionary rule; and,

edn, LexisNexis 2013) 542. One of Vogenauer's central claims was that the continental approach is more similar to the English approach than the generally accepted perspective would suggest. Stefan Vogenauer, *Die Auslegung von Gesetzen in England Und Auf Dem Kontinent: Eine Vergleichende Untersuchung Der Rechtsprechung Und Ihrer Historischen Grundlagen*, vol 2 (Mohr Siebeck 2001).

⁷³ See McGowan (n 6) 148–49.

4. the sophisticated plain meaning approach to statutory text—plain meaning binds, and ambiguities are resolved by a series of textualist-compliant rules of interpretation.

The faithful agent view of judging requires that judges must interpret and apply the law as provided for in the statute (with due consideration for relevant factors). This view of judging should not be taken to imply any sort of agency. The judge is not an agent of the legislature under the textualist doctrine. Any such agency would imply a co-operative partnership with the legislature which, in turn, could reasonably justify reliance on legislative history, and would violate the doctrine of separation of powers. The judge is the faithful agent of the law that the legislature has enacted.

While perhaps a fine point, Justice Scalia would probably have resisted the conception of the judge as a faithful agent of the legislature. This description has been used by many scholars when describing textualism;⁷⁴ however, it could easily be interpreted in a manner that is contrary to textualist doctrine. If the judge is a faithful agent of the legislature, then one could argue that judges ought to examine legislative history in order to uncover the legislative intent when a statutory text lacks clarity. For a textualist, the judge is the faithful agent of the law, and not of the legislature.

Because of this underlying principle of the judge as faithful agent, Justice Scalia had a tendency to make statements such as the following, when authoring a majority opinion: “the Court of Appeals for the Sixth Circuit granted respondent’s petition for a writ of habeas corpus on his Fifth Amendment claim. In so doing, it disregarded the limitations of 28 U. S. C. §2254(d)—a provision of law that some federal judges find too confining, but that all federal judges must obey. We reverse.”⁷⁵

When dissenting, Scalia would often admonish the majority if he believed that they had violated this principle:⁷⁶

The Court’s decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. ... This Court holds only the judicial power—the power to pronounce

74 See for example Glen Staszewski, ‘Textualism and the Executive Branch’ (2009) 2009 Mich State L Rev 143, 147; Nicholas S Zeppos, ‘Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation’ (1990) 76 Virg L Rev 1295, 1313; Abbe R Gluck and Lisa Schultz Bressman, ‘Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I’ (2013) 65 Stan L Rev 901, 905; Jonathan T Molot, ‘The Rise and Fall of Textualism’ (2006) 106 Col L Rev 1, 9.

75 *White v Woodall* 572 US slip op, 1 (2013).

76 *King v Burwell* 576 US slip op, 18 (2015).

the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that ‘[o]ur task is to apply the text, not to improve upon it.’

This passage was near the conclusion of a lengthy dissent which provided numerous reasons, mostly based on the relationship between various statutory provisions within the relevant statute and the implications about the meaning of the relevant provision that were gleaned from these relationships. This paragraph sets out the underlying principle for his dissent, and it reveals how the concept of judge as faithful agent is related to the concept of the separation of law-making from interpretation.

Sometimes Scalia went further. In the concurring opinion in *Bond v United States*, he claimed that “the Court shirks its job and performs Congress’s. As sweeping and unsettling as the Chemical Weapons Convention Implementation Act of 1998 may be, it is clear beyond doubt that it covers what Bond did; and we have no authority to amend it.” The opinion contained a section entitled “The Statute as Judicially Amended”.⁷⁷ The concept of the judge as faithful agent, whose role is separate and distinct from that of the legislature, is a recurring theme. The twin concepts are the cornerstones of his doctrine.

The rejection of legislative history is also conceptually connected to the separation of powers. It is predicated on the view that no information from law-makers beyond the actual words of the enactment can be at all trustworthy. As stated earlier, when Justice Scalia concurred with an opinion that included reliance on legislative history, there was usually a statement, sometimes in a footnote, indicating that Justice Scalia did not concur with respect to those particular portions of the opinion.⁷⁸ When dissenting, there were occasions when Scalia said much more. A typical example of the rhetoric deployed can be found in *Hamdan v Rumsfeld*:⁷⁹

the handful of floor statements that the Court treats as authoritative do not ‘reflec[t] any general agreement.’ They reflect the now-common tactic—which the Court once again rewards—of pursuing through floor-speech ipse dixit what could not be achieved through the constitutionally prescribed method of putting language into a bill that a majority of both Houses vote for and the President signs. ... As always—but especially in the context of strident, partisan legislative conflict of the sort that characterized enactment of this legislation—the language

⁷⁷ *Bond v United States* 189 L Ed 2d 1, 26 (2014).

⁷⁸ (n 37).

⁷⁹ 126 S Ct 2749, 2815–17.

of the statute that was actually passed by both Houses of Congress and signed by the President is our only authoritative and only reliable guidepost.

The sophisticated approach to plain meaning cannot be summed up in a passage from a case. Cases are anecdotal incidences of a very complex set of interacting rules and presumptions. However, the central fulcrum of the approach is the plain meaning rule. It is the starting point. Scalia articulated this principle in *Pavelic & LeFlore v Marvel Entertainment*:⁸⁰

We give the Federal Rules of Civil Procedure their plain meaning, ... and generally with them as with a statute, '[w]hen we find the terms ... unambiguous, judicial inquiry is complete,' *Rubin v. United States*, 449 U.S. 424, 430 (1981). The specific text of Rule 11 at issue here is the provision that requires a court, when a paper is signed in violation of the Rule, to 'impose upon the person who signed it ... an appropriate sanction.' Thus viewed in isolation, the phrase 'person who signed' is ambiguous as to the point before us today. That is not so, however, when it is read in the total context of all the provisions of Rule 11 dealing with the signing of filings.

It is important to note that a statutory provision must not be read in isolation.

If there was ambiguity, Scalia militated in favour of the ordinary, grammatical meaning of the relevant provision, but he also relied on a variety of presumptions and canons of interpretation to resolve the matter. This view comes across in *Chisom v Roemer*:⁸¹

first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.

The approach is sophisticated. It incorporates legacy common law concepts, and requires the balancing of specific provisions against the context of the statute within the larger backdrop of the law. However, textualist judges regard the approach as being comprised of a coherent set of rules. It is not viewed as a disparate collection of conflicting rules.

Whilst the approach to text is regarded as a singular, coherent whole, so too is the entire set of principles and rules that comprise textualism. The doctrine of textualism is regarded, by textualists, as a coherent, practical theory of statutory interpretation whose

80 493 US 120, 123 (1989).

81 501 US 380, 404 (1991).

predominant purpose is to curtail the kinds of judicial activism that are illegitimate.⁸² Furthermore, all four core elements are required to have textualism. One cannot adopt, for example, the strict view of separation of powers, the view of judging and the sophisticated plain meaning approach to language while permitting judicial consideration of legislative history, and still be a textualist. Such a doctrine would be similar to textualism, but would not align with the doctrine as has been propounded.

The strict insistence on the exclusionary rule is what makes textualism truly unique. In English-speaking common law jurisdictions, the two underlying principles are widely accepted. With respect to the sophisticated approach to statutory text, one may find a spectrum of points of view, ranging from strict adherence to literalism to a much broader acceptance of various considerations such as purpose in order to tug and strain at the meaning of words; yet the collection of rules that textualists rely upon have deep roots in common law adjudication. There have been some noteworthy critics, but the application of the various rules by judges deciding cases is uncontroversial, relatively speaking. It is the exclusionary rule that has been contested and rejected in many jurisdictions. This rule makes the doctrine truly stand out as an identifiable approach to statutory interpretation. As a result, more attention will be devoted to this feature of textualism than to the other features.

1.6 The Limits of Coherence

The claim that textualism is coherent is not absolute. There are limits to how well-developed the theory is from a legal philosophy perspective, and the doctrine is susceptible to the criticism from realists⁸³ that the many conflicting elements within it make it sufficiently indeterminate that it fails to achieve its fundamental objective of curtailing judicial discretion.

The most obvious tension within textualist doctrine concerns the open conflict

82 The textualists would likely assert that their approach curtails activist judging, full stop. However, Justice Scalia was an activist judge insofar as he sought to overturn prior decisions that he felt were wrongly decided, particularly when constitutional matters were before the court. *District of Columbia v Heller* (n 47), for example, overturned more than a century of prior jurisprudence on the Second Amendment. Keith A Ehrman and Dennis A Henigan, 'The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?' (1989) 15 U Dayton L Rev 58. Also see Donald H Zeigler, 'The New Activist Court' (1995) 45 Am UL Rev 1367; Robert Post and Reva Siegel, 'Originalism as a Political Practice: The Right's Living Constitution' (2006) 75 Ford L Rev 545.

83 The term is being used to denote the received view or "Frankified" realism, as described by Leiter, which holds that rules do not constrain judicial decision-making as they are purported to do. This is not a proper engagement with the claims of particular legal realists as one will find in, for example, Neil Duxbury, 'Jerome Frank and the Legacy of Legal Realism' (1991) 18 Journal of Law and Society 175; Brian Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' (1997) 76 Tex L Rev 267.

between the rule against absurdity and the central claim that judges must apply the text as given and have no authority to do otherwise. A critic could claim that the theory is contradictory, whilst a textualist would claim that there are conflicting principles to be balanced. In *Reading Law*, one of the five “fundamental principles” of interpretation is the “[p]rinciple of interrelating canons. No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”⁸⁴

One could dispute how satisfactory this is as a response to the accusation that the rule against absurdity contradicts the claim that the plain meaning is binding. This is not merely one canon overpowering another. This is a canon that explicitly authorises the judge to act as a cooperative partner in the law-making enterprise by correcting what the legislature has “said” in an enactment. It is a single canon capable of overpowering the core principles of textualism. However narrow, this is an exception to the role of the judge as faithful agent and a violation of the separation of powers.

Another source of tension arises from the harmonious reading statutes. In the words of Scalia and Garner, “statutes *in pari materia* are to be interpreted together, as though they were one law.”⁸⁵ This is contrary to the notion that the legislature can enact laws as they see fit (so long as they are *intra vires*). Judges are permitted to stray from the ordinary meaning of words in a statute and consider strained or less obvious meanings based upon the admitted fiction that the legislature always enacts laws with full knowledge of the relevant pre-existing laws.⁸⁶ There is a balancing act at issue where the judge must weigh ordinary meaning against the desire to create a consistent, coherent body of law. As such, there is a creative component to adjudication, within limits, which is not entirely consistent with the view that judges have no authority to make law.

The creative component to judging is something that textualists downplay, yet it exists within the bounds of ambiguity and vagueness. Within these domains there are numerous presumptions at work such as the presumption in favour of harmony with related areas of law, the presumption in favour of *vires*, the presumption in favour of harmony with treaty obligations, and the presumption that interpretations that are consistent with the ostensible purpose of the statute are to be preferred over interpretations that frustrate the purpose.

84 Scalia and Garner (n 8) 59.

85 *ibid* 252.

86 “We simply assume, for purposes of our search for ‘intent,’ that the enacting legislature was aware of all those other laws. Well of course that is a fiction[.]” Scalia, ‘Common-Law Courts’ (n 13) 16.

Collectively, these presumptions authorise a judge to make the law as good as it can be, within the reasonable (and somewhat indeterminate) bounds of the letter of the law. As such, it would be fair to regard textualism as a bounded Dworkinian enterprise.

Understood in this manner, the claim that judges have no authority to make law is normative and partly a fiction. The noble fiction is a concept that textualists readily embrace. To admit that judges make law is dangerous because it could be misconstrued to authorise discretion that exceeds the reasonable limits of statutory text from the textualist perspective. The overarching textualist concern about judges applying personal preferences in place of the law justifies a plain assertion which cuts through the complexities. Whilst the normative aspect of textualism is understood readily enough, the self-righteousness of textualist rhetoric, and the harsh criticism that judges like Justice Scalia readily direct at fellow benchers seems difficult to justify given the intricacies involved.

The claim that textualism is sufficiently open-textured that it cannot refute the “Frankified” realist critique is probably a perennial issue that will remain unsettled. Textualism governs interpretation via a collection of rules which permit and prohibit certain types of reasonings and justifications. In the context of appellate court litigation, some of the permitted considerations are susceptible to the Llewellyn challenge—that for every interpretive issue there are acceptable justifications for deciding either way. *Stare decisis* can justify an interpretation that is further afield from ordinary meaning than textualist doctrine might suggest,⁸⁷ and judges can selectively emphasise different permitted considerations (or interpretive factors).

Textualists acknowledge the issue. Justice Easterbrook put it this way:

I am skeptical of canons, and not simply because of Professor Karl Llewellyn’s famous list of canons and counter-canons. One could revise the list, as Justice Scalia and Garner set out to do, to avoid the direct conflict. My concern is different: every canon implicitly begins or ends with the statement ‘unless the context indicates otherwise,’ which potentially leaves so much room for manoeuvre that the canon isn’t doing much work. Indeed, a reference to ‘the context’ does not even pin down what context. ... Still, canons are inevitable, because all language depends on them.⁸⁸

Within the modified list of canons in *Reading Law*, there are two grammar canons that

87 An example concerning the meaning of “void” will be discussed in Chapter 5, Section 4.2.

88 Easterbrook, ‘The Absence of Method in Statutory Interpretation’ (n 46) 83–84. [Typo original.]

have come into direct conflict in *Lockhart v United States*.⁸⁹ The last-antecedent canon holds that “a pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent”;⁹⁰ and the series-qualifier canon holds that “when there is a straightforward parallel construction that involves all nouns for verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.”⁹¹ The dispute concerned whether the phrase “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward” in the Child Pornography Prevention Act of 1996 referred to all prior abuse convictions or whether it was limited to those “involving a minor or ward.” Justice Sotomayor for the majority relied on the last antecedent canon, and Justice Kagan for the dissent, relied on the series-qualifier canon.⁹²

Whilst being aware that canons do not provide a mathematical solution to interpretive problems, Justice Scalia dealt with Llewellyn’s rule-scepticism in stronger terms than Justice Easterbrook:

Llewellyn’s supposed demonstration ... treats as canons some silly (and deservedly contradicted) judicial statements that are so far from having acquired canonical status that most lawyers have never heard of them. ... The rest are not contradictions at all, but merely indications that different (noncontradictory) canons may sometimes provide differing indications of meaning. This unsurprising fact hardly renders the canons useless or obsolete.⁹³

Scalia follows this with a quote from Pound asserting that “common-law canons of interpretation are grounded in experience developed by reason and tend to a better administration of justice than leaving interpretation in each case to feelings of policy on the part of the tribunal” This quote reveals a strong faith in the common law tradition. There is a veneration of rules that have demonstrated their value over time in the context of adjudication.

Scalia concludes his refutation of Llewellyn with a quote from the treatise by Bishop: “statutory interpretation is governed as absolutely by rules as anything else in law [O]n

89 577 US (2016) Slip Op.

90 Scalia and Garner (n 8) 144.

91 *ibid* 147.

92 Also see Abbe R Gluck, ‘Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do’ (2017) 84 U Chic L Rev 177, 193.

93 Scalia and Garner (n 8) 59–60. “Mostly, however, Llewellyn’s ‘parries’ do not contradict the corresponding canon but rather merely show that it is not absolute. ... Every canon is simply one indication of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield.” Scalia, ‘Common-Law Courts’ (n 13) 27.

the whole, the rules of statutory interpretation are specially stable.”⁹⁴

Textualism is grounded in formalism—the belief in rules.⁹⁵ If taken to its logical conclusion, this would justify establishing rules governing the canons of interpretation which would determine, at least in many cases, when one canon should take priority over another. As Nelson has noted, “there is fairly widespread agreement that so-called ‘descriptive’ canons occupy a higher place in the interpretive hierarchy than the so-called ‘normative’ canons.”⁹⁶ The descriptive canons assist in the determination of meaning through a variety of considerations such as context, ordinary meaning or membership in series, as opposed to those canons like the rule of lenity which resolve ambiguities based on normative considerations. It makes sense to consider descriptive canons in pursuit of textual meaning first before resorting to normative presumptions. In the above-mentioned *Lockhart* case, Scalia relied on the rule of lenity⁹⁷ to break the tie between the canons and, in essence, followed the basic hierarchy of rules recommended by Nelson.

The insistence upon giving statutory texts a fair reading regardless of the area of law involved carries with it an implication that the substance of the statutory text ought to take priority over normative considerations. It is tempting to conclude that there is an implicit conceptual hierarchy within textualism. In *Reading Law*, five canons are designated as fundamental principles,⁹⁸ and the remainder are categorised as semantic canons, syntactic canons, contextual canons and “principles applicable specifically to governmental prescriptions.” This implies a hierarchy: there are fundamental principles which take priority. However, the non-fundamental canons include the ordinary meaning canon, the grammar canon and the whole text canon which seem rather fundamental to the textualist approach to text. At the same time, the principle of interrelating canons is one of the five fundamental principles. If it is a fundamental principle that any canon is capable of overtaking any other canon, then no formal rule-bound hierarchy can be established.

94 Scalia and Garner (n 8) 61.; quoting Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* (Little, Brown 1882) 3.

95 This is a belief that acknowledges some nuance. General rules will not always be readily applicable and recourse to the totality of circumstances will occasionally be required. Antonin Scalia, ‘The Rule of Law as a Law of Rules’ (1989) 56 U Chic L Rev 1175.

96 Caleb Nelson, *Statutory Interpretation* (Foundation Press 2011) 228. Scalia has referred to these as “dice-loading canons”.

97 The rule that ambiguities in a criminal law statute are to be resolved in favour of the accused.

98 The interpretation principle, the supremacy-of-text principle, the principle of interrelating canons, the presumption against ineffectiveness and the presumption of validity. Scalia and Garner (n 8) 53–66.

The refusal to set out formal criteria for dealing with conflicting canons is one more way that textualism is not entirely internally consistent. The insistence that rules are better than pragmatic judging based on the particular circumstances of each case can be viewed in a rather ironic light: the rules themselves are left to be applied pragmatically based on the particular circumstances of each individual case, albeit, within an overarching set of core principles (that exist in tension with some of the rules that may be applied). This is a very nuanced formalism.

Textualism is a common law doctrine. It consists of rules and principles that were developed within an adversarial process of adjudication. In accordance with the above quote from Pound, textualism is predicated on the belief that the adjudicative process will yield the optimal tools of the profession. Those rules and ideas which prove their worth to the best legal minds over time are the ones which deserve to be preserved and nurtured. Because of the professional orientation, textualism prioritises judicial efficiency over theoretical robustness. This is not to say that textualists disregard the tensions and direct conflicts that can and do arise between the various rules, principles and ideas when applying the law to human interactions in court. They simply yield to the necessity of the weighing and balancing of conflicting rules, principles and ideas in adjudication.

As Sunstein has pointed out, the formalism that textualists advocate depends on a number of claims that are empirical in nature.⁹⁹ For example, the textualist assumption that the legislature is better positioned than the courts to correct apparent problems with particular laws depends on the ability and willingness of the legislature to make legislative corrections. There is also a belief that, by following particular canons of interpretation such as the rule of lenity, the legislature will be compelled to legislate clearly.¹⁰⁰ If ambiguities are resolved in favour of the accused, the legislature must draft legislation with an appropriate amount of specificity in order to achieve the desired results. More generally, there is an underlying assumption that following rules of textualism enables Congress to draft legislation because the legislators know in advance the methods that judges will use to interpret the enacted texts. This matter has been studied, and Gluck reached the conclusion that “Congress views the

99 Cass R Sunstein, ‘Must Formalism Be Defended Empirically Symposium: Formalism Revisited: Formalism and Statutory Interpretation’ (1999) 66 U Chic L Rev 636.

100 Sunstein describes these rules as “information eliciting default rules”. Collectively, the rules force the legislature to be as explicit as possible when passing bills into law; *ibid* 655–58. Scalia has acknowledged this type of rule. Scalia, ‘Common-Law Courts’ (n 13) 27–28. Whilst he expressed scepticism towards this class of rule, he had a change of heart by the time that *Reading Law* was published.

courts' interpretive rules as arbitrary and results oriented, and so not worth learning or coordinating with.”¹⁰¹

It does not appear that Justice Scalia addressed such claims directly, yet it seems likely that his response would be an insistence upon the separation of powers. Whether or not judges are better positioned to fix problems with the law is not a question that textualists will entertain. It is a constitutional matter. It is not the judge's role to do this even if he or she is in a better position to do so. Equally, it is not up to the legislature or political scientists to determine how best to interpret statutes. Judges ought to follow rules so that the legislature can predict how their enactments will be dealt with by the courts, but if the law-makers choose to ignore these rules, this does not change the fact that the judiciary alone determines how such texts are to be dealt with.

1.7 Challenges to the Four Criteria

1.7.1 Originalism

On the face of it, this list of criteria may appear to be missing some key elements. Among other things, those who are familiar with the essays by Justice Scalia would note that he was a staunch originalist who repeatedly insisted that he was bound by the text of the statute. One might be inclined to argue that these items should be included.

With respect to originalism, it should be noted that textualism will tend to be originalist as a logical outcome of this belief system based on the four criteria listed. In order to be faithful to the statutory text, it should be understood at the time it was enacted, and not revised to fit the needs of the present. A judge does not have the authority to do any such thing. If a law leads to an uncomfortable outcome as a result of outdated rules, then it is up to the legislature to fix it, and not a judge.

However, there is a fundamental problem one confronts when setting out to determine the historical meaning of an old piece of text: the individual who sets out to do this exists at the present time with imperfect knowledge of the past and any number of potentially biased presumptions about what did or did not exist at the relevant time in history. As such, the

¹⁰¹ “Congress that knows many of the canons and that also knows about the Court's use of dictionaries and distaste for legislative history, but that cannot perfect its work, will never abandon legislative history, and does not use dictionaries itself.” Gluck (n 92) 185; Gluck and Bressman (n 74); Lisa Schultz Bressman and Abbe R Gluck, ‘Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II’ (2014) 66 Stan L Rev 725.

determination of a historical meaning is an imputation—a fiction.¹⁰²

A further complication arises when one has to determine what counts as a legitimate source of information about the historical context. One obvious source for the legal historian would be legislative history; however, this is a source that textualists are adamantly opposed to. For textualists, it comes down to the types of extrinsic materials that the particular judge believes to be legitimate (within the set of permitted materials). Justice Scalia was well-known for his reliance upon historical dictionaries,¹⁰³ and with respect to the Constitution, those portions of the Federalist Papers that were written by Madison and Hamilton.¹⁰⁴ He has been criticised for this because the Federalist Papers are sufficiently analogous to legislative history to amount to a violation of this textualist rule.¹⁰⁵ Justice Scalia couched this as a matter of contemporaneous exposition—the explanation of knowledgeable persons from the relevant time period rather than an examination of congressional deliberations.¹⁰⁶ Justice Easterbrook, on the other hand, has argued that originalism is of limited value.¹⁰⁷ He moderated his stance in the foreword to *Reading Law*. Yet, all things considered, the strong originalism advocated for by Scalia appears to be an element of his personal brand of textualism rather than a general core component of the doctrine. It will be shown that similar disagreements occurred in the treatises published in the nineteenth century.¹⁰⁸ The appropriate

102 JWF Allison, ‘History To Understand, and History To Reform, English Public Law’ (2013) 72 CLJ 526; Carl L Becker, ‘What Are Historical Facts?’ (1955) 8 Pol Res Q 327.

103 A Raymond Randolph, ‘Dictionaries, Plain Meaning, and Context in Statutory Interpretation’ (1994) 17 Harv J L & Pub Pol’y 71, 72; David O Stewart, ‘By the Book – Looking up the Law in the Dictionary’ (1993) 79 ABA Journal 47; Stephen C Mouritsen, ‘The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning’ (2010) 2010 Brigh Young UL Rev 1915, 1922.

See for example, Scalia’s reliance on an 1828 edition of Webster’s American Dictionary in *NLRB v Noel Canning*, (n 119), 596. Also see *District of Columbia v Heller* 554 US 570 (2008), 581 (reliance on the 1773 edition of “Samuel Johnson’s Dictionary of the English Language (4th ed)”, “Timothy Cunningham’s important 1771 legal dictionary”, “A New and Complete Law Dictionary”, and “Webster, American Dictionary of the English Language (1828)”). Also see *Obergefell v Hodges* 576 US slip op, 7 (2015) “(Webster’s 2nd 1828 and Black’s Law Dictionary 1st ed, 1891)”. Also see the opinion of Justice Thomas in *Bond* (n 77) 29–30: “S. Johnson, A Dictionary of the English Language 2056 (rev. 4th ed. 1773)”; “J. Buchanan, A New English Dictionary (1769)”; “N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789)”; “J. Montefiore, A Commercial Dictionary (1803)”; and “N. Webster, An American Dictionary of the English Language 97 (1828).”

104 Scalia, ‘Common-Law Courts’ (n 13) 38.

105 William N Eskridge, ‘Should the Supreme Court Read The Federalist But Not Statutory Legislative History?’ (1997) 66 Geo Wash L Rev 1301.

106 “I will consult the writings of some men who happened to be Framers—Hamilton’s and Madison’s writings in the Federalist, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.” Scalia, ‘Common-Law Courts’ (n 13) 38.

107 Easterbrook, ‘Textualism and the Dead Hand’ (n 17).

108 Chapter 3, 37, 76 & 77.

role of the doctrine of contemporaneous exposition was an issue of contention during textualism's formative years, and has remained so to a certain degree in its modern American iteration. For these reasons, originalism was not included as a fifth core element.

Originalism comes into play to a much larger extent when the interpretation of constitutional texts is involved. Although such cases are important because of the political ramifications, by Justice Scalia's own admission, these cases represent only a modest portion of the case load at the Supreme Court:

I would estimate that well less than a fifth of the issues we confront are constitutional issues—and probably less than a twentieth if you exclude criminal-law cases. ... By far the greatest part of what I do and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations.¹⁰⁹

Originalism is therefore of less importance, generally, given that much of the legislation at issue is relatively modern. Therefore, when considering textualism as a doctrine, the emphasis rightly belongs on legislation.

If one finds the arguments for downplaying originalism unconvincing, then in the alternative, originalism can be regarded as a core feature of American textualism, and a feature that distinguishes modern American textualism from English textualism. There is little room to doubt that, for Justice Scalia, originalism was important.

1.7.2 The Preoccupation with Activist Judging

Scalia maintained that originalism is legitimate despite its problems because of the greater problems posed by the alternative “living tree” approach. “Living tree” interpretation confines interpretation to the words of the enactment but permits the meanings of words to be understood in the present time.¹¹⁰ The problem is that such an honest acknowledgement authorises judges to disregard the statute, or in the very least, it authorises them to play loose with the language of the text.

The concern is a reflection of the central textualist preoccupation: the fear that, unless

109 Scalia, ‘Common-Law Courts’ (n 13) 13–14. Basic statistical information is difficult to find, perhaps because the matter is more complicated than it seems given that constitutional limitations affect all cases heard in some way. See for example Lee Epstein and others, *The Supreme Court Compendium: Data, Decisions and Developments* (5th edn, Sage 2012).

110 Antonin Scalia, ‘Originalism: The Lesser Evil’ (1988) 57 *University of Cincinnati Law Review* 849; Jack M Balkin, ‘The Roots of the Living Constitution Symposium: Originalism and Living Constitutionalism: A Symposium on Jack Balkin’s Living Originalism and David Strauss’s the Living Constitution: Panelist Papers’ (2012) 92 *BUL Rev* 1129.

properly constrained, judges will disregard the fair and politically neutral meaning of statutory text and replace it a meaning that is informed by the judge's personal policy preferences. It would be fair to ask if the fear of activist judging should be a core element of textualism. Yet there is a good reason for excluding it. The issue is sufficiently captured by the faithful agent view of judging, and it would therefore be redundant. It is better understood as one of the motivations behind the faithful agent view of judging rather than a separate core element of the doctrine.

1.7.3 Fidelity to the Text

The fact that being bound by the text of the statute is not a core feature of textualism is likely to be the most controversial aspect of the definition that has been set out. "Text" is the first syllable of the term, and textualist rhetoric is often highly critical of judgements that violate the bounds of the statutory text. However there are a number of issues which weigh against making this a core feature.

The first point concerns the relationship between textualism and other doctrines of interpretation that might be put forward. If the claim is made that textualists are bound by the text, the implication is that any doctrine that is not textualism permits judges to not be bound by the text of the statute, or at least to be implicitly less bound by the text. Whilst there are some theories which purport to be more liberal with statutory text, it is inaccurate to claim that dynamic theories do not adhere to the text. Most dynamic theories regard the text as binding but acknowledge that the meaning of words can change over time and, as a result, it is acceptable for judges to alter interpretations in a manner consistent with these changes. This difference is not captured well by the claim that textualists are bound by the text and that dynamists are not.

Another point concerns the indeterminacy inherent in statutes. The many causes and many issues that arise because of vagueness within legal language are well documented.¹¹¹ Yet, even when a provision is clear, in an era when statutes can exceed 1,000 pages in length, the notion of reading the provision within the context of the entire statute becomes at best a benign fiction. In such cases, there is significant room for disagreement over what parts of the context are relevant to any provision that may be at issue, and therefore what it means to be

¹¹¹ See for example Timothy O Endicott, *Vagueness in Law* (OUP 2000); Vijay K Bhatia, *Vagueness in Normative Texts* (Peter Lang 2005); Ralf Poscher, 'Ambiguity And Vagueness In Legal Interpretation', *Oxford Handbook of Language and Law* (OUP 2012).

bound by the text. Add considerations for common law principles and statutes in related areas of law, all of which are permissible justifications for strained interpretations according to textualist doctrine, and the notion of being bound by the text becomes more problematic.

*Babbitt v Sweet Home Chapter, Communities for Great Ore*¹¹² provides an interesting example. The decision hinged upon the meaning of §9(a)(1)(B) of the Endangered Species Act.¹¹³ As Stevens J put it, the Act “contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened.”¹¹⁴ The Act made it illegal to “take” an endangered species, and §3(19) stipulated that “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” The question before the court was whether deliberate habitat destruction, for example via logging, counted as “taking”. The majority opinions were as focused on the statutory text as was Scalia’s dissent. However, the majority focused on the meaning of the term “harm”, and asserted that harm, in the context of the statute, was sufficiently broad to include habitat destruction. Scalia focused on the term “take” instead, and argued, in essence, that “harm” was limited by it.¹¹⁵

How one interprets the meaning of “take” cannot be determined by recourse to the two relevant provisions within the context of the four corners of the statute. External considerations come into play, and whether or not one is relying on the doctrine of textualism, either decision is justifiable.

Scalia argued for a more narrow definition in *Babbitt*, and while he exhibited a tendency to prefer narrower constructions, he did not always do so. In *Bond v United States*,¹¹⁶ a woman had put a caustic chemical sufficiently potent to cause “an uncomfortable rash” on the doorknobs and handles at a former friend’s home as revenge after the former friend cheated with her husband. Scalia argued that this counted as possession of a chemical weapon sufficient to engage penalties under the Chemical Weapons Convention Implementation Act of 1998.¹¹⁷ His reasoning was as follows: §229(a)(1) of the statute

112 515 US 687 (1995).

113 16 USC §1531.

114 690.

115 Scalia relied on numerous justifications including a reading of the act as a whole, *noscitur a sociis*, the rule of lenity, and consistency with the definition of the word “harm” in other parts of the statute, among others. Scalia also relied on particular pieces of legislative history as well. For an excellent analysis, see William Eskridge Jr, ‘The New Textualism and Normative Canons’ (2013) 113 Col L Rev 531.

116 189 L Ed 2d 1, 18 (2014).

117 18 USC (Crimes and Criminal Procedure).

defined a chemical weapon as “[a] toxic chemical and its precursors” §229F(1)(A) defined a “toxic chemical” as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.” The use did not fit any of the excepted conditions which included an agricultural, industrial or medical purpose. The consequence is worth considering: Scalia argued that the entire statute should be struck as *ultra vires* the Constitution because of overbreadth.¹¹⁸ The opinion of the Court by Chief Justice Roberts held that the ordinary meaning of “chemical weapon” permitted a more narrow interpretation of the definitions at issue, and in so doing, avoided the constitutional challenge.¹¹⁹ One could reasonably doubt that an uncomfortable rash qualifies as temporary incapacitation or permanent harm.

Scalia’s interpretations do not always correspond with the plain or ordinary meaning of the relevant statutory provision. In *Immigration and Naturalization Service v Doherty*,¹²⁰ for example, Scalia argued that the alteration of a deportee’s designated country of deportation by the Attorney General was a “new fact” which, in accordance with the Immigration and Nationality Act,¹²¹ entitled the asylum seeker to have his petition reconsidered.

In *Branch v Smith*,¹²² Scalia’s opinion for the court held that voting districts “established by law” included voting districts imposed by the federal court, contrary to the most straightforward interpretation of the relevant statutory provisions. Admittedly, the provisions are complex. According to U S C § 2a(c): “Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: . . . (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State

118 His opinion only concurred about the outcome and criticised the reasoning of the controlling opinion. The court ruled that the statute was not engaged, and that only state criminal laws should apply.

119 Scalia denounced this in strong language: “It is the responsibility of ‘the legislature, not the Court, . . . to define a crime, and ordain its punishment.’ *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J., for the Court). And it is ‘emphatically the province and duty of the judicial department to say what the law [including the Constitution] is.’ *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (same). Today, the Court shirks its job and performs Congress’s. As sweeping and unsettling as the Chemical Weapons Convention Implementation Act of 1998 may be, it is clear beyond doubt that it covers what Bond did; and we have no authority to amend it. So we are forced to decide—there is no way around it—whether the Act’s application to what Bond did was constitutional.”

120 502 US 314, 338 (1992).

121 8 USC Ch 12.

122 (n 139).

at large.”¹²³ Section 2c, added decades later, stipulated that “[i]n each State ... under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative”

The plurality took the view that the latter provision impliedly repealed the former. Scalia argued that a reading which preserves both provisions “is contradicted both by the historical context of § 2c’s enactment and by the consistent understanding of all courts in the almost 40 years since that enactment.” In a dissent that Justice Thomas joined, Justice O’Connor argued that § 2a (c)(5) applied until the legislature established a redistricting plan that was approved by the federal court, as required under § 5 of the Voting Rights Act.¹²⁴ Hers was the opinion that relied most centrally on the words of the relevant provisions; she used Scalia’s own words against him:

Instead of simply reading the plain text of the statute, however, the plurality invents its own version of the text of § 2a(c). The plurality holds that ‘[u]ntil a State is redistricted . . .’ means ‘[u]ntil . . . the election is so imminent that no entity competent to complete redistricting pursuant to . . . the mandate of § 2c [] is able to do so without disrupting the election process.’ Ante, at 274, 275. But such a reading is not faithful to the text of the statute. . . . the only way to understand the Court’s opinion is that the Court is overlooking the words of the statute for nontextual prudential reasons. Cf. A. Scalia, *A Matter of Interpretation* 18–23 (1997) (discussing the case of *Church of Holy Trinity v. United States*, 143 U. S. 457 (1892), and noting that ‘Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former’).¹²⁵

When considering how central the binding nature of statutory text is to textualism, it is equally important to bear in mind that it is permissible to apply the rule against absurdity, and thus expressly transgress clear statutory provisions.¹²⁶ Although it is an exception that ought to be applied rarely, the notion that the judge is bound by the text of the statute under all circumstances is simply not true. Meanwhile, the subjective nature of any distinction between that which is sufficiently absurd to justify such a transgression, and that which is not,

¹²³ The population of Mississippi had declined and fewer Representatives were required.

¹²⁴ USC § 10101.

¹²⁵ (n 119). [Ellipsis and square brackets original.]

¹²⁶ *Green v Bock Laundry Mach. Co.*, 490 US 504, 527–28 (1989); *K Mart Corp v Cartier Inc* 486 US 281, 324 (1988); *INS v Cardoza-Fonseca* 480 US 421, 452 (1987). In *United States v. X-Citement Video* 513 US 64, 82 (1994) Scalia affirmed his acceptance of the rule but refused to apply it in this case. Also see Scalia and Garner (n 8) 234–39.

cannot be set out clearly.

Textualism must be understood as incorporating rules which seem, on the face of it, to contradict its fundamental claims. Textualism is not about literalism, and only in part about being bound by statutory text, despite the mantra repeated by critics and proponents alike that “the exclusive reliance on text when interpreting text is known as textualism.”¹²⁷ McGowan’s research has shown that this description is inaccurate. Textualist judging places the statutory text alongside precedents, relevant common law principles, canons of interpretation, consequential analyses, considerations of purpose (which are often inferred), the prior state of the law, fairness, reasonableness, and secondary literature, including dictionaries and scholarly works.¹²⁸ The reliance on text is by no means to the exclusion of extrinsic elements.

Textualism is more centrally concerned with permitting textualist-compliant justifications for tampering with the meaning of text while rejecting reasons that are not textualist compliant. This is why the concept of being bound by the text is not a central feature of textualism. Being bound by the words of the statute is not its hallmark, particularly in light of the rule against absurdity, which enables a textualist judge to set aside the plain meaning of a statutory provision and apply a judicial amendment. The textualist approach to text is best captured by the collection of rules and presumptions that textualists claim to follow: the plain meaning rule, the ordinary meaning rule, the well-known Latin maxims, etc.¹²⁹ This is why the sophisticated plain meaning approach is a core element. This is the description which fits best with what textualist judges do when adjudicating.

1.7.4 Textualism, Ideology, and the Realist Critique

Textualist judgements reveal a remarkable breadth of materials, considerations and techniques. As a result of the complexity of the statute-based disputes that typically make it to appellate courts, and the breadth of considerations permitted, the textualist’s tool-kit leaves a judge with ample room to cherry-pick from among the various elements and arguments that are available thus emphasising particular elements to establish one of several competing contexts. In the words of Eskridge:

cherry-picking among interpretive sources is a problem for all methodologies, and the new textualism offers no solution to this ancient dilemma. Indeed, the

127 *ibid* 15.

128 McGowan (n 6).

129 These rules will be examined in more detail in Chapter 3, Section 3.5.

most illuminating analyses in *Reading Law* are those in which the authors engage both sides of a close debate and admit that textualist sources offer no easy answers to some interpretive issues.¹³⁰

As was discussed earlier, the realist critique has some merit, and to properly contextualise this issue, Eskridge's comment should be kept in mind: this problem is common to all interpretive theories. There is a tendency to ask too much of any theory of interpretation. If one looks to the hard cases—those cases which involve ambiguously worded statutes and factual circumstances which have factors pulling in different directions—no theory can disprove the rule sceptics. These are cases about which reasonable people can and do disagree. However, textualism adds weight to the (Frankified) realist accusations because the three judges who made the doctrine famous were appointed by Republican presidents and all of them have strong Republican party affiliations.

Within the textualist domain of discretion, there is room to choose between permissible outcomes while following the rules of textualism. A judge can also strategically resist the rules on occasion to achieve results for cases about which the judge has particularly strong feelings.¹³¹ A number of scholars such as Dworkin have asserted that judicial decision-making necessarily involves the values that judges bring to the process.¹³² Adjudication cannot be separated from politics, and in the US, there is no pretence: judges are often appointed to forward political agendas, and this was the case with Scalia and Thomas. Both were prominent Republicans who were appointed to the bench through an entirely politicised appointment process. When looked upon with broad strokes, the accusation of partisan judging fits: there is a tendency for both Thomas and Scalia to defend outcomes which generally cohere with the core of the Republican voter base by resisting environmental

130 Eskridge Jr (n 115) 534.

131 Randal NM Graham, 'What Judges Want: Judicial Self-Interest and Statutory Interpretation' (2009) 30 Stat L Rev 38.

132 Ronald Dworkin, *Justice in Robes* (Belknap Press, 2006); Ronald Dworkin, *Law's Empire* (Harvard University Press 1986). Also see Trevor Allan 'Statutory Interpretation: Why Complaints of Judicial Disobedience Make no Sense' (2016) Legal Studies Research Paper 46/2016 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839854> accessed 23 November 2016; Graham (n 131); Dworkin, *Justice in Robes*; John Bell, *Policy Arguments in Judicial Decisions* (Clarendon Press 1983); JAG Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press 1997); Jeffrey Hackney, 'The Politics of the Chancery' (1981) 34 Current Legal Problems 113.

protection,¹³³ affirmative action,¹³⁴ campaign finance restrictions,¹³⁵ Obamacare,¹³⁶ firearm regulations,¹³⁷ and same-sex marriage laws,¹³⁸ and by upholding abortion laws.¹³⁹ This is a tendency and there are exceptions. As well, there are some issues, for example procedural protections and freedom of expression, where Scalia's opinions have supported values that are contrary to that of the political right.¹⁴⁰ These decisions were insufficiently weighty for him to acquire any popular support from the political left. Meanwhile, an empirical study by Cross concluded that "[r]eliance on textualism shows no constraining effect. ... The theory that textualism constrains may be conventional wisdom, but it is utterly lacking in empirical support"¹⁴¹

The series of decisions that provided the most fuel for realist criticism were the ones that culminated in the infamous *Bush v Gore* case.¹⁴² This case determined whether the Republican or Democratic candidate would be the next President of the United States. When one reads the judgments, each of which contain multiple conflicting opinions, one is presented with an apparently non-partisan, highly technical legal determination. However,

133 See for example, *Massachusetts v Environmental Protection Agency* 549 US 497 (2007); *Utility Air Regulatory Group v. Environmental Protection Agency* 137 S Ct 255 (2014). Also see James R May, 'Environmental Law Jurisprudence and Associate Justice Antonin Scalia's Legacy' (2016) 47 Trends 4.

134 See for example, *Fisher v University of Texas* 133 S Ct 2411 (2013); *City of Richmond v J A Croson Co* 488 US 469 (1989). Scalia and Thomas have been forthright about their shared view that affirmative action violates the equal protection clause of the US Constitution. Antonin Scalia, 'The Disease as Cure: In Order to Get beyond Racism, We Must First Take Account of Race' (1979) 1979 Wash ULQ 147.

135 *Citizens United v Federal Election Commission* 558 US 310 (2010).

136 *King v Burwell* 137 S Ct 438 (2015). Also see Erwin Chemerinsky, 'Political Ideology and Constitutional Decisionmaking: The Coming Example of the Affordable Care Act' (2012) 75 Law & Contemp Probs 1.

137 *District of Columbia v Heller*, (n 47); *Abramski v United States*, (n 119). Also see Reva B Siegel, 'Dead or Alive: Originalism as Popular Constitutionalism in *Heller*' (2008) 122 Harv L Rev 245.

138 *Obergefell v Hodges* (n 47); *United States v Windsor* 135 S Ct 2675 (2013). Also see Erwin Chemerinsky, 'The Jurisprudence of Justice Scalia: A Critical Appraisal' (2000) 22 U Hawaii L Rev 385; Chemerinsky (n 136); Richard A Jr Brisbin, 'Justice Antonin Scalia, Constitutional Discourse, and the Legalistic State' (1991) 44 Western Pol Q 1005.

139 *Webster v Reproductive Health Services* 492 US 490 (1989).

140 See, for example, *Texas v Johnson* 491 US 397 (1989), in which case, Scalia argued that a law against flag burning violated the right to free speech; *Prado Navarette et al v California* 137 S Ct 2117 (2014) in which case Scalia argued that police could not search an automobile trunk based on an anonymous tip that a vehicle was being driven recklessly. Also see Edwin J Butterfoss, 'Bright Line Breaking Point: Embracing Justice Scalia's Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law' (2007) 82 Tul L Rev 77.

141 Cross (n 103) 178; and at 152: "there is a clear association between interpretive methods and justice ideology." Also see Robert M Howard and Jeffrey A Segal, 'An Original Look at Originalism' (2002) 36 L & Soc Rev 113. In their empirical study, they concluded that "the legal scholars who have critically examined the Justices' claims of originalism are by and large right. Anomalies aside, Justices might speak about following an 'originalist' jurisprudence, but they only appear to do so when arguments about text and intent coincide with the ideological position that they prefer."

142 531 US 98 (2000).

with respect to outcome, all judges sided with their affiliated party—an uncomfortable truth that inspired significant scholarly criticism.¹⁴³

Scalia’s approach to the Constitution generally produced outcomes that cohered with the political right in America, in part, because he looked to authoritative legal sources from the time when the particular provisions were drafted and ratified. Thus, for example, the equal protection clause in the 14th Amendment has little to say about women’s rights since women could not vote and married women could not hold property when that amendment became part of the Constitution.¹⁴⁴ Scalia insisted that he was defending a minimalist constitution that leaves state legislatures free to legislate as they choose over matters such as the death penalty, birth control and same-sex marriage. Meanwhile, Scalia’s interpretation of the second amendment concerning firearms disregarded the entire first half of the provision which states that “[a] well regulated Militia, being necessary to the security of a free State ...”. This portion is deemed to be a prefatory clause and therefore devoid of substance.¹⁴⁵ As a result, firearm ownership for personal protection became a firmly protected right of individuals divorced from any military purpose; and more than a century of prior jurisprudence was overturned.¹⁴⁶ He regarded the equal protection clause as prohibiting affirmative action.¹⁴⁷ The collective result is that legislation that is typically desired by the political right in the US, for example laws restricting abortion and same sex marriage, is generally permitted while legislation generally desired by the left, for example, gun control, affirmative action, restrictions on election finance and even Obamacare, is *ultra vires*. From this perspective, Scalia’s Constitution is not entirely minimalist.

A number of scholars, including Gerber and Graham, have argued that originalism does not necessarily produce outcomes that cohere with the political right.¹⁴⁸ The history is

143 Jack Balkin, ‘Bush v. Gore and the Boundary Between Law and Politics’ (2001) 110 Yale L J 1407; Stephen P Nicholson and Robert M Howard, ‘Framing Support for the Supreme Court in the Aftermath of Bush v. Gore’ (2003) 65 Journal of Politics 676; Alan M Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (OUP 2001); Herbert M Kritzer, ‘The Impact of Bush v. Gore on Public Perceptions and Knowledge of Supreme Court’ (2001) 85 Judicature 32; Michael W McConnell, ‘Two-and-a-Half Cheers for Bush v Gore’ (2001) 68 U Chic L Rev 657; Nicholson and Howard; David A Strauss, ‘Bush v Gore: What Were They Thinking?’ (2001) 68 U Chic L Rev 737.

144 Sandra L Rierison, ‘Race and Gender Discrimination: A Historical Case for Equal Treatment under the Fourteenth Amendment’ (1994) 1 Duke J Gender L & Pol’y 89, 93–95.

145 Heller (n 47) 573.

146 Ehrman and Henigan (n 82) 41–57. Ehrman and Henigan also assert that the right to keep and bear arms, as a collective right tied to military purpose, was the original understanding of the framers.

147 (n 134).

148 Scott D Gerber, ‘Liberal Originalism: The Declaration of Independence and Constitutional Interpretation’ (2014) 63 Clev State L Rev 1; Randal NM Graham, ‘Evolutionary Analysis: Originalism and the Impact of

open to different interpretations and can lead in other directions. Graham's central point is that there are three basic components at work: the text, the interpretive theory and the values of the individual judge.¹⁴⁹ Allan agrees that "the values of the judge, and in particular, the moral values of the judge, are a necessary component."¹⁵⁰ The tendencies revealed in Scalia's judicial opinions are consistent with these claims.

This issue is important when seeking to understand textualism because adherents insist that the doctrine is apolitical. According to Justice Scalia, "[t]extualism is not well-designed to achieve ideological ends, relying as it does on the most objective criterion available[.]"¹⁵¹

It is perhaps more accurate to assert that textualism demands that all issues, but particularly those affecting strongly political issues, be settled based on technical arguments rooted in a common law approach to statutory interpretation. Textualism insists on modes of legal reasoning that are deeply ingrained in the legal communities of democratic, common law jurisdictions like England and America. By deciding cases in this manner, adjudication is depoliticised, at least on the face of it. One can disagree about whether the decision in any particular case was correct or reasonable, according to the rules of textualism, but if the matter is settled without explicit recourse to political values, there is plausible deniability which can provide more legitimacy to hard cases than open appeals to conservative or progressive values. Textualism is not the only doctrine of interpretation that provides this benefit, but this is one of textualism's virtues.

1.8 Conclusion

Aside from introducing the fundamental claims that will be defended in this dissertation, and explaining the methodological strategy deployed to defend these claims, the main objective of this chapter has been to set out a concise definition of textualism.

The doctrine, as propounded by the modern American textualist judges, is rooted in four criteria: the faithful agent view of judging, the separation of legislating from

Interpretive Theory' (2010) 34 Manitoba LJ 143; Paul Killebrew, 'Where Are All the Left-Wing Textualists?' (2007) 82 NYUL Rev 1895; Jack M Balkin, 'Abortion and Original Meaning' (2007) 24 Const Com 291; David A Strauss, 'Why Conservatives Shouldn't Be Originalists' (2008) 31 Harv J L & Pub Pol'y 969.

149 Graham (n 148). Graham's theory was developed further in Graham (n 131).

150 Allan (n 13).

151 Scalia and Garner (n 8) 19; also see 20–22.

interpreting, the rejection of legislative history and the sophisticated plain meaning approach to legal texts. These components include a sufficiently broad set of rules and underlying principles that the doctrine is not revealed clearly in individual cases. Furthermore, it is a theory that does not lend itself to mechanical application. The term “textualism” is often used as a synonym for strict literalism. However, the doctrine incorporates a wide variety of methods and considerations which permit judges to stray from the literal meaning of legislative texts. Being bound by the statutory text is not a core feature of the doctrine.

Whilst many scholars doubt that textualism amounts to a coherent or functional theory, and many scholars doubt that textualism is capable of achieving its purported objective, textualists believe in the theory; and whilst textualist judges often assert that purposivism is the contrarian theory to textualism, purpose is a legitimate consideration for textualists—the issue is a matter of degree rather than kind. The Frankified Realist perspective is the view that is more directly contrary to textualism. The claim that common law rules of interpretation merely obfuscate is an attack on the textualist belief that their very particular collection of rules and principles amount to a coherent, functional theory of statutory interpretation.

With a clear definition of textualist established, the next step is to consider where the ideas that comprise textualism come from. This will be the topic addressed in Chapter 2.

Chapter 2

The Roots of Textualism

2.1 Introduction

There can be little doubt that Justice Scalia was influenced by famous jurists from previous centuries. In his treatise on statutory interpretation, co-authored by Garner, 674 cases appear in the case list. The mean average year of these cases is 1925.¹ The oldest case is from 1305: *Aumeye v Anonymous*.² It is cited and quoted for the same purpose that Maxwell cited it for in 1875—to elaborate on the separation of powers by noting that, in times long past (twelfth century England), judges were involved in drafting and enacting legislation.³ The older cases from the twelfth to the seventeenth centuries are few in number and are outliers in that respect. They are almost exclusively English and many of them come from traditional English sources that were also relied upon in the Victorian treatises on statutory interpretation, for example, Coke’s Reports and Blackstone’s Commentaries.⁴ There are only 12 cases from the eighteenth century, but there are 109 cases from the nineteenth century. Justice Scalia’s approach to judging was rooted in a legal tradition which drew heavily from nineteenth century jurisprudence.

Of the 675 cases cited, 7 percent are English. Some cases are cited positively in support of principles, whilst others are cited to distinguish English law from American law. Nonetheless, based on the sheer quantity of English cases, one can see that English jurisprudence is relevant to textualism.

In his essay “Common-Law Courts in a Civil-Law System”, Scalia J cites a number of historical legal scholars including James Madison, Robert Rantoul, David Dudley Field and Montesquieu.⁵ However, more importantly for the discussion to follow, he also cites and quotes from several treatises on statutory interpretation published in the nineteenth century, including

1 Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012).

2 *Aumeye v Anonymous* (1305) YB 33–35 Edw I Rolls Series 78.

3 “‘Do not gloss the statute,’ Chief Justice Hengham admonished counsel in 1305, ‘for we know it better than you: we made it.’” Scalia and Garner (n 1) 395; Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (William Maxwell & Sons 1875) 23; Gustav Adolf Endlich, *A Commentary on the Interpretation of Statutes* (F D Linn 1888) 39.

4 See for example *Heydon’s Case* (1584) 3 Rep 7a discussed at 433–34; also see *Archbishop of Canterbury’s Case* (1596) 2 Co Rep 446a, 76 E R 519, reported by Coke and cited by Blackstone, William Blackstone, *Commentaries on the Laws of England*, vol 1 (Clarendon Press 1765) 88.

5 Antonin Scalia, ‘Common-Law Courts in a Civil-Law System’ in Amy Gutman (ed), *A Matter of Interpretation* (Princeton University Press 1997) 15. [*Common-Law Courts*.]

works by Black, Sutherland, Endlich, Bishop, Dwarris and Sedgwick.⁶ On occasion, these treatises also appeared in his judicial opinions. The following passage is taken from Justice Scalia's opinion for the majority in *District of Columbia v Heller*:⁷

a prefatory clause does not limit or expand the scope of the operative clause. See F. Dwarris, *A General Treatise on Statutes* 268–269 (P. Potter ed. 1871) (hereinafter Dwarris); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 42–45 (2d ed. 1874). ‘It is nothing unusual in acts ... for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.’ J. Bishop, *Commentaries on Written Laws and Their Interpretation* §51, p. 49 (1882) (quoting *Rex v. Marks*, 3 East, 157, 165 (K. B. 1802)).

These treatises played a significant role in the development of modern American textualism, and this issue has not been researched to any great extent to date. Some scholars have commented on this topic. For example, when Eskridge reviewed *Reading Law*, he described the book as “an effort to retrieve a culture of judicial restraint and objectivity through the mechanism of the nineteenth century’s rule filled treatise.” Eskridge also noted that Scalia had expressed “nostalgia for Sutherland and other nineteenth-century treatises that recognized the “science of statutory interpretation,” in his essay *Common-Law Courts*. However, aside from brief comments, most of the scholarship directed towards textualism is firmly rooted in the present.⁸

This chapter will examine two issues. It will consider the evidence suggesting that Justice Scalia was familiar with the contents of the nineteenth century treatises, and it will examine the intertwining of English and American scholarship that occurred as these treatises developed over the course of the nineteenth century. The first issue will be dealt with via some basic observations as an introduction, then it will be revisited at the end of the chapter after considering the second issue. The preponderance of the chapter will seek to show the treatises on statutory interpretation, in which the doctrine of textualism was made explicit, developed as an Anglo-American genre of scholarly literature. The treatises that Justice Scalia co-authored will be considered as a lineal descendent of these treatises in order to reveal a deeper connection that this work, which is Justice Scalia's enunciation of textualism, shares with the prior treatises.

6 *ibid.* Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* (West 1896); JG Sutherland, *Statutes and Statutory Construction* (Callaghan & Co 1891); Endlich (n 3); Fortunatus Dwarris, *A General Treatise on Statutes* (Platt Potter ed, Gould & Sons 1871).

7 554 US 570 (2008).

8 One scholar has considered the influence of Hayek on Scalia's jurisprudence. Gautam Bhatia, ‘The Politics of Statutory Interpretation: The Hayekian Foundations of Justice Antonin Scalia’ (2015) 42 *Hastings Const LQ* 525.

2.2 The Relationship Between Modern American Textualism and the Treatise on Statutory Interpretation

In his essay, *Common-Law Courts*, Justice Scalia devoted several paragraphs to discussion of what he perceived to be a central problem in US courts:

American judges have no intelligible theory of what we do most. ... [T]he science of interpretation (if it is a science) is left to be picked up piecemeal, through the reading of cases (good and bad) There is to my knowledge only one treatise on statutory interpretation that purports to treat the subject in a systematic and comprehensive fashion⁹ Despite the fact that statutory interpretation has increased enormously in importance, it is one of the few fields where we have a drought rather than a glut of treatises—many fewer than we had fifty years ago, and many fewer than a century ago.¹⁰

This passage establishes the central problem with judging in the US: the lack of an “intelligible” interpretive theory. Then, this passage implies that the treatise on statutory interpretation is the cure for the problem. Interpretation should be dealt with in a systematic manner, based on rules grounded in a theory, as one finds in a treatise. Justice Scalia exhibits a yearning for the good old days when treatises were numerous. The good old days for the treatise on statutory interpretation occupied the latter two-thirds of the nineteenth century, during which time all of the treatises that he mentioned were first published.¹¹ This is a period of time that Sugarman referred to as the “golden age of legal scholarship”.¹² It was a time when treatises propounded theories with respect to numerous areas of law.¹³

Justice Scalia does more than just mention these treatises. He also quotes from some of them to elaborate on particular ideas. When explaining what judges look for when interpreting statutes, for example, Scalia supports his claim with a quote from Bishop’s 1882 treatise:

9 Scalia J is referring to Norman J Singer and JD Shambie Singer, *Statutes and Statutory Construction* (7th edn, West 2008). Scalia believes the work has little value as an educational tool because it lacks an underlying theory: “As its size alone indicates, it is one of those lawbooks that functions primarily not as a teacher or advisor, but as a litigator’s research tool and expert witness—to say, and to lead you to cases that say, why the statute should be interpreted the way your client wants.” Scalia (n 5) 15.

10 Scalia (n 5) 15.

11 The first edition of the treatise by Dwarris was published in 1831. The version cited by Scalia was a revised version of the second edition, with notes and US cases added by Potter, published in 1871. Sir Fortunatus Dwarris, *A General Treatise on Statutes* (Saunders & Benning 1831); Sir Fortunatus Dwarris and William Henry Amyot, *A General Treatise on Statutes* (2nd edn, W Benning 1848); Dwarris (n 6).

12 David Sugarman, ‘Legal Theory, the Common Law Mind and the Making of the Textbook Tradition’, *Legal Theory and Common Law* (Blackwell 1986).

13 These theories were rooted in common law methods and reasoning. As was typical at the time, Wigmore, for example, sought firstly “to expound the Anglo-American law of Evidence as a system of reasoned principles and rules; secondly, to deal with the apparently warring mass of judicial precedents as the consistent product of these principles and rules.” JH Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (Little & Brown 1904) vii. Also see Robert C Berring, ‘Legal Research and Legal Concepts: Where Form Molds Substance’ (1987) 75 Cal L Rev 15; SFC Milsom, *Historical Foundations of the Common Law* (Butterworth-Heinemann 2014) 399.

The evidence suggests that ... we do not really look for subjective legislative intent. We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris. As Bishop’s old treatise nicely put it, elaborating upon the usual formulation: ‘[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; *or, exactly, the meaning which the subject is authorized to understand the legislature intended.*’¹⁴

This quote is quite apt for the principle that laws are to be interpreted within the larger context of the law (alongside the remainder of the corpus juris). Of all the treatises that Scalia mentions, Bishop’s work stands out for its emphasis on the point that “[n]o statute is written, so to speak, upon a blank in the institutions of society. ... It is never to be contemplated as a thing alone, but always as a part of a harmonious whole. ... Every statute, as just said, combines and operates with the entire law whereof it becomes a part; so that, without a discernment of the original mass, one can form no correct idea of the action of the new element.”¹⁵

Justice Scalia’s comment that Bishop was “elaborating upon the usual formulation” provides more evidence of his familiarity with the late nineteenth century treatises. These works were influenced by one another and all of them made similar claims, often by using similar language, and sometimes by direct quotation of a previous work. It was customary in these treatises to describe the purpose of statutory interpretation as a quest for the legislative intent.¹⁶ This was invariably qualified to make it clear that intention was to be gleaned from the text. Black and Endlich make the point by quoting Maxwell’s words: “[s]tatute law is the will of the legislature; and the object of all judicial interpretation is to determine what intention is either expressly or by implication conveyed by the language used[.]”¹⁷

Whilst Justice Scalia could be highly critical of judicial interpretations justified using the rhetoric of “legislative intent”,¹⁸ he quoted Bishop approvingly, and was careful to criticise intention “divorced from the text”¹⁹ rather than criticising legislative intention in any unqualified sense. Thus,

14 Scalia and Garner (n 1) 17; from Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* (Little, Brown 1882). (Emphasis added and citation omitted by Scalia.)

15 Bishop (n 14) 4–5.

16 For example Dwarris said “it is ... an universal maxim; that in all cases, the design and intent of the framer, when it can be indisputably ascertained, shall prevail.” Dwarris (n 11) 552.; Also see See Henry Hardcastle, *A Treatise on the Rules Which Govern the Construction and Effect of Statutory Law* (Stevens & Haynes 1879) 17.; also see Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (J S Voorhies 1857) 242; and Sutherland (n 6) 309–10.

17 Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* (2nd edn, West 1911) 11; Endlich (n 3) 1–2; Maxwell (n 3) 1; Sutherland (n 6) 6–7. Sutherland discusses this formulation in detail with quotes from Wilberforce and a passage by Kent that is cited to Blackstone.

18 See Chapter 1, 13–14.

19 Scalia (n 5).

he avoids criticising the approach described in these Victorian works.

It is important to note that Scalia co-authored such a work himself.²⁰ This is a point worth emphasising: a presiding judge at the US Supreme Court co-authored a treatise on statutory interpretation (and the foreword was penned by fellow textualist, Justice Easterbrook). It is hard to conceive of more compelling evidence to support the claim that textualist judges value the treatise on statutory interpretation.

Reading Law can be regarded as an iteration of a traditional work within an established genre of legal literature. The legal treatise is a book that seeks to comprehensively describe and explain a particular area of law, by presenting the relevant cases, and to a lesser and varying extent, excerpts from secondary literature, as a synthesis. The many cases are organised and distilled into a much smaller number of underlying principles via common law reasoning.²¹ Insofar as particular cases do not fit with the reasoning and principles, these treatises seek to influence the law by arguing that the contrary cases are undesirable.²² As such, a treatise will typically contain some normative content.

It is typical, within this genre of legal literature, for an author to read the prior treatises, then (with a few noteworthy exceptions) to quote and cite from them. Following the first treatise on statutory interpretation, each subsequent treatise was an attempt to update and improve upon that which came before. As a result, the prior treatises influenced the content of the subsequent treatises. The nature and extent of this influence will be considered in the remaining sections of this chapter, with an emphasis on the intertwining of English and American influences.

2.3 The Treatises on Statutory Interpretation Published in the 19th Century

The first work that fitted the mould of the modern treatise on statutory interpretation was *A General Treatise on Statutes*, by Dwarris, which was first published in England in 1832.²³ This lengthy two-volume work was intended for an English readership. The vast majority of cases cited were from the UK, and Dwarris turned to the canonical scholarly works that had become woven into the fabric of the common law for many of the underlying principles: the works by Bacon,

20 Scalia and Garner (n 1).

21 Supra (n 12 & n 13).

22 See for example, Scalia & Garner's critique of reliance on legislative history. Scalia and Garner (n 1) 369. Also see the revision to Maxwell's treatise concerning reliance on the rule against absurdity in Chapter 5, 138.

23 Dwarris (n 11). Volume I, which dealt with the history of Parliament and parliamentary procedure, was published in 1831. Volume II, which addressed statutory interpretation, was published in 1832.

Blackstone, Plowden, Coke and the Roman Digest.

However, Dwarris also cited the commentaries by the American jurist Kent at least eleven times. Many of the citations were in support of claims about the law in the US insofar as it was different from England.²⁴ However, when discussing the rule that private acts do not bind strangers, Dwarris stated that: “This, says the judicious and candid commentator on the laws of the United States of America, is a safe and just rule, and it was adopted by the English courts in very early times.”²⁵ Dwarris regarded Kent as an authority for claims about the law in Great Britain as well as in the US.

Dwarris’ second edition also included at least seven references to Story’s works on the Constitution and the conflict of laws.²⁶ In certain cases, this was merely an additional corroborating source in a footnote;²⁷ however there were also citations for substantive legal principles, for example, the effect of marriage contracts in foreign jurisdictions.²⁸ As well, there were lengthy passages quoted to assert principles of interpretation and which were directly relevant to the development of textualism:

‘Although the spirit of an instrument,’ says Story, ‘is to be regarded no less than its letter, yet the spirit is to be collected from the letter. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case, for which the words expressly provide, shall be exempted from their operation[.]’²⁹

The basic point being made here is that, from the beginning, the English treatise on statutory interpretation incorporated American scholarship.

As was fairly common at the time, Dwarris’ second edition was adapted to the American legal community by Platt Potter and published in New York in 1871.³⁰ The first volume, which dealt primarily with parliamentary procedure and constitutional matters particular to England, was

24 See for example *ibid* 504, 555, 562, 515 & 564; James Kent, *Commentaries on American Law*, vol 1 (O Halsted 1826).

25 Dwarris (n 11) 635.

26 Joseph Story, *Commentaries on the Constitution of the United States*, vols i & ii (Hilliard Gray & Co 1833); Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (Thomas Clark 1835). Story’s treatise on the Conflict of laws was more broadly influential according to Leslie. William R Leslie, ‘The Influence of Joseph Story’s Theory of the Conflict of Laws on Constitutional Nationalism’ (1948) 35 *Miss Valley Hist Rev* 203.

27 Dwarris and Amyot (n 11) 485, 488 & 493.

28 *ibid* 493, 494–95.

29 *ibid* 462–63. Also see 555–56: “There are certain general rules of interpretation,” says Story, treating of the conflict of laws, recognized by all nations; which form the basis of all reasonings on the subject of contracts.” Also see 589: “Where words conflict with each other,” says Story, “where the different clauses of an act bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words, is justifiable.”

30 Dwarris (n 6).

omitted. The opening chapters were revised to explain the role of the US Constitution, but the vast majority of the second volume concerning statutory interpretation remained entirely intact with notes and US cases added. When Justice Scalia refers to this work in judicial opinions and essays, he is citing an English work from the nineteenth century that was adapted to the US legal context through annotation.

The next significant treatise, published in New York in 1857, was penned by the American lawyer Sedgwick, who said the following about Dwarris in the preface: “The well-known work of Sir Fortunatus Dwarris ... is a work of great soundness ... and my frequent references show at once the extent of my obligations to it, and my profound sense of its ability and value.³¹ Sedgwick wrote an American treatise but he relied on Dwarris’ treatise as a model. His work was structured in a similar way with an important exception that will be discussed shortly. There were approximately 80 citations to Dwarris in support of numerous claims. Some were very basic, such as the parts of the statute³² and the role of punctuation.³³ Others, such as the plain meaning rule, are iconic textualist rules of interpretation.³⁴ Several long passages were quoted,³⁵ and there were also instances where Sedgwick took issue with Dwarris:

[Dwarris] says, ‘The English lawyers ... do not inculcate implicit obedience to a law which leads to absurd consequences, or to an infraction of the natural or divine law; neither do they proclaim the law itself (which may be immoral, but cannot be illegal) of no validity, and null and void. They only hold it inapplicable, and declare that the particular case is excepted out of the statute.’ For this position Mr. Dwarris cites no more recent authority than a dictum of Lord Coke; nor can I reconcile it with his previous reasoning: The distinction is, I believe one of a metaphysical and not a practical character; and I apprehend that no modern case can be found where the English judiciary have attempted to question the supremacy of Parliament.³⁶

31 Sedgwick (n 16) vi. Sedgwick also mentioned Story and Smith as influences. Smith’s treatise on statutory and constitutional interpretation was not widely cited by the treatises that followed, probably because it did not advance a well-theorized approach. According to Saunders, “to a considerable extent, the approach breaks down into the simple repetition of particular instances and particular rules without consideration for the interrelationship of such rules. ... [T]he analysis of and systematic development of statutory interpretation is not greatly advanced by this work.” Paul H Sanders and John W Wade, ‘Legal Writings on Statutory Construction’ (1949) 3 Vand L Rev 569, 574; E Fitch Smith, *Commentaries on Statute and Constitutional Law and Statutory and Constitutional Construction* (Gould, Banks & Gould 1848).

32 Sedgwick (n 16) 28.

33 *ibid* 92.

34 “The general and received doctrine certainly is, that an act of Parliament of which the terms are explicit and the meaning plain, cannot be questioned, or its authority controlled in any court of justice.” Sedgwick (n 16) 153. Quoting Dwarris.

35 See for example *ibid* 32 fn*, 34 fn §, 40, 41 fn I & 69 fn t.

36 *ibid* 152. At 142 Sedgwick faults Dwarris for discussing the rules of construction before he addressed the division of powers. At 41–42 Sedgwick took issue with Dwarris’ treatment of repeal statutes: “Mr. Dwarris says, p. 478, ‘Repeal acts are revocations or former statutory laws authorizing and permitting the parties to whom the repeal extends, to forbear from acts which they were before commanded to do. Hence they are often named permissive laws; or, more briefly, permissions.’ This, however, seems a very narrow definition or a repeal act. It would be

In this instance, Sedgwick challenged Dwarris' equivocal stance about equitable interpretation, and a strict stance towards text is advanced. As with Dwarris, there were citations to the legacy scholars—Bacon, Blackstone, Plowden and Coke, as well as many English cases despite the fact that the work was directed at an American audience. The law governing statutory interpretation was regarded as an Anglo-American phenomenon.

The next significant treatise by Maxwell was published in 1875.¹ Maxwell cited Dwarris and Sedgwick in the preface, as authors of “two important books already in the hands of the legal profession”.³⁷ Unlike his predecessors, however, Maxwell sought to create a new approach to scholarship on the subject. He addressed many of the same issues, but the order of topics was entirely different. Rather than commencing with the sources of law and the authority of statutes³⁸ or the parts of the statute,³⁹ Maxwell begins with the objective of interpretation and the plain meaning rule. The work is structured around the rules of interpretation.

Maxwell's style of writing also represented a break from prior scholarship. Instead of exploring ideas and the contrary positions at length then arriving at a claim as a conclusion, as Dwarris and Sedgwick had done, Maxwell expressed his claims clearly as a starting point, then discussed cases to flesh out the contours and nuances of the issue. As a result, his work was shorter and more concise.⁴⁰ These are two fundamental ways that Maxwell was influenced by the prior treatises, although the influence is not revealed in citations and quotes from the previous works. Instead, the influence is revealed insofar as Maxwell's treatise is a reaction to what came before. His structure and style are a form of dialogue.

Maxwell drew from the usual American scholars. When acknowledging (and rejecting) Coke's approach in *Dr. Bonham's Case*, and the concept of interpretation by equity, Maxwell concluded by stating:

Perhaps what Lord Coke said in his reports on this point, may have been one of the many things that King James alluded to, when he said that in Coke's reports there were many dangerous conceits of his own uttered for law, to the prejudice of the crown, parliament and subjects.

difficult, for instance, to find any permission contained in the act repealing the general bankrupt law of the United States. ... Mr. Dwaris ... makes one class of statutes to consist of those which are void. It seems hardly proper to make a class of statutes which are in the eye of the law no statutes at all[.]”

37 Maxwell (n 3) iii.

38 Sedgwick (n 16) Ch 1.

39 Dwaris and Amyot (n 11) Ch 7 (1st chapter of volume II).

40 Maxwell's first editions contained 383 pages. In comparison, Dwaris' treatise was 912 pages long. The font was smaller and the pages were noticeably more dense. Sedgwick's treatise was 698 pages long, and again, the font was smaller than Maxwell's.

This point was cited to Kent's Commentaries.⁴¹

There are also references to Story's Conflict of Laws,⁴² and several of Story J's opinions. The claim that "[i]t is a general rule that all statutes are to be construed to operate in future, unless, from the language, a retrospective effect be clearly intended" was supported solely by the opinion of Story J in *Prince v US*.⁴³

Hardcastle's treatise was published in London in 1879. Dwarris and Sedgwick were named in the preface while Maxwell was noticeably absent.⁴⁴ Dwarris was cited in support of numerous claims,⁴⁵ although he disagreed with Dwarris on certain points. For example, Hardcastle took issue with Dwarris and Maxwell's claim about the coming into force of statutes:

It is stated in Dwarris on Statutes ed. 2, p. 544, and also in Maxwell on Statutes p. 383, on the authority of *Burn v. Varvalho*, 4 Nev. & Mann., 893, that 'where a particular day is named for the commencement of the operation of a statute, but the Royal Assent is not given till a later day, the Act would come into force only on the later day. This rule is not borne out by the case cited'⁴⁶

Note that Hardcastle did more than just read the prior works. He also read the authorities cited and arrived at his own conclusions about their meaning.

Of the prior treatises, Sedgwick's was cited most often, and generally with approval,⁴⁷ although there were instances of dialogue. Hardcastle disagreed with Sedgwick's claim that certain types of statutes were subject to strict or liberal interpretation. He asserted a claim to the contrary, which would come to be embraced by Justice Scalia, that "all statutes, whatever may be the subject of them, are now construed according to the same rules, so that the question of 'strict or liberal construction' does not now arise in the same way as formerly."⁴⁸

41 Maxwell (n 3) 236; 1 Kent Comm 447.

42 For example, to establish legal claims concerning the role of domicile that were then used to elaborate upon rules of interpretation. Maxwell (n 3) 121, 125, 125 & 127.

43 2 Gallison 208 (1815). *ibid* 191. On the next page, Maxwell cites the presumption that statutes are not intended to have retrospective effect to Story J in *Society for Propagation of the Gospel v Wheeler* 2 Gallison 139 (1823); and per Chase CJ in *Calder v Bull* 3 Dallas 390 (1798). Story's opinions are also cited in support of proposition, alone or in conjunction with English cases at 192, 239 & 256.

44 "Dwarris on Statutes, can be said to have dealt completely with the subject, and this last-mentioned treatise has not been re-edited for more than twenty years.

This subject has also been ably treated in America by the late Mr. Theodore Sedgwick. ... This treatise has been of the greatest assistance to the present writer, and he has not scrupled to quote from it freely; for as Mr. Sedgwick points out 'the rules governing the application of statutes may, as a general proposition, be considered the same in both countries.'" Hardcastle (n 16) 6.

45 See for example *ibid* 2, 6, 40, 92 & 267.

46 *ibid* 193.

47 *ibid* 2, 5, 8, 58, 125, 130, 195, 208, 242, 267 & 287.

48 "Mr. Sedgwick in his work on Statutory Law, discusses this question in a chapter entitled 'Strict and Liberal Construction,' Chap VII, p. 250. But (as is pointed out, ante, p. 8, and in the chapter on Penal Statutes) all statutes,

Hardcastle also said the following about Sedgwick's claim about "equitable" interpretation:

It may be observed that Mr. Sedgwick, in his work on this subject (pp 254, 311, 316) cites and comments upon many cases where the only point to be determined was how to apply a particular enactment to a particular set of circumstances, with a view to proving that the Courts still decide cases upon what is called the equity of the statute, but it will be found if these cases are examined, that no reasons are given by the Courts for these decisions, and that in fact they merely decide the cases as they considered best under the particular circumstances ...⁴⁹

This disagreement reveals the depth of the trans-Atlantic dialogue that was occurring. As he did with Dwarris and Maxwell, Hardcastle went so far as to read the cases cited by Sedgwick and form his own opinion about whether the reasoning conformed with Sedgwick's claim.

Wilberforce's treatise was published in London in 1881.⁵⁰ Wilberforce did not mention the contemporary competing treatises, although, as will be discussed in Chapter 4,⁵¹ the authorities he cited in support of the exclusionary rule included most of the cases cited by both Maxwell and Hardcastle.⁵² It seems likely that he had mined these prior treatises for authorities. There were a few citations to Dwarris,⁵³ but with respect to direct scholarly dialogue, Wilberforce engaged with Sedgwick's claims:

It is contended by Mr. Sedgwick that 'where the mandate of a statute is called and regarded as directory, the legislative enactment is neither strictly nor liberally construed, but simply disregarded altogether'. This, however, is an exaggerated statement of the course pursued by the judges in their treatment of statutes which use words of command, but do not state the consequences of disobedience.⁵⁴

Wilberforce preferred cases to secondary literature. There were few citations to prior treatises in his work beyond what has been mentioned here.

Wilberforce's treatise is noteworthy for the consistent appearance of the occasional US Supreme Court case.⁵⁵ Within the American cases, attention is drawn to the opinions of Kent, and

whatever may be the subject of them, are now construed according to the same rules, so that the question of 'strict or liberal construction' does not now arise in the same way as formerly." *ibid* 40 fn 1.

49 *ibid* 7 fn 4.

50 Edward Wilberforce, *Statute Law: The Principles Which Govern the Construction and Operation of Statutes* (Stevens & Sons 1881).

51 Chapter 4, 92.

52 The authorities will be discussed at 68–71.

53 Dwarris and Amyot (n 11) 118 fn y; 213 & 309 fn a.

54 Wilberforce (n 50) 206. Wilberforce also doubted the proposition that limitation periods are to be interpreted strictly, as claimed by Sedgwick and Heath J in *Roe v Ferrars* (1801) 2 B & P 547, 232.

55 Wilberforce (n 50) cited Kent's Commentaries at 1, 124 & 142. Story J. is cited in the introductory discussion on statutes at 4. In total 67 US cases were cited. The cases were almost always cited to corroborate claims based in English cases.

Story, JJ. A telling example can be observed in the footnote to the discussion of retrospective legislation, about which Wilberforce said: “Retrospective laws are of questionable policy, and need express words or necessary implication, but are not necessarily opposed to natural justice.” The footnote in support was as follows:

Phillips v. Eyre, L. R. 6 Q. B. at p. 23, per Willes, J. See the principles of retrospective legislation stated by Chancellor Kent, *Dash v. Van Kleeck*, 7 Johnson, 477, 602. It is laid down by Story, J., that in the United States a retrospective interpretation is never adopted without absolute necessity: *Blanchard v. Sprague*, 2 Story, 164, 172.⁵⁶

One is left with the impression that the principle has a strong connection to the American legal system. This can be contrasted with Black’s American treatise which stated that the rule against retroactive laws is “of great antiquity and dignity in the English law”⁵⁷

Based on the consistent appearance of citations to US cases, it appears that Wilberforce intended the work to be relevant to America as well as England. The ploy was successful, apparently, given that the next treatise by Bishop, published in Boston in 1882, cited Wilberforce multiple times, while Hardcastle and Maxwell were not cited at all.⁵⁸ Among the citations to Wilberforce, there were lengthy quoted passages including the entire section on the exclusionary rule, which was recited to show the similarity in the approach between the US and England.⁵⁹

Bishop’s treatise represented a next step from Sedgwick towards a truly American treatise.⁶⁰ It contained less discussion about English law and more reliance upon US cases than Sedgwick’s treatise. Yet the prior treatise cited most frequently was Dwarris’ second edition. Bishop chose to draw from this English edition rather than the American version annotated by Potter, which contained the same content but with US cases and commentary added. There were about fifty citations to Dwarris, in support of an array of claims and many incorporated quotes.⁶¹ In

56 Wilberforce (n 50) 157. In total, 6 cases are cited from Story’s Reports: *Blanchard v Sprague* 2 Story 164 (1834); *The Harriet* 1 Story 25; *Re Richardson* 2 Story 571 (1843); *US v Bassett* 2 Story 389 (1858); *US v Morse* 3 Story 87 (1844); *US v Wigglesworth* 2 Story 369 (1842). It should be noted that William W Story is the author of Story’s Report, and not Justice Joseph Story.

57 Black (n 6) 251 fn 11. In support, Black cited and American work: Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Little, Brown & Co 1868) 370.

58 There were citations at 43, 43, 134, 140, 188 & 229. Passages were quoted at 61, 145–46, 182 & 188.

59 Bishop (n 14) 61 fn 7. The footnote extends across 3 pages. Also see footnote 2 at 145 concerning the doctrine of implied repeal.

60 Bishop (n 14).

61 *ibid.* There were quotes at 24, 46, 49–50, 50, 175, 229 & 241–42. There is one minor instance of dialogue. Dwarris claimed that the notion that the title is no part of the statute was based on a change in Parliamentary procedure whereby judges no longer determined the title. Bishop notes at fn 3 that “[t]he date is stated by Dwarris, as above, to be about the eleventh year of Henry VII. But it seems that the new practice came gradually into use, beginning at a still earlier period.”

comparison, there were seven citations to Sedgwick, and Bishop took issue with two of his claims.⁶² For example, Bishop disagreed strenuously with Sedgwick's claim that the rule that statutes in derogation of the common law are to be strictly construed "has ceased to have any 'solid foundation in our jurisprudence:'"⁶³

the rule is derived from no such reason as is thus supposed, nor could it ever have depended on any reason even analogous thereto. Every judge is by the character of his duties compelled to pay respect to all the laws which he is sworn to administer, whatever may be his private opinions respecting any particular ones,—he cannot judicially deem one law to be good and another bad,—cannot prefer one to another,—cannot love one and hate another. Therefore he cannot construe one law strictly because he thinks another better than it, or liberally because he deems another poorer. But the reason why an affirmative statute contrary to the prior law is to be kept by the courts within its express terms is, that, where two laws stand side by side with no words of repeal, the one later in date is in its very nature powerless to take from the earlier any thing which is not directly in conflict with it. Presumption has no room to work. Implication against what is positively ordained is never permitted in our jurisprudence.

Given that this was an American treatise, it is perhaps unsurprising that it contained numerous citations to Kent and Story.⁶⁴ However, Dwarris' treatise was the prior treatise that was cited and relied upon most often.

In 1888, Endlich saw fit to adapt Maxwell's treatise to the American context in a similar⁶⁵ fashion to Potter's revision of Dwarris.⁶⁶ This makes a significant statement about the perceived relationship between England and the US concerning statutory interpretation; and at the same time, it is a strong endorsement of Maxwell's treatise. Endlich could have revised Sedgwick's treatise, or if the rights were unobtainable, he could have written his own treatise. No doubt, Endlich felt that Maxwell stated the issues more succinctly than Sedgwick or Dwarris. However, his additions were significant, and approximately doubled the length of the work.⁶⁷ Within these additions, Endlich took issue with some of Sedgwick's claims.⁶⁸ His added notes include only 3 citations to Bishop's treatise, typically for a quote to express a point.⁶⁹ In contrast, there were 30 citations to

62 *ibid* 39, 49, 93 & 178.

63 *ibid* 178–79.

64 There were 11 citations to Kent's Commentaries at 25, 30, 48, 55, 79, 91, 124, 128, 154, 175, 176 & 242. There was a lengthy quote at 166. Story, *Commentaries on the Constitution of the United States* (n 29). was cited at 9, 13, 61, & 227. Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (n 29). was cited at 164, 168 & 173. Story's judgments were cited and quoted at 26 and 29.

65 Bishop (n 14) 178.

66 Endlich (n 3).

67 Maxwell's treatise occupied 383 pages. Endlich's treatise had 765 pages, and the pages were more dense.

68 An example will be discussed in Chapter 3, 66.

69 For example: "It is said by an eminent writer, that 'the chapter headings and the like, in the revisions of statutes and

Wilberforce's treatise, generally in support of claims, and occasionally incorporating lengthy quoted passages.⁷⁰

Sutherland's treatise was published in Chicago in 1891 and it had a similar structure to Dwarris' treatise. It was comprised of two parts, the first of which addressed procedural and constitutional issues, and the second of which dealt with interpretation. Thus the structure of Sutherland's work bears Dwarris' imprint. It is perhaps unsurprising that Dwarris' treatise was the prior treatise cited most often, although it is rather curious that the first edition from 1831 was effectively the default version cited. It was cited on 28 occasions,⁷¹ whilst the second edition was cited for 4 propositions that did not appear in the first edition.⁷² Furthermore, the American edition was cited for Potter's additions on 6 occasions.⁷³ It is difficult to resist the conclusion that Sutherland had extensive knowledge about all of the editions and their differences. Sutherland's treatment of Dwarris' treatises stands in stark contrast to his treatment of Endlich's annotated edition of Maxwell, which was cited for claims drawn from Maxwell's text and not Endlich's additions, without attribution.⁷⁴ Wilberforce and Bishop were quoted and cited approvingly.⁷⁵ Yet, the most influential prior treatise was that of Dwarris.

The final treatise in this era was by Henry Campbell Black, published in 1896 in St Paul. It too was an American-focused work. The majority of citations were to US cases. Yet the purpose of statutory interpretation was described by quoting Maxwell, and of all the prior treatises, Maxwell's was cited most often—18 times, with 12 quotes, 5 of which were quite long.⁷⁶ Endlich's treatise was cited separately, typically for matters pertaining to the US Constitution.⁷⁷ In so doing, Black

in codes, are deemed to be of somewhat greater effect than the ordinary titles to legislative acts.” Endlich (n 3) 89; see also 37 & 508.

70 *ibid* 7, 7, 34, 42, 53, 77, 87, 87, 91, 93, 142, 142, 174, 183, 253, 257, 287, 353, 405, 454, 460, 508, 511, 524 & 660. There are lengthy quoted passages at 1, 254, 320, 350, 585 & 651.

71 Dwarris (n 11) 31, 211, 212, 212, 213, 260, 262, 262–63, 263, 264, 265, 266, 267, 276, 307, 324, 340, 354, 361, 367, 367, 368, 374, 423, 444, 459, 461 & 563.

72 Dwarris and Amyot (n 11) 262, 284, 299 & 307.

73 Dwarris (n 6) 216, 264, 270, 294, 458 & 587.

74 Sutherland (n 6) 270, 286, 336, 344, 344, 349, 410 & 592.

75 There were 15 citations to Wilberforce: *ibid* 7, 338, 352, 360, 367, 413, 420, 437, 449, 449, 506, 515, 515, 572 & 598. There were 12 citations to Bishop at 61, 199, 258, 270, 284, 293, 299, 303, 303, 354, 438 & 448. Wilberforce tended to be cited as the sole authority for a claim, while Bishop tended to be cited along with corroborating authorities.

76 Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (2nd edn, Bradbury, Agnew & Co 1883). Most of the citations are sole authorities or quotations to elaborate on the various presumptions, for example the presumption against inconsistency at 98, 101 presumption against injustice at 102 and the presumption against unnecessary change in law at 110. Also see 8, 44, 26, 49, 51, 54, 68, 73 fn 21, 79, 91, 98, 101, 110, 123, 152 fn 28, 130 fn 19, 140 & 144.

77 Black (n 6) 14, 23, 27, 33, 34, 47, 66, 115, 124, 139, 156, 181, 205 fn 21, 308 & 334. The citations were typically quotes in support of claims.

demonstrated deep knowledge of these two related works, in much the same way that Sutherland revealed his extensive knowledge of Dwarris' treatises. Conversely, Black only cited the American edition of Dwarris, and made no distinction between Dwarris' text and Potter's additions.⁷⁸ There were 6 citations to Hardcastle⁷⁹ and a single reference to Wilberforce.⁸⁰ Sutherland was also cited.⁸¹ Black tended not to take issue with prior treatises. Meanwhile, despite the author's emphasis on American authorities, the familiar pattern of reliance on scholarship from England was maintained.

The intertwining of American and English sources within these works is quite striking. It was not inevitable that the first treatise would be come from England. American authors were the first to publish treatises on a variety of topics.⁸² Each subsequent treatises bore some content and influence from some of the prior treatises, and without a doubt, the authors were reading prior works from the other side of the Atlantic. It is rather curious that American scholars adapted English treatises to the US while no English scholar adapted an American treatise to England. The flow of influence was by no means only from England to America. America was a significant source of legal developments in the nineteenth century due, in part, to the relatively developed state of university-based legal education which sustained a community of professional legal scholars—something that the English legal community lacked at the time.⁸³ American legal works were read and acknowledged by English scholars. Kent and Story could be counted among the canonical common law scholars in England and America.⁸⁴ The influence was bidirectional.

Within these treatises there was a tendency for a prior treatise from across the Atlantic to be

78 Generally, the work was cited for American issues, and therefore it was Potter's additions that were cited.

79 Henry Hardcastle and William Feilden Craies, *A Treatise on the Construction and Effect of Statute Law* (2nd edn, Stevens & Haynes 1892). As an example, Hardcastle is cited for a textualist conception of judging: "It must be borne in mind that it is not competent to a judge to modify the language of an act of parliament in order to bring it into accordance with his own views as to what is right or reasonable." Black (n 6) 41. Also see 7, 112, 113, 115 & 199.

80 Wilberforce (n 50). This work was cited at 193 to show that English judges had demonstrated disfavour towards interpretation clauses.

81 Sutherland (n 6). There are citations at 21, 88, 149, 195, 216, 285, 286, 293 340 & 408. There is lengthy quote at 143 fn 83 elaborating upon *ejusdem generis*. Sutherland and Maxwell are both quoted to put forward the basic objective of statutory interpretation at 8.

82 In many instances American scholars were the first to produce treatises on significant topics. See for example Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (n 26); Theodore Sedgwick, *A Treatise on the Measure of Damages* (J S Voorhies 1847).

83 MH Hoeflich, 'The Americanization of British Legal Education in the Nineteenth Century' (1987) 8 J Leg Hist 244; Robert Bocking Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, 1983); Harold Dexter Hazeltine, *Legal Education in England* (American Bar Association 1909). Meanwhile, some US scholars such as Sedgwick were lawyers.

84 Leslie (n 26); Morton J Horwitz, 'Part III - Treatise Literature Special Sources of American Legal History' (1976) 69 L Library J 460; John H Langbein, 'Chancellor Kent and the History of Legal Literature' (1993) 93 Col L Rev 547, 571-78 & 592-94; G Edward White, 'The Path of American Jurisprudence' (1976) 124 U Penn L Rev 1212, 1250-53.

the one that was cited and relied upon the most. This is clearly the case for American scholars who annotated English treatises, yet the pattern persisted for Sedgwick, Hardcastle, Sutherland and Black. The treatise on statutory interpretation was an Anglo-American genre of legal literature. This applies with particular clarity to the treatises that Justice Scalia cited and discussed in his essay on textualism—the treatises by Black, Sutherland, Endlich, Bishop, Sedgwick, and Potter’s edition of Dwarris.

2.4 *Reading Law: Another Iteration*

In some ways, *Reading Law* differs from the previous treatises. Unlike the nineteenth century works, its scope is much more limited—it does not purport to provide comprehensive, detailed coverage of the field of statutory interpretation. It is intended, instead, “[t]o prescribe the sound principles of interpretation.”⁸⁵ Furthermore, it is more normative. The previous treatises criticised certain practices, particularly the overstepping of the bounds of statutory language, however, these works generally sought to explain the law as it was. Scalia and Garner explicitly set out to prescribe what the law ought to be. They readily cite and criticise what they regard as improper (but accepted) current judicial practices: the book includes an entire section devoted to “thirteen falsities” which have been a source of judicial abuse in the quest for “liberation from the text”.⁸⁶

Despite these differences, there are many traits that *Reading Law* has in common with the previous treatises. Whilst it is more concerned with fundamental principles and less so with the finer details, the work does purport to cover the basic principles of statutory interpretation comprehensively. In keeping with the tradition, the book is replete with quotes and references to judgments and scholarly works, both English and American, across a relatively broad period of time. For example, the first “Fundamental Principle” that “[e]very application of text to a particular circumstance requires interpretation” is sub-headed with a quote from Chief Justice Marshall in *Marbury v Madison*.⁸⁷ This principle is elaborated upon by reference to US cases from 1915, 1917, 1957 and 1989, as well as American secondary works from 1932, 1993, and 2002.⁸⁸ The “whole

85 Scalia and Garner (n 1) 29.

86 *ibid* 10, 341–410.

87 Scalia and Garner (n 1). *Marbury v Madison* 5 1 Cranch 137, 177 (1803).

88 *Gans v Aetna Life Insurance Co* 108 NE 443, 444 (NY 1915); *Caminetti v United States* 242 US 470, 485 (1917); *Sears, Roebuck & Co v Poling* 81 NW 2d 462, 466 (Iowa 1957); *Mautner v Peralta* 263 Cal Rptr 535, 541 (Ct App 1989); Frank E Horack Jr, ‘In the Name of Legislative Intention’ (1931) 38 W Va LQ 119; Cass R Sunstein, *The Partial Constitution* (HUP 1994) 104.; Christopher Ricks “Stanley Fish: Is There a Text in This Class?” in *Reviewery* (2002) 192, 196.

text” canon is traced to Coke.⁸⁹ Within the citations, one finds all of the usual legacy common law sources from the Roman Digest,⁹⁰ Coke,⁹¹ Blackstone⁹² and Kent⁹³ through to more recent scholars including Holmes,⁹⁴ Pollock⁹⁵ and Pound⁹⁶ in order to prove that the principles are old, enduring, and deeply rooted in the Anglo-American common law tradition. This was the explicit objective: “Our approach is consistent with what the best legal thinkers have said for centuries.”⁹⁷

That Scalia and Garner chose to put the “interpretation principle” first and the “supremacy-of-text” principle second is an interesting choice for authors who self-identify as textualists. One would expect the supremacy-of-text canon to come first. However, when considered as a work alongside the prior treatises, this choice makes sense when it is understood as part of a dialogue. Several of the nineteenth century treatises claimed that, when language was clear, “interpretation could hardly be said to occur at all[,]” usually with a citation to Vattel.⁹⁸ Scalia and Garner take issue with this description of the process to such an extent that they make their claim as the starting point for their treatise.

A cursory review of the work reveals that there is nothing novel about the collection of canons within *Reading Law*. For those who have engaged with the older treatises, the rules are entirely familiar. Principle #4 is the Presumption against ineffectiveness: “A textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favoured.”⁹⁹ Principle #6 is the ordinary meaning canon, a core feature of the textualist approach to text: “[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.” These presumptions are restatements of what was said in prior treatises with more recent cases for examples and elaboration. *Reading Law* could be aptly described using the words of Sanders and Wade when reviewing Endlich’s treatise: “[t]he innumerable maxims and technical rules of statutory interpretation, shrouded for the most part in a

89 “Sir Edward Coke explained the canon in 1628: ‘[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers.’” The passage is cited to 1 Edward Coke, *The First Part of the Institutes of the Laws of England* at 381a (1628; 14th ed 1792). Scalia and Garner (n 1) 167.

90 For example, in support of the rule against surplusage, *ibid* 174. Also 56.

91 For example, in support of the whole text canon, *ibid* 167. Also 200, 210 & 313.

92 *ibid* 234. Quoted for the absurdity doctrine along with RE McGerry, *A Second Miscellany-at-Law* (Stevens 1973) among others. Also 80, 131, 210, 234, 278, 281, 296, 300, 303, 308, 357, 365, 369 & 404.

93 Cited, for example, for the presumption against retroactivity along with Cooley, and US cases from 1798 through to 2004. *ibid* 261. Also 69, 193, 252, 261, 295, 327, 334, 369 & 375.

94 *ibid* 29 & 375.

95 *ibid* 54.

96 For example, concerning living tree interpretation of the Constitution, *ibid* 84. Also 61, 325 & 399.

97 *ibid* xxix.

98 See for example Maxwell (n 3) 3; Sedgwick (n 16) 227.

99 Scalia and Garner (n 1) 63.

dead language, are well enough known. ... The author has sought ... to translate them into a living language and reduce them to a few easily grasped obvious general principles[.]”¹⁰⁰

It is rather curious that, whilst the treatises by Bishop, Black, Craies, Dwarris, Endlich, Sutherland and Wilberforce appear in the bibliography,¹⁰¹ only some of these works are cited in *Reading Law*, and those that are cited are only cited occasionally.¹⁰² This is so despite the fact that Scalia demonstrated his familiarity with them in his judgments and essays, and despite the similarity of the claims. For example, the interpretation principle was stated by Bishop as follows: “All Laws require Interpretation. ... There is no law, written or unwritten, which does not require to be interpreted in its administration.”¹⁰³ Another example is the ordinary meaning canon, which is supported by citations to Kent, Story and Jellum, among others in *Reading Law*.¹⁰⁴ As will be shown in Chapter 3, this rule was put forward in all of the nineteenth century treatises. A decision was made to not cite the earlier treatises for specific “canons,” and the influence of these earlier treatises must be inferred.

2.5 Conclusion

This chapter set out to show two things. First, it sought to show that Justice Scalia and his fellow textualist judges based their doctrine upon the contents of the treatises on statutory interpretation that were published in the nineteenth century. Second, this chapter sought to show that these treatises developed as an Anglo-American genre of legal literature which developed, in part, through a transatlantic dialogue. It is safe to conclude that the modern American textualists, and Justice Scalia in particular, were influenced by these Anglo-American, Victorian era treatises. The next step will be to examine the development of the four core elements of textualism. This will be addressed in Chapters 3 and 4. It will be revealed that, after some developments in the first few treatises, the claims of the modern American textualists align very neatly with the claims in the Victorian-era treatises.

100 Sanders and Wade (n 31) 575.

101 Scalia and Garner (n 1) 466–480.

102 Bishop is cited at 61, 190, 278 & 337. Black is cited at 171, 189, 212, 217 & 346. Sedgwick is cited at 246.

103 There is a footnote which explains that this principle is to be understood as consistent with Vattel’s claim that interpretation is not required when the words yield a plain meaning. Bishop chose to explain the difference in a manner that accommodated prior scholarship rather than contradicting it. The treatises by Sedgwick and Maxwell also asserted that no interpretation was required when the meaning was plain, and therefore the proposition had significant authority behind it. The practice of adding nuance to accommodate apparent contradictions is common within the genre.

104 Scalia and Garner (n 1) 69.

Chapter 3

The Development of the Faithful Agent View of Judging, the Separation of Powers and the Sophisticated Plain Meaning Approach to Text

3.1 Introduction

Textualism, as it is propounded in the US by the Federal Court judges who self-identify as textualists, consists of the following four core elements:

- 1 The faithful agent view of judging;
- 2 The separation of legislating from interpreting as a constitutional necessity;
- 3 A structured, rule-bounded approach to statutory text that is referred to as the sophisticated plain meaning approach to text; and,
- 4 The rule that legislative history as an aid to statutory interpretation is inadmissible.

The analysis that follows will examine the historical roots of these elements. Because of the central importance of the exclusionary rule to textualism, and because the generally received view on the development of the rule will be challenged, this feature of textualism will be dealt with separately in Chapter 4. The development of the first three elements will be dealt with in this chapter, beginning with the faithful agent view of judging, then moving on to the separation of powers and the sophisticated plain meaning approach to statutory text.

3.2 The Judge as Faithful Agent

The notion that judges have no authority to make law and must always seek to avoid anything resembling judicial law-making when interpreting and applying statutes has been called the “faithful agent” view of judging. This can be contrasted with the co-operative partner view of judging, which regards judges as agents who have the authority to alter the law through interpretation, whether to update the law to fit with current circumstances, or to mitigate harshness or apparent injustices that result from plain or ordinary meaning. This authority is deployed to improve the law, and it presumes a collaborative role for judges in the law-making enterprise.

In the introduction to *Reading Law*, Scalia and Garner state the following:

Ours is a common-law tradition in which judicial improvisation has abounded. Statutes were a comparatively infrequent source of English law through the mid-19th century.

Where statutes did not exist, the law was the product of judicial invention, at least in those many areas where there was no accepted common law for courts to ‘discover.’ It is unsurprising that the judges who used to be lawgivers took some liberties with the statutes that began to supplant their handiwork—adopting, for example, a rule that statutes in derogation of the common law (judge-made law) were to be narrowly construed and rules for filling judicially perceived ‘gaps’ in statutes that had less to do with perceived meaning than with the judges’ notions of public policy. Such distortion of texts that have been adopted by the people’s elected representatives is undemocratic. In an age when democratically prescribed texts (such as statutes, ordinances, and regulations) are the rule, the judge’s principal function is to give those texts their fair meaning.¹

This passage is representative of the modern American textualist stance. It embodies a number of historical generalisations about English law that are distortions, for example the notion that, until the middle of the nineteenth century, statutes were few in England, and that judges readily developed common law principles through judicial invention. The overall rhetorical effect is to distance the (virtuous) formalism of the American statute-based system, which is rooted in democracy, from the free-wheeling, common law system in England where tyrannical judges impose their personal views on the law. Similarities and interconnections are disregarded. England is used as a foil. When authoring opinions, Justice Scalia was equally prepared to direct this criticism at his fellow judges at the US Supreme Court.² It is the textualist judge alone who properly respects the legislative outputs of Congress.

This rhetorical stance exemplifies the textualist preoccupation with activist judging and the concomitant belief in the faithful agent view of judging. Properly understood, the faithful agent view of judging is nuanced. As explained in Chapter 1, textualism permits strained interpretations in order to harmonise statutory provisions with related areas of law, and regards the application of the rule against absurdity as entirely acceptable.³ Nonetheless, the faithful agent view of judging is expressed in categorical language, and it is a core principle that runs throughout Scalia’s judgments and essays.

This belief manifests itself in several ways. It is expressed through strong claims about the binding nature of clear statutory text. It is also expressed by repeated claims that judges must not consider their own values when interpreting statutory text. It is also expressed through the often repeated mantra that equitable relief against a statutory provision is impermissible even if it was

1 Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012) 3. Footnotes omitted.

2 See for example Chapter 1, 8, fn 11 & 11, fn 22.

3 See Chapter 1, 18.

permissible at some point in the past.

Endlich, reciting Maxwell, put it this way:

a Court is not at liberty to speculate on the intention of the Legislature when the words are clear, or to construe an Act according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground of construing an enactment that is quite complete and unambiguous in itself. To depart from the plain and obvious meaning on account of such view, is, in truth, not to construe the Act, but to alter it. The business of the interpreter is not to improve the statute, but to expound it.⁴

Maxwell and Endlich also explained the role of the judge by quoting Bacon: to construe a statutory provision “contrary to, or different from that which the words import or can possibly import, is not to interpret law, but to make it; and Judges are to remember that their office is jus dicere, not jus dare.”⁵ Bishop claimed that “Laws are expounded and enforced, not made, by the courts.”⁶ According to Sutherland, “[t]he sole authority of the legislature to make laws is the foundation of the principle that courts of justice are bound to give effect to its intention. When that is plain and palpable they must follow it implicitly.”⁷

Near the beginning of his treatise, Black explained the objective of interpretation as declaratory: “It is not permissible, under the pretence of interpretation, to make a law, different from that which the law-making body intended to enact.”⁸ The following passage by Black is cited to Sutherland:

The sole function of the judiciary is to expound and apply the law. To enact the law is the prerogative of the legislative department of government. Nor can the courts correct what they may deem excesses or omissions in legislation, or relieve against the occasionally harsh operation of statutory provisions, without danger of doing more mischief than good.⁹

Thus the treatises published after 1870 were consistent with the modern textualist position with respect to the role of the judge. While references to older scholars such as Bacon and Coke might lead one to believe that this view was widely held by the great English jurists for centuries, there is good reason to believe that most legal scholars prior to the nineteenth century held a less strict view about the authority of judges when interpreting the law.

4 Gustav Adolf Endlich, *A Commentary on the Interpretation of Statutes* (F D Linn 1888) §7; Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (William Maxwell & Sons 1875) 6.

5 Maxwell (n 4) 6; Endlich (n 4) §9.

6 Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* (Little, Brown 1882) §70.

7 JG Sutherland, *Statutes and Statutory Construction* (Callaghan & Co 1891) §234.

8 Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* (West 1896) 8.

9 *ibid.*

Coke was well-known for his approach to interpretation which permitted a judge to stretch words and disregard them altogether. There were cases in his reports in which a statute was construed “liberally and by equity, against the letter[.]”¹⁰ There were also cases in which judges declared statutes void because they were contrary to common right and reason.¹¹ The sanctioning of such practices accords with the cooperative partnership view of judging. It is contrary to the faithful agent view.

In his notes on the case of *Eyston v Studd*, Plowden established an explicit role for equity in the process of interpretation.¹² He asserted that the letter of the law was the “body” of the law, and the reason and sense of the law is the “soul,” and that “[e]quity ... enlarges or diminishes the letter according to its discretion”¹³ This was predicated on the belief that general rules applied too rigidly to particular situations will bring about injustice. Discretion to vary the rules was therefore regarded as essential for the law to be just. One finds a similar approach described in Rastell’s *Exposition of Termes* and Thomas Ashe’s *Epieikeia*.¹⁴

One can also find a clear description of the authority of judges which aligns with the cooperative partnership view in *A Treatise Concerning Statutes* by Lord Chancellor Hatton, published in 1677.¹⁵ Hatton asserted there were two “sorts” or “divisions” of interpretation. “One is, according to the precise words of every Statute; the other according to equity[.]”¹⁶ Hatton claimed that “(a)ll Statutes may be expounded by Equity”¹⁷ although there had to be “plain and evident utility publick, and necessity for supplying defects in the Law[.]”¹⁸

Blackstone also countenanced equitable interpretation:

The most universal and effectual way of discovering the true meaning of a law, when

10 See for example *Chudleigh’s Case* 1 Co Rep 283.

11 *Dr Bonham’s Case* 8 Co Rep 114 (1610); For a more nuanced interpretation of Coke’s view of the authority to strike down legislation, see RA MacKay, ‘Coke: Parliamentary Sovereignty or the Supremacy of the Law?’ (1924) 22 Mich L Rev 215.

12 *Eyston v Studd* (1575) Plow 459.

13 *ibid* 465. Also see Carleton Kemp Allen, *Law in the Making* (7th edn, Clarendon Press, 1964) 451–52. Also see Neil Duxbury, *Elements of Legislation* (CUP 2012) 179–86.

14 David Ibbetson, ‘A House Built on Sand’ in E Koops and WJ Zwolve (eds), *Law & Equity: Approaches in Roman Law and Common Law* (Martinus Nijhoff 2014) 61–66; J Rastell, *Exposiciones Terminorum Legum Anglorum* (No year indicated); John H Baker, ‘John Rastell and the Terms of the Law’, *Collected Papers in English Legal History*, vol 2 (CUP); Thomas Ashe, *Epieikeia* (1609).

15 Sir Christopher Hatton, *A Treatise on Statutes, or Acts of Parliament: And the Exposition Thereof* (Richard Tonson 1677). For more about equitable interpretation see WH Lloyd, ‘The Equity of a Statute’ (1909) 58 U Penn L Rev 76; SE Thorne, ‘Equity of a Statute and Heydon’s Case’ (1936) 31 Ill L Rev 202; Frederick J DeSloovere, ‘Equity and Reason of a Statute’ (1935) 21 Cornell LQ 591; Ibbetson (n 14).

16 Hatton (n 15) 28.

17 *ibid* 31.

18 *ibid* 37.

the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. ... From this method of interpreting laws, by the reason of them, arises what we call equity; which is thus defined by Grotius, ‘the correction of that, wherein the law (by reason of its universality) is deficient.’ For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted.¹⁹

This was the fifth and final rule that Blackstone put forward in his Commentaries for interpreting statutes. One started with, in essence, the ordinary meaning of the words, then one looked to the context, the subject matter and the effect of the words before resorting to the equitable approach. Equitable interpretation was a residual authority, and the extent of the authority was subject to qualification—a fact which holds true for all of the above-mentioned scholars. What is important is that this residual authority was regarded as a legitimate, and that prominent scholars found it acceptable to propound these concepts in their time. The acceptability of such ideas changed in the nineteenth century when the concept of equitable interpretation came to be regarded with something akin to moral outrage in the treatises on statutory interpretation.

3.3 The Role of the Judge in the Nineteenth-century Treatises

Dwarris posited a faithful agent view of judging: “The duty of the judge is to adhere to the legal text, and not to travel out of what that expressly or impliedly contains.”²⁰ In the second edition of his treatise, he supported this assertion with a quote by Story: “It would be dangerous in the extreme to infer from extrinsic circumstances that a case, for which the words expressly provide, shall be exempted from their operation[.]”²¹ However, Dwarris acknowledged “equitable interpretation” explicitly.²² According to his conception of equitable interpretation, “[a]ll acts are to be taken by reasonable construction; and in doubtful cases judges may enlarge or restrain the construction of acts of Parliament, according to the sense of the law-makers.”²³ This was more narrow than the equitable interpretation described by previous scholars. It was only available to resolve ambiguity, and there were a number of further restrictions. For example, equitable interpretation could never “overthrow an estate” and could not provide for an inconvenience that

19 William Blackstone, *Commentaries on the Laws of England*, vol 1 (Clarendon Press 1765) 61.

20 Sir Fortunatus Dwarris, *A General Treatise on Statutes* (Saunders & Benning 1831) 704.

21 Sir Fortunatus Dwarris and William Henry Amyot, *A General Treatise on Statutes* (2nd edn, W Benning 1848) 561–62.

22 Dwarris (n 20) 721–734.

23 *ibid* 725.

rarely happens.²⁴ A number of scholars have pointed out that the cases Dwarris cited predate the Glorious Revolution.²⁵ Dwarris acknowledged that judges often exceeded the bounds of the circumscribed discretion of equitable interpretation; however, he discussed judicial modifications of legislation to avoid injustice in rather ambivalent language, refusing to decide whether it was by “equitable interference, or by judicial usurpation[.]”²⁶ Furthermore, he laid the blame on Parliament:

Obsolete or unsuitable laws have been evaded, instead of being removed from the statute book. Instead of the Legislature framing new provisions as occasion has required, it has been left to able Judges to invade its province, and to arrogate to themselves the lofty privilege of correcting abuses and introducing improvements.²⁷

In this subtle manner, Dwarris condoned the practice as a matter of practical necessity despite referring to judicial modifications of legislation as an “evil”.²⁸

Sedgwick exhibited much less tolerance for judicial creativity. He repeated Dwarris’ claim albeit in more concise language, that “from a very early period in English jurisprudence, the courts of equity, proceeding according to the course of the civil law, undertook to enlarge the remedies and modify the rigor of the common-law tribunals.”²⁹ He quoted Lord Eldon for the modern approach: “the rule is, that equity will give no relief against a statute. There can be no relief in equity ... if the act has positively said so.”³⁰ This claim was repeated in all the subsequent treatises.³¹

Sedgwick also rehabilitated Blackstone. He quoted Blackstone’s rules of interpretation in a footnote in a manner that seemed complete; however he left out the paragraphs concerning equitable interpretation without any markings to indicate abridgement.³² One was left with the

24 *ibid* 729–30.

25 See for example JA Corry, ‘Administrative Law and the Interpretation of Statutes’ (1936) 1 UTLJ 286, 297; Duxbury (n 13) 154.

26 Dwarris (n 20) 792–93.

27 *ibid* 792. The 2nd edition added the following, at 708: “if in modern times, complaints be justly made of alterations in the laws effected by equitable interference, or by judicial usurpation, it is ascribable to the remissness of the Legislature, which should long since have provided for a revision of our statute law.”

28 *ibid* 708.

29 Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (J S Voorhies 1857) 104.

30 *ibid. Mestaer v Gillespie* 11 Ves 621, 627.

31 Maxwell (n 4) 235. “But this mode of interpretation has at the present day altogether fallen out of use in Courts of law in England.” Henry Hardcastle, *A Treatise on the Rules Which Govern the Construction and Effect of Statutory Law* (Stevens & Haynes 1879) 39. Wilberforce discussed the matter under the headings of “Ancient theories of judicial supremacy” and “Modern refutations of that theory” in which he stated plainly that “equity cannot relieve against express provisions.” Edward Wilberforce, *Statute Law: The Principles Which Govern the Construction and Operation of Statutes* (Stevens & Sons 1881) 31. Sutherland claimed that “The wisdom of a statute is not a judicial question; nor can courts correct what they may deem excesses or omissions in legislation, or relieve against the occasionally harsh operation of statutory provisions without danger of doing more mischief than good.” Sutherland (n 7) 311. Also see 524–30. Black accepted this claim although his position was more nuanced. Black (n 8) §28.

32 Sedgwick (n 29) 236–37.

impression that Sedgwick's views aligned with Blackstone's with respect to the proper role of the judge.

Whilst rejecting the notion that it was acceptable for judges to supply deficiencies, Sedgwick was sceptical about the ability of a judge to avoid law-making when the text lacked sufficient clarity: "if the language employed is such, or for any other reason the case is such, that the judge cannot pretend to say what the meaning of the lawgiver was ... [the judge] acts on the case before him by his own intellect In doing this he acts, truly, not as a judge, but as a legislator."³³ He stressed that this was a very narrow authority because it occurred rarely. He also claimed that this authority was often abused by judges relying on it when the designated rules would have sufficed to ascertain the meaning of a statutory provision.³⁴ Yet, however narrow, this claim is contrary to the faithful agent view of judging which requires the denial of all judicial law-making authority.

Two decades later, Maxwell dealt with textual deficiencies in much more circumscribed terms. If the text:

is open to doubt ... the true meaning is to be sought, not on the wide sea of surmise and speculation, but 'from such conjectures as are drawn from the words alone, or something contained in them'³⁵; that is, from such arguments and inferences as may be based within the four corners of the law of which the passage under interpretation forms a part, viewed by such light as its history may properly throw upon it, and construed with the help of certain general principles, which though neither infallible nor inflexible, are, nevertheless, indispensable to a right understanding of the language of enactments.³⁶

In his additions to Maxwell's work, Endlich explicitly addressed Sedgwick's claim about judges acting as legislators:

It is submitted, however, that this is inaccurate. If the judge were to guess at the interpretation, and arbitrarily fix the result, no doubt it would be true that he would be assuming the functions of a legislator. But so long as the interpretation of an ambiguous enactment proceeds upon ascertained legal principles, which 'those who were or ought to have been learned in the law' must be supposed to have understood,³⁷ and with reference to which the act must be presumed to have been framed and passed, it cannot be said that the result is a new law, or even a departure from the language of the statute constituted, it is simply giving effect to that language as understood in the light of

33 *ibid* 294.

34 *ibid* 294–95.

35 Cited to "Puff. L.N. b. 5, c. 12, s. 2, note by Barbeyrac."

36 Maxwell (n 4) 49.

37 Cited to *Brocket v Ohio & Pac R R Co* 14 Pa St 241, 248 (1850); *Commonwealth v Churchill* 2 Met 118 (1840); *State v Brooks* 4 Conn 446 (1823).

recognized rules and presumptions relating to legislative language.

A review of these works reveals that the description of the role of the judge as put forward in Dwaris' and Sedgwick's treatises contained subtle exceptions which did not fit entirely with the textualist view. It is in the treatises by Maxwell and those that came after that the descriptions of the role of the judge align with the modern American textualist position.

3.4 The Separation of Powers

The separation of powers as it pertains to textualism simply refers to the separation of legislating and interpreting. As Scalia and Garner stated in the preface to *Reading Law*, “[o]ur basic presumption: legislators enact; judges interpret.”³⁸ For more than a century, this claim has been uncontroversial. One can find similarly categorical enunciations in modern English scholarship.³⁹ In the past in America, and in England until relatively recently, the separation was not so sharp. In England, many kinds of matters on appeal were heard by a political body with legislative authority—the House of Lords—whose jurisdiction can be traced back to the conception of the Parliament as the highest court of appeal.⁴⁰ The delegation of the authority to settle substantive matters on appeal to a specialised judicial committee occurred over the course of several decades in the 1800s. Subsequently, until 2009, appeals were heard by people who were entitled to sit in the House of Lords to debate, propose amendments and vote on bills.⁴¹ In the early years of the United States, the highest court of appeal for state matters was often the state legislature.⁴² Thus in many circumstances, one did interrogate the legislators when an appeal hinged upon the meaning of statutory provisions. Historically, the belief in the necessity of separating legislating from judging was subject to plausible contrary points of view.

In *Common-Law Courts* Scalia quoted James Madison quoting Montesquieu's famous passage from *L'Esprit Des Lois*: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the Judge* would then be *the*

38 Scalia and Garner (n 1) xxx.

39 See for example, FAR Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (OUP 2001) 16: “Legislation is what the legislator says it is. The meaning of legislation is what the court says it is.”

40 Glenn Dymond “The Appellate Jurisdiction of the House of Lords” House of Lords Library Note (November, 2007 LLN 2007/008), 6–9.

41 *ibid* 2.

42 Most of the 13 colonies incorporated this mechanism. In Rhode Island and Connecticut, the legislatures remained the court of appeal after secession. The New Hampshire and Massachusetts legislatures retained some jurisdiction as a court of appeal after secession. New Hampshire did not completely delegate this authority until 1818. Erwin C Surrency, ‘The Courts in the American Colonies’ (1967) 11 Am J Leg Hist 347, 36–38.

legislator.”⁴³

In American scholarship, England is sometimes used as a foil with respect to the separation of powers. It is pointed out that there is mixed government in England,⁴⁴ and that the Law Lords sit in one of the houses of Parliament (although as of 2009 this is no longer the case).⁴⁵ Furthermore, it is noted that Parliament can legislate on any subject and in any manner without limit while the US Constitution clearly delineates and limits the scope of Congressional legislative authority.⁴⁶ These claims exude a sense of national pride at the US founding document, and leave an implied sense that American constitutional arrangements are superior to those of England.

Yet interpretive theory is also rooted in nationalism in England. England was emancipated, so to speak, by the Glorious Revolution. The three estates of the realm—the Crown, Lords and Commons—were preserved, but the balance of power between them was restructured. As Kent pointed out, the separation of powers in England was concerned with preventing a tyranny of the monarch.⁴⁷ It became established in the decades that followed the Glorious Revolution, that judges did not sit at the pleasure of the Crown,⁴⁸ and the notion that the judiciary must be separate from the executive is rooted in this historical understanding.

Montesquieu is often credited as a key source of the common law conception of separation of powers. He was influenced by observations of English institutions, including the English judiciary, which he held in high regard.⁴⁹ Some scholars have claimed that Montesquieu was also influenced by the English philosopher, John Locke.⁵⁰ Whether or not one agrees, the notion of separation of powers has a decidedly English heritage.

Montesquieu’s writings were influential in the eighteenth century,⁵¹ and Blackstone’s enunciation of the principle bears a significant resemblance to that of Montesquieu:

Were it [ie the judicial power] joined with the legislative, the life, liberty, and property,

43 Antonin Scalia, ‘Common-Law Courts in a Civil-Law System’ in Amy Gutman (ed), *A Matter of Interpretation* (Princeton University Press 1997) 10.

44 Mixed government in the British context consists of Crown, Lords and Commons. Conceptually, it is a blend of monarchy, aristocracy and democracy.

45 See for example Sutherland (n 7) 29–33.

46 See for example Sedgwick (n 29) 144–55.

47 James Kent, *Commentaries on American Law*, vol 1 (O Halsted 1826) 274–77.

48 CH McIlwain, ‘The Tenure of English Judges’ (1913) 7 *Am Pol Sci Rev* 217; Sam J Ervin, ‘Separation of Powers: Judicial Independence’ (1970) 35 *L Contemp Problems* 108; Corry (n 25).

49 See for example Cheryl Saunders, ‘Separation of Powers and the Judicial Branch’ (2006) 11 *Jud Rev* 337; Mitchell Franklin, ‘Passing of the School of Montesquieu and Its System of Separation of Powers’ (1937) 12 *Tul L Rev* 1.

50 Some scholars claim that Montesquieu developed his conception based on Locke’s writings. See for example Claud Mullins, *In Quest of Justice* (Murray 1931) 43.

51 MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) 83–106.

of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative.⁵²

Blackstone's statement can be distinguished from Montesquieu's on a number of grounds. Property was placed alongside life and liberty. This description also explicitly incorporates the textualist concern about judges deciding cases based on personal preferences.⁵³

Dwarris had a very different approach. He devoted an entire chapter to "The Boundaries of Legislation and of Judicial Interpretation" in which he explored the complexities of the purported division of labour.⁵⁴ He asserted that "the meaning of the terms employed by the Legislature, and the cases to which the provisions of the law are applicable, must be left to the decision of the Judges." He also considered the "improper assumption of legislative powers by the Judges",⁵⁵ as discussed in the previous section. He concluded with a quote by the "First Common Law Report" that is prescriptive:

whatever causes the invention or encouragement of legal fictions may be assigned, we have no doubt that they have an injurious effect in the administration of justice, because they tend to bring the law itself into suspicion with the public, as an unsound and delusive system[.]⁵⁶

The details discussed to reach this conclusion acknowledged the reasonableness of many of the judicial innovations, for example, modification to the jurisdictions of the various courts which created overlapping and competing jurisdiction,⁵⁷ and legal fictions, which judges created when a legislative remedy was wanting.⁵⁸ As a result, one is not left with the sense of moral indignation that later writers would express about this matter.

Sedgwick's discussion of this topic was more brief. He claimed that "the only remains of judicial power by Parliament consists in its capacity to pass bills of attainder, and of pains and penalties."⁵⁹ Furthermore, he claimed "as a general rule, equally true of England and of the United

52 Blackstone (n 19) 259–60.

53 Compare: "Were it [the judicial power] joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." Charles de Secondat Montesquieu Baron de, *The Spirit of the Laws*, vol 1 (Thomas Nugent tr, Hafner 1949) 152.

54 Dwarris (n 20) 780–990.

55 Dwarris and Amyot (n 21) 708.

56 Dwarris (n 20) 711–12.

57 *ibid* 792–96.

58 His examples included the development of various types of trusts, and mechanisms for transferring stocks. *ibid* 793–97.

59 Sedgwick (n 29) 146.

States, that while the law-making power is exclusively confined to one branch of the government, that department neither construes nor enforces its own acts. The enactment of laws belongs to the legislature, their construction and application to the judiciary”⁶⁰

Maxwell did not discuss the separation of powers explicitly, but implied that it was significant when discussing the “lax” approach to the interpretation of ancient statutes which “has also been accounted for by the fact that in those times the dividing line between the legislative and judicial functions was feebly drawn, and the importance of the separation imperfectly understood.”⁶¹ The role was implicit in his strong claims about the binding nature of text that yields a plain meaning.

Wilberforce addressed the point more explicitly: “The laws of England draw a clear and broad distinction between the legislative and judicial functions. As it is the work of the Legislature to express the will of the nation, and to enact or declare what for the future shall be the law of the country, so it rests solely with the judges to interpret what is so expressed, and to give that law its full operation.”⁶²

In the American treatises, the claim was often supported with reference to the Constitution. Sutherland, for example, claimed that the separation of the executive, legislature and judiciary, as required by the Constitution, “is deemed to be of the greatest importance—absolutely essential to the existence of a just and free government.”⁶³ The statement was supported by citations and lengthy quotes from Montesquieu, Paley and Blackstone—revealing yet again the English character of this conception. The claim was made on the first page of his treatise, and this early mention suggests that the idea held a certain amount of primacy for Sutherland. It was regarded as a starting point for understanding the law governing statutory interpretation.

There are obvious differences between the English and American constitutions, and as a result, American treatises had more to say about the separation of powers. However, the concept, as it pertained to legislation, was discussed in the treatise as a matter of central importance to ensure democratic fidelity in both England and America. Whilst Dwarris’ treatment of the topic did not comport with the textualist view, the subsequent treatises did.

60 *ibid* 146–47.

61 Maxwell (n 4) 230.

62 Wilberforce (n 31) 9.

63 Sutherland (n 7) §2.

3.5 The Sophisticated Plain Meaning Approach to Statutory Text

The sophisticated plain meaning approach to text can be summarised as follows. Words are to be understood in their ordinary meaning in accordance with the rules of grammar, and technical words are to be understood in their technical sense. The words are to be understood in the context of the entire statute and within the context of related statutes and case law. Plain meaning is binding unless the outcome is sufficiently absurd to justify the rule against absurdity. Ambiguities are resolved through the application of the many textualist-compliant common law rules and presumptions that developed over time through adjudication.⁶⁴

As with the other components of textualism, this collection of rules underwent some development as it moved through the treatises in the nineteenth century. Generally speaking, Dwarris was more of an observer than the authors that followed, and less normative. He began his discussion of interpretation by noting that “[t]he general and received doctrine certainly is, that an act of Parliament, of which the terms are explicit and the meaning plain, cannot be questioned, or its authority controlled, in any Court of Justice.”⁶⁵ He cast doubt on this claim through considering whether a statute could violate fundamental “constitutional” principles, for example by making someone a judge of his or her own cause. In the first edition he cited Plowden, with approval, for the proposition that “[a] thing, which is within the intention of the makers of a statute, is as much within the statute, as if it were within the letter.”⁶⁶ This statement was qualified by a quote from Story in the second edition: “Although the spirit of an instrument is to be regarded no less than its letter, yet the spirit is to be collected from the letter. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case, for which the words expressly provide, shall be exempted from their operation”⁶⁷ With subtle changes like this, one can observe a move towards the textualist position.

For Dwarris, clear provisions were to be dealt with in isolation: “If the words of a statute are plain, they must be strictly followed; but if they are ambiguous, the whole context must be looked to, for their explanation.” In this regard, Dwarris’ position is contrary to the approach of modern textualists, who always read a provision in context. For Dwarris, the whole context included “the whole and every part of a statute taken and compared together.”⁶⁸ Furthermore, it is “an established

64 Chapter 1, Section 1.4.4.

65 Dwarris and Amyot (n 21) 484.

66 Dwarris (n 20) 691.

67 Dwarris and Amyot (n 11) 561–62.; from Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (Thomas Clark 1835) 10.

68 Dwarris (n 20) 698. Footnotes omitted.

rule of law, that all acts *in pari materia* are to be taken together, as if they were one law”⁶⁹ This is consistent with the modern view.

Dwarris noted, separately, that the rules of grammar were rules of construction,⁷⁰ and that words of reference and relation in conjunction with the rules of grammar provide for a ranking or hierarchy of concepts that must be followed.⁷¹ This is entirely consistent with Scalia’s “syntactic canons”, the most important of which is the Grammar Canon: “words are to be given the meaning that proper grammar and usage would assign.”⁷²

The canons of ordinary and technical usage also appeared in Dwarris’ first edition. In his enunciation of the rule of ordinary usage, one can observe the similarity with passages by Blackstone and Kent. Dwarris said the following, which was cited to Coke’s Reports:

The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use; for *jus et norma loquendi* is governed by usage; and the meaning of words, spoken or written, ought to be allowed as it has constantly been taken and the meaning of words, spoken or written, ought to be allowed to be as it has constantly been taken to be:—*loquendum est ut vulgus*.

If terms of art are used, they are to be taken in their technical sense.”⁷³

The Latin maxim appears in *Wrote v Wigges*,⁷⁴ but it settles only one of several issues in the case. This passage bears a stronger resemblance to the words of Blackstone:

Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. ... Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade and science.⁷⁵

Kent addressed this topic as well. He chose not to engage with the issue of grammar, claiming that “[t]he words of a statute are to be taken in their natural and ordinary signification; and if technical words are used, they are to be taken in a technical sense.”⁷⁶

In this series of passages one can observe the evolutionary precursors to a core textualist

69 *ibid.* Scalia and Garner use very similar language: “Statutes *in pari materia* are to be interpreted together, as though they were one law.” Scalia and Garner (n 1) 252.

70 Dwarris (n 20) 704–05.

71 Dwarris (n 20).

72 Scalia and Garner (n 1) 140.

73 Dwarris (n 20) 702.

74 4 Co Rep 45 b.

75 1 Blackstone 59.

76 1 Kent 432.

rule of interpretation. The development continued in Dwarris' second edition, in which grammatical usage became conjoined with the concept of ordinary usage: "The correct rule is to construe acts of Parliament according to their grammatical and natural sense unless the context show clearly that a different sense was intended."⁷⁷ Dwarris cited *R v Ditchett* for this rule.⁷⁸ A search of the nominative reports suggests that the concept of grammar conjoined with ordinary or natural meaning became fairly common for statutes, contracts, wills and deeds by the 1830s.⁷⁹ The concept of ordinary usage predates the nineteenth century, but the textualist concept of ordinary, grammatical meaning as a rote description is a nineteenth century development.

Among the well-known Latin maxims, *reddendo singula singulis*, and the rule against providing for a *casus omissus* appeared in Dwarris' first edition, while *noscitur a socio* and *ejusdem generis* were added to the second edition.⁸⁰ All of these maxims appear in *Reading Law*.

The canon of *contemporanea expositio* was also put forward via a quote from Coke: "great regard ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it; because they were best able to judge of the intention of the makers at the time when the law was made."⁸¹ This was a method of resolving ambiguity for Dwarris and not a principle of universal application. Because this was a rule of limited application, it was not equivalent to the Justice Scalia's originalism canon.

The mischief rule was also stated in Dwarris' first edition, and it would be repeated in the subsequent nineteenth-century treatises. One could argue that this represents a point of differentiation between the Victorian era treatises and the modern American textualists. In *Reading Law*, Scalia and Garner stated that "[t]he prevailing view today is that the mischief rule represents 'the last remnant of the equity of the statute'".⁸² This rule dates back to Coke and co-existed with the notion that the spirit of the law was, at times, at variance with the letter of the law. However, the

⁷⁷ Dwarris and Amyot (n 21) 577.

⁷⁸ 9 B & C 176 (1829) per Parke J at 186: "My judgment may have the effect of defeating the intention of the framer of that Act. But it is a very safe rule of construction to adhere to the words of an Act of Parliament in their grammatical and natural sense, unless it appears clearly from the context that they were intended to be used in some other sense."

⁷⁹ See for example *R v Ringstead* (1929) 9 B & C 219, 223, regarding a devise; *Becke v Smith* (1836) 2 M & W 191, 195 per Parke B; *Garland v Carlisle* [1837] IV Cl & Fin 639 per Coleridge J at 705–06; *Paddon v Bartlett* 3 Ad & E 884 per Tindal J at 895; *Wilson v Wilson* (1851) 1 Sim (NS) 298–99 per Lord Cranworth LC; and *Jones v Harrison* (1851) 3 Ex 328, per Pollock, Parke & Martin BB.

⁸⁰ Dwarris (n 20). "*Noscitur a socio*" has typically been spelled *noscitur a sociis* in other treatises; *casus omissus*, 711; *ejusdem generis*, 657.

⁸¹ *ibid* 693. This was cited to 2 Inst 11, 136 & 181.

⁸² Scalia and Garner (n 1) 434–35, quoting; John H Baker, *An Introduction to English Legal History* (4th edn, OUP 2002) 212.

nineteenth-century treatise writers defined the mischief rule in more circumscribed terms. The rule entitled a judge to consider the prior state of the law, and a subsequent change in the law. Although “recourse may be had to the title and the preamble; as these ... may often serve to show the general scope and purport of the act, and the inducements which led to its enactment. The remedy is to be gathered from the act itself.”⁸³ The rule did not authorize judges to consider sources that a textualist would find problematic. Justice Scalia drew inferences based on the change a statute made to the prior law on numerous occasions.⁸⁴

Finally, there was the rule against absurdity. Dwarris claimed that the rule was only available in cases of ambiguity, however, elsewhere in the treatise stated that “if words literally understood, bear only very absurd signification, it is necessary to deviate a little from their primary sense”⁸⁵

One can see the foundations of the sophisticated plain meaning approach in Dwarris’ treatise. However, he was equivocal with respect to plain meaning and some of the rules he posited were not textualist-compliant. For example, a remedial statute could be extended to include “persons”, “things”, “places”, and “times” not mentioned in the statute.⁸⁶ It was also permissible to interpret “and” to mean “or” and vice versa without the high bar of the scrivener’s error rule.⁸⁷ There were some important differences between Dwarris’ approach and the textualist approach.

Sedgwick was more strict with text. When the text was plain, there was no room for the rule against absurdity to apply:

If the courts could give to phrases new, unusual, forced, or strained interpretations; if they could insert a word here or strike out a word there,—all idea of conforming to the legislative intent would be lost, and cases turning on the construction of doubtful statutes would soon come to be decided either on judicial notions of policy or on the peculiar equities of the particular matter in hand.⁸⁸

When the words were not plain, Sedgwick summarised the rules as follows:

The intention of the legislature should control absolutely the action of the judiciary

83 Dwarris (n 20) 696–97.

84 In *Immigration and Naturalization Service v. Doherty* 502 US 314 (1992), Justice Scalia noted the prior law and a change made in compliance with a UN convention at 332, then considered the consequence of alternate interpretations at 339–41. In *Sekhar v United States* 186 L Ed 2d 794, 796 (2013), Justice Scalia considered the “genesis of the Hobb Act” at length. He concluded that “absent other indication, ‘Congress intends to incorporate the well-settled meaning of the common-law terms it uses.’” Quoting *Neder v. United States* 527 US 1, 23 (1999).

85 Dwarris (n 20) 756.

86 *ibid* 721–23.

87 *ibid* 772.

88 Sedgwick (n 29) 260.

The means of ascertaining that intention, are to be found in the statute itself, taken as a whole and with all its parts,—in statutes on the same subject, antecedent jurisprudence and legislation, contemporaneous and more recent exposition, judicial construction and usage; and to the use of these means, and these alone, the judiciary is confined. No other extrinsic facts are in any way to be taken into consideration.⁸⁹

Reasonable interpretations were to prevail over unreasonable or absurd interpretations as a means of resolving ambiguity only.⁹⁰ The mischief and the prior state of the law were legitimate considerations, and by implication, the purpose could be considered, as deduced from the words of the statute.⁹¹ Prior judicial construction was generally binding and customary usage was a consideration, as was contemporaneous exposition.⁹² As with Dwarris, contemporaneous exposition was a means of resolving ambiguity rather than a rule of constant application. Whilst there is a great deal of overlap, for Sedgwick there was no equivalent to the doctrine of scrivener's error.⁹³ In this regard, Sedgwick was too strict with text to align with the modern textualist position, even though he shared the modern textualist preoccupation with activist judging.

Maxwell began with a concise explanation of the proper approach to interpretation:

it is to be assumed in the first instance, that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be construed according to the rules of grammar; and from this presumption it is not allowable to depart, unless it appears, upon an examination of the rest of the law to which the passage under consideration belongs, that they were used in a different sense.⁹⁴

The provision in the context of the whole statute,⁹⁵ statutes *in pari materia*,⁹⁶ and the prior state of the law⁹⁷ formed the context that judges were to consider. The language of a statute was to “be understood in the sense which best harmonizes with the subject matter.”⁹⁸ This was posited as the principle of “beneficial construction” which best suppressed the mischief, and required reasonable or convenient outcomes over unreasonable, inconvenient or absurd results.⁹⁹ There was an extended

89 *ibid* 379.

90 *ibid* 260–298.

91 *ibid* 241.

92 *ibid* 251–260.

93 *ibid* 297–306.

94 Maxwell (n 4) 2–3.

95 *Ibid* 25: “construction is to be made of all the parts together, and not of one part only by itself.”

96 *ibid* 27–28: under the heading of “Earlier, Later—Analogous Acts”

97 *ibid* 18: “... phrases and sentences are to be sought in the context, read, when necessary, by the light which the history of the enactment may throw upon it.”

98 *ibid* 50.

99 *ibid* 166 & 179.

discussion of the rule against absurdity, or “modification of the language to meet the intention.”¹⁰⁰

Maxwell concluded that:

the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text. He must be satisfied, however, on solid and legitimate grounds, that the language thus treated does not really express the intention, and that his amendment does.

This is consistent with the modern textualists’ rule against absurdity, which is also referred to as scrivener’s error.¹⁰¹

The usual Latin maxims were put forward, including *generalia specialibus non derogant*,¹⁰² and *ejusdem generis*.¹⁰³

The essential elements of the sophisticated plain meaning approach to statutory text are present in this treatise. The modern textualist collection of rules sits somewhere between Dwarris’ prolix nuance and Sedgwick’s rigid literalism. One can even find an approximation of the originalism canon in Maxwell’s description of the canon of contemporaneous construction:

the meaning publicly given by contemporary, or long professional usage, is presumed to be the true one, even when the language has etymologically or popularly a different meaning. Those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted, than their descendants, with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions.¹⁰⁴

It is not entirely clear that one should always seek to interpret in a manner harmonious with the contemporary understanding based on this rule, but it was more than a means for resolving ambiguity: this rule could overcome plain meaning.

Whilst Bishop chose a structure and order of ideas for his treatise that seems rather inelegant in comparison to the prior treatises, all of the same basic ideas were expressed.¹⁰⁵ “Where the legislative meaning is plain, there is, not only no occasion for rules to aid the interpretation, but it is contrary to the rules to employ them.”¹⁰⁶ “[C]ommon, popular meanings” should apply unless the

100 *ibid* 209–26.

101 Scalia and Garner (n 1) 234: “No one would contend that the mistake cannot be corrected if it is the sort sometimes described as ‘scrivener’s error.’”

102 Maxwell (n 4) 157.

103 *ibid* 297.

104 *ibid* 271.

105 Bishop structured the work around the parts of a statute and types of statutes. As a result, more fundamental rules were placed within discussions of more narrow, technical elements.

106 Bishop (n 6) §72.

context indicates that a technical or legal meaning should apply.¹⁰⁷ The courts should interpret “[a]ll its parts, and all acts, though made at different times or even expired or repealed, and the entire system of laws, and the common law, touching the same matter, must be taken together.”¹⁰⁸ It is assumed that the court knows the prior law and the changes to the law, and the court is entitled to consider the mischief the law was enacted to affect, and interpret in a manner that is harmonious with the intent of the law.¹⁰⁹ Only a few of the Latin maxims appear including *expressio unius* and *leges posteriores*.¹¹⁰ Finally, reasonable interpretations should prevail over unreasonable ones¹¹¹ and indeed, “interpretation should lean strongly to avoid absurd consequences, and even great inconvenience”.¹¹²

In addition to the rule about *contemporanea expositio*, which Bishop referred to as contemporaneous interpretation, Bishop also said the following: “If the statute is old, or if it is modern, the court should transport itself back to the time when it was framed, consider the condition of things then existing, and give it the meanings which the language as then used, and the other considerations, require[.]”¹¹³ This was a rule of constant application that is entirely consistent with the originalism canon of the modern American textualists.

Sutherland summarised the basic rules for interpreting statutory text as follows:

The question for the court is, what did the legislature really intend to direct; and this intention must be sought in the whole of the act, taken together, and other acts *in pari materia*. If the language be plain, unambiguous and uncontrollable by other parts of the act, or other acts or laws upon the same subject, the courts cannot give it a different meaning to subserve public policy or to maintain its constitutionality.¹¹⁴

Furthermore, statutes were to be understood in their grammatical sense,¹¹⁵ and “in the absence of anything in the context to the contrary—common or popular words are to be understood in a popular sense: common-law words according to their sense in the common law; and technical words, pertaining to any science, art, or trade in a technical sense.”¹¹⁶ Effects and consequences are relevant: “statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience, and to oppose all prejudice to

107 *ibid* §96, 99–110.

108 *ibid* §82: quoting Lord Mansfield in *Rex v Loxdale* 1 Bur 445, 447.

109 *ibid*.

110 *ibid* §249 & §126.

111 *ibid* §93.

112 *ibid* §82.

113 *ibid* §75.

114 Sutherland (n 7) x, §238.

115 *ibid* §258.

116 Sutherland (n 7).

public interests.”¹¹⁷

The standard Latin maxims were put forward,¹¹⁸ and a much more limited rule of contemporaneous construction was posited than that of Bishop, whereby a construction “sanctioned by long acquiescence on the part of the legislature and judicial tribunals” and “long acted upon by the inferior courts” could be relied upon when the provision in context did not provide clarity.¹¹⁹ Contemporaneous exposition was subject to disagreement within these treatises.

Black’s basic claims were sufficiently consistent with Sutherland’s that reciting them would be redundant.

Scalia and Garner’s treatise incorporates the same basic set of rules. With respect to certain issues about which there was disagreement in the Victorian treatises, Scalia and Garner took sides. This is the case for the originalism canon and the claim that all statutes are to be treated the same (as opposed to interpreting some statutes liberally and others strictly).¹²⁰ Despite taking the basic view that all statutes are to be treated the same, the modern textualists still apply presumptions, like the rule of lenity, which provides room to argue that some statutes are treated more strictly than others. The opposing points of view are not so far apart. The modern textualist approach has incorporated two grammatical canons—the series qualifier, the last antecedent canons, and the nearest reasonable referent canon—which do not appear in the older treatises. There has been some evolution. However, these two canons comport with the basic rules of grammar. They are similar to *ejusdem generis* insofar as they provide ways of parsing the words in a sentence in order to connect the meaning of related words. They represent a modest addition to the collection of rules assembled in the nineteenth century, rather than a point of departure from the nineteenth century position.

The sophisticated plain meaning approach to statutory text was a Victorian era development. Many of the individual rules can be traced back further, whether to Bacon, Coke or the Roman Digest. However, the collection of canons as unified and bounded by textualist doctrine, using plain meaning as the fulcrum and the presumption that ordinary, grammatical meaning is the starting point, developed in the nineteenth century.

117 *ibid.*

118 *ibid.* *Ejusdem generis*, §268–73; *Reddendo singula singulis*, §282; *Expressio unius*, §204 & §269.

119 *ibid.* §307.

120 Sutherland claimed that statutes intended to correct a defect in the prior law were to be “liberally construed to suppress the evil and advance the remedy.” *ibid.* §207. This was a restatement of the often repeated canon which held that remedial statutes were to be liberally construed. See for example Dwaris and Amyot (n 21) 614; Maxwell (n 4) 203. Sedgwick was sceptical about the efficacy of this concept. Sedgwick (n 29) 318–19.

3.6 Conclusion

This chapter set out to demonstrate that three of the core elements of modern American textualism—the faithful agent view of judging, the separation of powers, and the sophisticated plain meaning approach to statutory text—were nineteenth century developments; and the development can be observed in the nineteenth century treatises on statutory interpretation. Whilst Dwarris posited the basic positions, his approaches to all three features were too nuanced to align with the modern textualist view. Sedgwick set out a clear description of the strict separation of powers that was maintained in the subsequent treatises; however, his approach to text was too rigid with respect to plain meaning, and he posited a residual creative/legislative role for the judge for unclear text. With respect to these latter two elements, it was Maxwell who put forward an approach that aligned neatly with the modern textualist position. Thus it is in the 1870s that these three elements came together in a treatise on statutory interpretation. These works were a considered reflection of judicial practice at the time, and it is conceivable that there was a lag between the beliefs and practices of judges and the contents of the treatises. It seems likely that many judges in England and America had adopted the textualist approach, or something very close to it, earlier. It would be fair to say that, with respect to these three elements, the doctrine emerged over the first half of the nineteenth century, and was crystallised in the treatises by the 1870s. The remaining core element of textualism, the exclusionary rule, will be considered in the next chapter.

Chapter 4

The Exclusionary Rule

4.1 Introduction

This chapter will address three matters. First, the development and evolution of the exclusionary rule will be examined from its purported beginnings in England and America through to the turn of the twentieth century. Then, the role of the treatise in the development of textualism will be considered. Finally, the development of textualism will be contextualised within the available scholarly literature.

The exclusionary rule is the rule which forbids recourse to legislative history—documents pertaining to parliamentary and congressional deliberations prior to enactment—as aids to statutory interpretation. Legislative history includes records of statements made in the legislature, journals of proceedings in the legislature, bills, debates in committee, reports of committees, commissioners’ reports, and any other documents generated by law-makers in the law-making process. Given the breadth of material covered, it is a rule that is broad. Given the strict stance that textualists take towards these materials, it is also a very strong rule.

This rule is the most prominent feature of textualism. The other core principles and practices are widely, although not universally, accepted in most common law jurisdictions. It is the exclusionary rule that makes textualism stand out as a unique doctrine of statutory interpretation.

In the discussion that follows, I comply with the standard practice within doctrinal legal scholarship of explaining the basic issue being adjudicated when helpful to understand a particular judicial statement, insofar as space permits. I ask for the reader’s understanding for not consistently providing the context. For textualists, the exclusionary rule applies regardless of the facts and the nature of the textual problem being adjudicated. Strictly speaking, the context is not relevant to the rule.

4.2 Early Judicial Encounters with Legislative History

The nineteenth century treatise authors presumed that particular types of material could not be considered unless there were prior cases demonstrating acceptability. The contemporaneous construction rule permitted reliance on how an older statute was understood “by the members of the

legal profession who lived at or near the time.”¹ Judges were also entitled to take judicial notice of historical facts at the time of a statute’s enactment.² However the notion of judicial notice of historical facts was vague, particularly with respect to scope. There was no explicit rule governing what constituted a legitimate source of historical facts. As one would expect in a common law system, different judges dealt with the rule differently. There were judges who felt that the statute must speak for itself. In so doing, they followed the principle of minimalism and took the view that one could not venture beyond the statute regardless (although they might consider the writings of canonical legal scholars such as Coke and Blackstone). There were also judges who felt the need for further information in the face of unclear text. These judges applied the rule more permissively, and occasionally relied on documents like commissioners’ reports, Bills, and petitions to the legislature, often by way of asserting an exception, for example, under the mischief rule.³

Judges were deemed to have knowledge of the law, and had to take notice of enacted statutes. Parliamentary process was therefore relevant when statutory issues arose in court proceedings.⁴ It is consequently unsurprising that arguments supported by commissioners’ reports and proceedings in the legislature were heard in court in England with a certain amount of regularity in the late eighteenth and early nineteenth centuries.⁵ In England, the practice dates back to at least the 1760s. Statements made in the House of Commons and inferences drawn from changes made to a Bill were relied upon in *Entick v Carrington*,⁶ and changes made to a bill as it

1 Edward Wilberforce, *Statute Law: The Principles Which Govern the Construction and Operation of Statutes* (Stevens & Sons 1881) 142.

2 See for example Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (William Maxwell & Sons 1875) 19: “the interpreter must, in order to understand the subject-matter and the scope and object of the enactment, call to his aid all those external and historical facts which are necessary for the purpose.” Also see JG Sutherland, *Statutes and Statutory Construction* (Callaghan & Co 1891) 382–83.

3 Relevant cases will be discussed shortly.

4 The Victorian era treatises noted that the journals of the Houses were admissible as evidence of a statute’s enactment. See for example Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (J S Voorhies 1857) 68–70.

5 See for example, *Campbell v Hall* (1774) Lofft 655, 694–95; *Donaldson v Beckett* (1774) 2 Bro PC, 141–43; *Gosling v Lord Weymouth* (1778) 2 Cowper 844, 884; *R v Thomas Amery* (1788) 2 TR 515; *The Earl of Lonsdale v Littledale* (1793) 2 H Bl 267, 302; *Lloyd v Petitjean* (1839) 2 Curt 251, 261.

6 (1765) 2 Wils KB 275. The lawfulness of a search warrant granted by the secretary of state under Statute 24 Geo 2 was at issue. The majority of the judgment of Lord Chief Justice Camden centres around statements made in the House of Commons, and inferences based on changes made to the bill. The following is but one example:

Whoever attends to all these observations will see clearly, that the secretary of state in those days never exercised the power of committing in his own right; I say, in his own right, because that he did in fact commit, and that frequently even at the time when the matter of the Habeas Corpus was agitated in the 3d of King Charles the 1st, will appear from a passage in the *Ephemeris Parliamentaria*, page 162. This passage, when it comes to be attended to, will throw great light upon the present enquiry. It is sufficient of itself to convince me, from what source this practice first arose. It was from a delegation of the king’s royal prerogative to commit by his own power, and from the king devolved in point of execution upon the secretary of state. The passage I allude to is a speech of secretary Cook.

moved through Parliament were relied upon in *Millar v Taylor*.⁷

Prior to 1783, it was illegal to publish reports on deliberations in the houses of Parliament, although it had occurred for centuries.⁸ Originally, false names were used to protect the publishers, but reports with proper names commenced in 1771.⁹ The reporters were partisan: their reports were unreliable. Nonpartisan reporting commenced in 1803.¹⁰ In the US, systematic private publication of the congressional floor debates commenced in 1834.¹¹

The available records indicate that the libraries at some of the Inns of Court contained extensive collections of the journals and reports of debates of the Houses of Parliament by the 1800s.¹² These materials were becoming more widely available around this time, and with the benefit of hindsight, it seems inevitable that judges would develop rules governing their use. However, the treatises on statutory interpretation did not discuss rules of statutory interpretation governing legislative history until the second half of the nineteenth century.¹³

This detail deserves emphasis. The orthodox belief is that reliance upon Hansard was forbidden in the courts of England beginning with the case of *Millar v Taylor* in 1769. However, the first treatise in which this claim appeared was Craies', published in 1907.¹⁴ Over time this claim was repeated in journal articles and textbooks, particularly after World War II. This claim also appears in *Reading Law*.¹⁵

In *Millar v Taylor*, Mr Justice Willes said “[t]he sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise.”¹⁶ However, this statement was an introduction to the legal analysis upon which the decision was based. The issue concerned whether or not there was

7 (1769) 4 Burr 2303.

8 William Law, *Our Hansard* (Sir Isaac Pitman & Sons 1950) 12–13.

9 *ibid.*

10 *ibid.* 13.

11 Elizabeth Gregory McPherson, ‘Reporting the Debates of Congress’ (1942) 28 QJ Speech 141; Zon Robinson, ‘Are Speeches in Congress Reported Accurately?’ (1942) 28 Q J Speech 8.

12 An 1806 catalogue of the Inner Temple Library contained debates from the houses of Parliament from 1640–1801. Sir Soulden Lawrence, *A Catalogue of the Printed Books and Manuscripts in the Library of the Inner Temple* (C & W Galabin 1806). An 1845 Middle Temple catalogue had debates in the House of Commons from 1667–1694, the debates in Parliament published by Johnson in 1787 and Hansard’s Debates from 1803–1844. *A Catalogue of the Library of the Middle Temple*, vols I & II (Middle Temple 1845).

13 See for example, Hans W Baade, ‘Original Intent in Historical Perspective: Some Critical Glosses’ (1990) 69 Tex L Rev 1001.

14 I have not found any earlier reference in secondary literature.

15 Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012) 369.

16 (n 7) 2332.

copyright in perpetuity at common law prior to the enactment of the Statute of Anne.¹⁷ A few paragraphs after his now infamous statement, Mr Justice Willes said the following:

The preamble is definitely stronger in the original bill, as it was brought into the House, and referred to the committee.

But to go into the history of the changes the bill underwent in the House of Commons.— It certainly went to the committee, as a bill to secure the undoubted property of copies for ever. It is plain, that objections arose in committee, to the generality of the proposition; which ended in securing the property of copies for a term; without prejudice to either side of the question upon the general proposition as to the right.

By the law and usage of Parliament, a new bill cannot be made in a committee: a bill to secure the property of authors could not be turned into a bill to take it away. And therefore this is not to be supposed, though there had been no proviso saving their rights.

What the Act gives with a sanction of penalties, is for a term; and the words ‘and no longer,’ add nothing to the sense; any more than they would in a will, if a testator gave for years. Yet, probably, these words occasioned the express proviso being afterwards added; from the anxiety of the university-members, who knew the universities had many copies. The University of Oxford had published Lord Clarendon’s History in three volumes, but about five years before; and had the property of the copy.¹⁸

Mr Justice Willes was the most junior judge on a panel of four. His opinion was followed by that of Mr Justice Aston, who concurred with Mr Justice Willes and made further comments on the parliamentary deliberations:

This Act was brought in at the solicitation of authors, booksellers and printers, but principally of the two latter; not from any doubt or distrust of a just and legal property in the works or copy-right, (as appears by the petition itself, pa. 240, vol. 16, of the Journals of the House of Commons;) but upon the common-law remedy being inadequate, and the proofs difficult, to ascertain the damage really suffered by the injurious multiplication of the copies of those books which they had bought and published. And this appears from the case they presented to the members at the time.¹⁹

In a vigorous dissent, Mr Justice Yates stated the following:

After examining the several clauses and expressions contained in it, I can not but conclude that the Legislature had no notion of any such things as copy-rights, as existing for ever at common law: but that, on the contrary, they understood that authors could have no right in their copies after they had made their works public; and meant to give them a security which they supposed them not to have had before. And that this was the idea of the Legislature, is plainly discoverable from the debate before it passed

17 8 Ann c 21 (1710).

18 (n 7) 2333–34.

19 *ibid* 2350.

into a law.

The booksellers petitioned, ‘that they might have their right secured to them.’ The committee expunged that word; and substituted ‘vesting,’ in the place of ‘securing,’ (as it had stood in the original bill:) and the House determined the title should be ‘For the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein Mentioned.’ And afterwards, when the Lords would have struck out the clause restraining the authors with regard to the price, they came to a conference. The Commons said, they thought it reasonable that some provision should be made, ‘that extravagant prices should not be set on useful books.’ And the Lords gave it up. It certainly appeared to the Legislature, that abstractedly from this statute, authors had no exclusive right whatever; and consequently, must be very far from having any pretensions to an eternal monopoly.²⁰

Finally, the then Lord Chancellor, Lord Mansfield, said the following in his opinion: “[t]he bill was brought in, upon the petition of the proprietors, to secure their property for ever, by penalties; An alteration was made in the committee, to restrain the perpetual into a temporary security.”²¹

All four judges in the panel relied on deliberations in Parliament in their opinions. This case is not a compelling authority for the proposition for which it has become famous, nor was it cited by a judge in support for the exclusionary rule prior to 1887, although the case was cited for various procedural and substantive issues throughout the nineteenth century.²² In 1854 counsel noted that the judges relied on legislative history in this case.²³ The first clear judicial statement indicating that the case stood for the exclusionary rule occurred in *Caird v Sime* in 1887.²⁴ In dissent, Lord Fitzgerald, stated that “[t]he rule so aptly expressed has always been enforced in this House. But, strangely enough, Willes, J., does, shortly afterwards in the same judgment, seem to offend against his own rule. He uses language which I quote as not inapplicable to the statute before us.”²⁵ Lord

20 *ibid* 2390–91. Justice Yates was absent. His opinion was conveyed orally by Aston J.

21 *ibid* 2405.

22 See for example *Gurney v Longman* (1807) 13 Ves Jr 493, re Crown granting exclusive right to publish; *Power v Walker* (1814) 3 M & S 7, re transfer of copyright; *Bramwell v Halcomb* (1836) 3 My & Cr 737 and *Chappell v Purday* (1841) 4 Y & C Ex 485, re procedure when seeking an injunction in copyright cases; *Chappell v Purday* (1845) 14 M & W 303, re right of foreign copyright holder to take action in England; *Novello v Sudlow* (1852) 12 C.B. 177, by counsel, that copyright was only governed by statute; *Thomas Eales Rogers v Rajendro Dutt, and Others* (1860) 8 Moo Ind App 103 re wrongful act that causes damage is actionable; *Dixon v London Small Arms Co Ltd* (1876) 1 QBD 384 by counsel in a patent case; *Tuck & Sons v Priester* (1887) 19 QBD 48 re copyright.

23 *Jefferys v Boosey* (1854) 4 HL Cas 815, by counsel for defendant at 874: “The Judges, in construing the 8th of Anne, in *Millar v. Taylor*, advert to its Parliamentary history, as brought in to secure copyright, and altered in its progress to destroy it. But without going upon such a ground of construction, it is legitimate to observe, from the statute itself, that it appears to have proceeded from the conflicting interests of readers and authors.” The judges, including Pollock CB and Coleridge, did not comment on this submission but cited *Millar* as an authority for issues pertaining to copyright law.

24 *Caird v Sime* (1887) 12 App Cas 326, 355.

25 *ibid*. At issue was whether delivering a lecture at a public university constituted publishing under the law of

Fitzgerald proceeded to make arguments based on Hansard.²⁶ Thus, the first reported judicial acknowledgement that *Millar v Taylor* stood for the exclusionary rule occurred in order to use the case for the opposite proposition.

Whilst one can find cases in which counsel made arguments based on legislative history from the 1760s through to the late nineteenth century,²⁷ the typical response was judicial silence—the judges did not acknowledge the argument. The cases were decided on other grounds. One could infer that the judges were following a rule. However, it cannot be the case that the rule was established by *Millar v Taylor*. At best, one could assert that after *Millar v Taylor* the judges appeared to be following a rule. It would be equally reasonable to conclude that, in the decades after *Millar v Taylor*, the judges did not find such arguments compelling for particular reasons in each particular case and chose only to discuss the arguments that were compelling. Judicial economy was the order of the day and most cases do not benefit from arguments based on legislative history.

Had this rule been regarded as an important rule of law, one would expect an explicit enunciation of it to appear in a judgment, at least on occasion. There are no such statements prior to 1834 in England.²⁸ Had the rule been widely known and strictly followed, one would expect opposing counsel to object when such arguments were made. One cannot find evidence of this until 1859, in the case of *Shrewsbury (Earl) v Scott*.²⁹

copyright.

26 *ibid* 357: Lord Fitzgerald relied on deliberations in the House of Commons to understand the Lectures Copyright Act 1835, 5 & 6 William IV c 65. “The bill as introduced in this House seems to have passed without debate, but in the Commons it met with considerable opposition on the broad ground, that if it was intended to shield public lectures from public inspection, it ought not to receive the sanction of Parliament. ... It ended in a compromise, by which words were added at the end of clause 5 providing that the Act should not extend “to any lecture delivered in any university or public school, or college, or on any public foundation, or by any individual, in virtue of or according to any gift, endowment, or foundation, and that the law relating thereto shall remain the same as if this Act had not been passed.” Lord Fitzgerald concluded that delivering a lecture constituted publication.

27 See (n 5). Also see *Smith v Powdich* (1774) 1 Cowp 182, 186; *Boulton & Watt v Bull* (1795) 2 H Bl 463, 472; *Veley v Burder* (1841) 12 Ad. & El. 265, 266; *Phillips v Pickford* (1850) 9 CB 459, 474; *Hilton v Eckersley* (1855) 6 El & Bl 47, 69–70; *Hodgkinson v Fernie* (1857) 2 CB NS 415, 485; *Long v Bishop of Cape Town* (1863) 1 Moo PC NS 411, 435; *Hamilton v Dallas* (1875) 1 Ch D 257, 264; and *Purcell v Sowler* (1877) 2 CPD 215, 217.

28 *Cameron v Cameron* (1834) 2 My & K 289; There is a New York Supreme Court case from 1818: *People v Utica Insurance Co* 15 Johns 358.

29 *Shrewsbury (Earl) v Scott* (1859) 6 CBNS 1, 213. A report of proceedings of a Committee of the House of Lords on a Bill was admitted “by consent of counsel on both sides” which suggests that a rule about admissibility was in place at this time. Byles J said “I do not think it is competent to a court of justice to make use of the discussions and compromises which attended the passing of the act; for, that would be to admit parol evidence to construe a record; but such discussions ... may legitimately serve as hints for suggesting a point of view from which when the provisions of the act are once regarded those provisions will of themselves appear harmonious and clear.”

4.3 Arguments in Support of Seventeenth Century Adoption of the Rule

Baade has made one of the most comprehensive defences of the claim that the rule was followed after *Millar v Taylor*. He argues that the rule was widely known and strictly followed in both the United States and England from the late eighteenth century onward based on statements made in the debates in the House of Representatives in the 1790s, the notoriety of *Millar v Taylor*, and a case from the New York Supreme Court in 1818.

The debates from the House of Representatives concerned whether or not the president should release to Congress documents pertaining to the negotiation of Jay's Treaty.³⁰ Representative Robert Harper stated that it was the "universal practice of Courts of Law, who, when called upon to explain acts of the Legislature, never resorted to the debates which preceded it—to the opinions of members about its signification—but inspected the act itself, and decided by its own evidence."³¹ Similar statements were made by Nathaniel Smith and William Smith during the same debate. Madison expressed the same point in a letter expressing a legal opinion about the constitutionality of a national bank in 1791, although previously, when debating the related bill, he had made arguments based on deliberations at the continental congress.³²

Millar v Taylor was an important case at the time in both England and America.³³ Based on its infamy, Baade believes it is reasonable to infer that the statement by Mr Justice Willes was known and accepted as law throughout the UK and the post-secession former American colonies. However, the case was regarded as important because of the substantive issues concerning copyright, and one can find extensive substantive analyses of this case which entirely ignore Mr Justice Willes' statement about statutory interpretation.³⁴ A straightforward reading of the judgment

30 Baade (n 13) 1010–11.

31 *ibid* 1010–20. 5 Annals of Congress 462 (1796). 1 Annals of Congress 1940–2012 (J. Gales ed. 1791) (reporting the debate preceding enactment of the Act of Feb. 25, 1791, ch. 10, 1 Stat. 191).

32 Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank, in 8 The Papers of Alexander Hamilton 97, 111 (H Syrett ed, 1965).

33 The case was cited widely in English courts, *supra* (n 177). According to Baade, Burrows published the case in advance of the Report in which it was formally published. Furthermore, "[i]n the equally famous United States copyright case of *Wheaton v. Peters* [33 US 591 (1834)], counsel for both sides assumed that *Millar v. Taylor* was familiar to lawyer members of the Philadelphia constitutional convention in 1787. This assumption is corroborated by James Madison's statement, in Federalist No. 43, that the copyright of authors 'has been solemnly adjudged in Great Britain, to be a right at common law.' The *Wheaton* majority also assumed that *Millar* was part of the corpus of the common law of the United States" Baade (n 13) 109.

34 See (n 22). Also see Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Hart, 2004) 174–90; James O Pierce, 'Anomalies in the Law of Copyright' (1879) 5 Southern L Rev n s 420, 422–30; Lyman Ray Patterson, 'The Statute of Anne: Copyright Misconstrued' (1966) 3 Harv J Legis 223; Robert Maugham, *A Treatise on the Laws of Literary Property* (Longman, Rees, Orme, Brown & Green 1828) 1–40.

would leave the impression that parliamentary deliberations were a permissible consideration rather than a prohibited one. With respect, Baade's inference is subject to reasonable doubt.

Baade also cites *People v Utica Insurance Co*,³⁵ an 1818 case at the New York Supreme Court in which legislative history was explicitly rejected. There was also an opinion of the Attorney General in 1823, which had persuasive authority as a quasi-judicial statement.³⁶ The relevant opinion implied that recourse to legislative history was not allowable when construing public acts by declaring an exception for private acts.³⁷ Thus there is some evidence suggesting that the exclusionary rule was known by lawyers in the early decades of the nineteenth century in America.

4.4 The Exclusionary Rule in the Treatises

Despite the evidence proffered, the exclusionary rule appeared in neither the first nor the second edition of Dwaris' treatise. The first clear enunciation of the rule was put forward in Sedgwick's treatise in 1857. He commenced his analysis by stating: "[w]e are not to suppose that the courts will receive evidence of extrinsic facts as to the intention of the legislature; that is, of facts which have taken place at the time of, or prior to, the passage of the bill."³⁸ In support, he quoted passages from a Pennsylvania State Court judgment from 1856, and from the Court of Appeals in New York from 1852, which stated explicitly that journals of proceedings of the state legislature were not to be considered as evidence of the meaning of statutory provisions.³⁹ He noted the mischief rule for which "very eminent judges take a sort of judicial cognizance of many extrinsic facts, in regards to which evidence certainly would not have been permitted, and which, indeed, could not perhaps be proved."⁴⁰ He then stated that times had changed, that "the business of legislation has become multifarious and enormous", resulting in the separation of the judiciary and the legislature; and that "any general theory or loose idea [of legislative intention] ... must be dangerous in practice." He proceeded to cite and discuss a US Supreme Court judgment, five House of Lords judgments, two Queen's Bench judgments and a Michigan State Court judgment, all setting out variations on the plain meaning rule.⁴¹ He concluded that "for the purpose of ascertaining

35 15 Johns 358 (NY Sup Ct 1818).

36 Arthur H Garrison, 'The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant' (2012) 76 Alb L Rev 217.

37 Opinion of Feb 21, 1823, in United States, *Opinions Of The Attorneys General of the United States, From the Commencement of Government Down to the 1st March, 1841* (Doc No 123, 26th Cong 2d Sess 1841).

38 Sedgwick (n 4) 241.

39 Sedgwick cited *Bank of Pennsylvania v Commonwealth*, 7 Penn State R 144 (1856); and *Newell v The People*, 7 NY 9 (1852). There were relevant earlier cases, but apparently Sedgwick was not aware of them.

40 Sedgwick (n 4) 241.

41 *Schooner Paulina's Cargo v The United States*, 7 Cranch 52 (1812); Lord Tenterdon in *Notley v Buck* (1828) 8 B & C 160 at 164; Lord Tenterdon in *Brandling v Barrington* (1827) 6 B & C 467 at 475; Bayley J. in *The King v*

the intention of the legislature, no extrinsic fact, prior to the passage of the bill which is not itself a rule of law or an act of legislation, can be inquired into or in any way taken into view.”⁴² It seems likely that Sedgwick’s position aligned with the predominant judicial view in the US federal courts at this time. As will be discussed shortly, the picture was far less clear in state courts.

The next treatise was by Maxwell in 1875. Maxwell expressed the rule as follows:⁴³

Reference is occasionally made to what the framers of the Act, or individual members of the Legislature intended to do by the enactment, or understood it to have done.⁴⁴ ... But the language of an Act can be regarded only as the language of the legislature, and the meaning attached to it by its framers or by members of parliament cannot control the construction of language when it becomes that of the Legislature. The intention of the Legislature can be collected from no other evidence than its own declaration, that is, from the Act itself; and, indeed, if any inference were to be drawn from comparing the language of the Act with that of its framers, it would be that the difference between the two was not accidental but intentional.

Whilst expressing the same principle, Maxwell acknowledged several cases in which inferences were drawn from the framers of statutes—contrary cases—two of which were recent. The case of *re Mew and Thorne* was downplayed by describing it, not as an exception, but as a case in which the judge called into aid historical facts “to understand the subject-matter and the scope and object of the enactment.”⁴⁵ Maxwell noted that Westbury LC cited his own speech introducing the relevant bill to Parliament while disavowing his personal understanding of the words of the statute that resulted from his involvement in its framing. This description ignores the fact that a commissioners’ report was relied upon under the mischief rule in this case.⁴⁶

In support of the exclusionary rule, Maxwell cited *Martin v Hemming*, *Cameron v Cameron*,

Inhabitants of Stoke Damerel (1827) 7 B & C 568 at 569–60; *King v Inhabitants of Ramsgate* (1827) 6 B & C 712 at 715; Lord Denman in *Green v Wood* (1845) 7 QB 178 at 185; Coleridge J in *The King v Poor Law Commissioners* 6 A & E 1 at 7; *King v Burrell* (1840) 12 A & E 468; *Lamond v Eiffe* (1842) 8 QB 910; *Everett v Wells*, 2 Scott N C 581; *Bidwell et al v Whitaker et al*, 1 Mich 469 (1850).

42 Sedgwick (n 4) 247.

43 Maxwell (n 2) 23.

44 The following cases were cited: Year Book of Ed 1 p. xxxi; *R v Wallis* (1703) 5 TR 379; *M’Master v Lomax* (1833) 2 My & K 32; *Mounsey v Ismay* (1865) 3 H & C 486; and *Drummond v Drummond* (1865) LR 2 Ch 45.

45 *Re Mew and Thorne* (1862) 31 LJ Bcy 87; Maxwell (n 2) 22.

46 At issue was s 159 of the Bankruptcy Act 1861. The then Lord Chancellor mentioned the speech to show that the framers drafted the law based on the problems with the prior law as described in the commissioners’ report on the Bankruptcy Act 1849. “[I]t will be found in the speech of the member of the House of Commons who introduced the bill of 1860, and then the bill that afterwards became law in 1861, the state of the law which I have described, and the complaints made of it both on the one ground and on the other, were fully brought before the attention of parliament. Now, I advert to these matters for the purpose of abiding by the rule that interpretation which is approved by Lord Coke, that law existing at the time of its introduction, and then the complaints or the evils that were existing or were supposed to exist, in that state of the law.” *Re Mew*, 89.

Hemstead v Phoenix Gas Co and *Salkeld v Johnson*.⁴⁷

Martin v Hemming is an unusual choice as an authority. A commissioners' report was submitted by counsel, but the motion for leave was settled on procedural grounds. Substantive argument was not discussed by the judge.⁴⁸ It is odd to suggest that this case supports a general, substantive rule.

In *Hemstead*, counsel argued that “the intention of the Commissioners, in recommending the change effected by this section ... seems to be scarcely borne out by the passage in the Report.” The judgment, *per curiam*, contained a single sentence: “In the language of the Act of Parliament there is no such limitation as that contended for; consequently there shall be no rule.” There was no suggestion that the report was an impermissible consideration. As with *Martin v Hemming*, it seems a stretch to draw a broad, general rule from this particular case.

Cameron v Cameron is a stronger authority. In a motion, counsel for the plaintiff sought an order to serve a subpoena to the defendant in Scotland, in accordance with the Service of Process out of the Jurisdiction Acts of 1832 and 1834.⁴⁹ These statutes enabled the court to make such order in “the United Kingdom of Great Britain and Ireland.” Counsel for the defendant discussed a motion heard by the “Late Lord Chancellor,” Lord Brougham, who “intimated that it was not the intention of Lord Plunkett, under whose auspices the measure was brought into Parliament, to extend its provisions to Scotland, and that such an extension would amount to a virtual repeal of one of the Articles of the Union.”⁵⁰ Lord Lyndhurst LC began his ruling by stating “What Lord Plunkett intended is, for the purpose of construing the Act, immaterial, for the words of the Act must speak for themselves.”⁵¹ The Lord Chancellor found the relevant provisions to be clear, and it is not obvious that this very brief ruling went beyond the plain meaning rule. This case can be regarded as

47 *Martin v Hemming* (1854) 10 Ex 478; *Cameron* (n 28); and *Hemstead v Phoenix Gas Light & Coke Company. Hemstead Et Uxor v Phoenix Gas Light & Coke Company* (1865) 3 H & C 745 [*Hemstead*]. Maxwell did provide some further examples to elaborate upon the specific aspects of the rule.

48 The plaintiff requested a bill ordering interrogatories prior to declaration by the plaintiff and pleading by the defendant. The plaintiff failed to prove the required urgent necessity. There was no explicit refusal to consider the Report of Common Law Commissioners. “I think it perfectly clear, that the 51st section points to the time of the declaration as the proper period for the delivery of the written interrogatories by the plaintiff, and to the time of the plea as the period when they are to be delivered by the defendant. Whether or not, according to the true construction of this section, the Court has power to allow them to be delivered at other times ... is immaterial for the present purpose, because I think that, upon these affidavits, that sort of case is not made out of extreme urgency, which, according to the principles laid down by the Court of Queen’s Bench in *Finney v. Beesley* (17 Q. B. 86), is necessary.” *Martin v Hemming*, (n 47) 487.

49 Service of Process out of the Jurisdiction (England and Ireland) Act 1832 (2 & 3 Will 4 c 33); Service of Process out of the Jurisdiction England and Ireland Act 1834 (4 & 5 Will 4 c 82).

50 *Cameron v Cameron, supra* (n 28), 291–292.

51 *ibid* 292.

a dialogue of sorts with the case of *M'Master v Lomax*, heard one year earlier, in which Lord Plucknett's intimations were relied upon.⁵²

*Salkeld v Johnson*⁵³ was an authority that clearly evidenced the exclusionary rule. A vicar alleged that he was due tithes, and the defendants claimed to be exempt because of s 1 of An Act for shortening the Time required in Claims of Modus decimandi, or Exemption from or Discharge of Tithes.⁵⁴ Counsel sought to rely on the recommendations in a report of the Real Property commissioners, which preceded the Act. In the words of Tindal J, "we are not at liberty to infer the intention of the legislature from any other evidence than the construction of the act itself."⁵⁵

Three of the cases cited dealt with commissioners' reports, despite the fact that Maxwell specifically named "framers" and individual members of Parliament when describing the rule. For Maxwell, the matter was governed by a single principle: commissioners' reports and debates in the Houses were alike. Maxwell had a stronger collection of authorities than Sedgwick, but he did not mention the strongest authorities that were available. There was a knowledge gap of sorts.

Hardcastle's treatise devoted several pages to the issue of legislative history, beginning as follows:

There is one matter which is not allowable to refer to in discussing the meaning of an obscure enactment, and that is what is sometimes called 'the Parliamentary history' of a statute, that is to say, the debates which took place in Parliament when the statute was under consideration; and the alterations made in it during its passage through committee, are 'wisely inadmissible to explain it.'⁵⁶

The "wisely inadmissible" phrase was a quotation from Lord Coleridge CJ in *R v Hertford College*.⁵⁷

We are not, however, concerned with what parliament intended, but simply with what it has said in the statute. The statute is clear, and the parliamentary history is wisely inadmissible to explain it if it is not; but in this case, if it could be referred to, it would appear beyond all controversy *Parliamentum voluisse quod dicit lex*. [Parliament intended what the law says].

Note that this case is from 1878, relatively late in the century. No authority was cited for the notion

52 (n 44).

53 (1848) 3 Exch 273.

54 2 & 3 W 4 c 100.

55 At 757.

56 Henry Hardcastle, *A Treatise on the Rules Which Govern the Construction and Effect of Statutory Law* (Stevens & Haynes 1879) 56.

57 (1878) 3 QBD 693, 707.

of inadmissibility, and it was a concept that rarely arose earlier in the century.⁵⁸

In support of his claim about reference and admissibility, Hardcastle also cited *Green v The Queen*, a case where historical facts that existed at the time of enactment were disregarded because of the plain meaning rule.⁵⁹

Hardcastle also quoted Pollock CB in *Attorney General v Sillem*:⁶⁰

No Court can construe any statute, and least of all a criminal statute, by what counsel are pleased to suggest, were alterations made in committee by a Member of Parliament, who was ‘no friend of the Bill,’ even though the Journals of the House should give some sanction to the proposition. This is not one of the modes of discovering the meaning of an Act of Parliament recommended by Plowden, or sanctioned by Lord Coke or Blackstone.

The reference to Coke, Plowden and Blackstone is significant. This was the closest any English judge came to citing authority for the exclusionary rule at this time. As discussed earlier, all three of these historic scholars endorsed a non-textualist view of judging. Sedgwick’s effort to rehabilitate Blackstone was part of a larger pattern.⁶¹ The ideas of many of the scholars from prior times were interpreted so as to cohere with the emerging textualist doctrine of the nineteenth century.

Hardcastle cited none of the cases cited by Sedgwick and only a few of the cases cited by Maxwell in support of his claims about the exclusionary rule. Hardcastle also chose to address commissioners’ reports separately from proceedings in the Houses.⁶² He cited *Salkeld v Johnson*⁶³ and *Farley v Bonham*⁶⁴ for the proposition that it was not “usual to refer to any reports of commissioners or such like documents, to which the enactment may be supposed to owe its origin.”⁶⁵ The choice of words is rather odd given the strong statement by Tindal CJ in *Salkeld v Johnson*, although this was perhaps influenced by Lord Denman’s reliance on a commissioners’ report in *Fellows v Clay*.⁶⁶

Hardcastle’s distinction between commissioners’ reports and proceedings in Parliament was

58 *Shrewsbury* (n 29) appears to be such a case.

59 (1876) 1 App Cas 513.

60 2 H & C 521, 521–22; from Hardcastle (n 56) 56.

61 See Chapter 3 at 65–66.

62 Maxwell regarded the materials as covered by the same principle. Maxwell (n 2) 23–24.

63 (1848) 3 Exch 273.

64 (1861) 30 L J Ch 239. Both cases are cited by Maxwell in his elaboration of the exclusionary rule.

65 Hardcastle (n 56) 56. Maxwell cited both of these cases to elaborate upon the rule against reliance on legislative history.

66 (1843) 3 Gale & D 407. This was the same commissioners’ report that was rejected in *Salkeld v Johnson*.

apt. The exclusionary rule developed in a manner that distinguished between these two sources and treated them differently in the twentieth century. Meanwhile, with the cases put forward by Hardcastle, the exclusionary rule was supported by a compelling set of cases, and thus it reached something akin to scholarly maturity.

Wilberforce's treatise explained the issue in a more comprehensive and detailed fashion:⁶⁷

'[w]e cannot aid the Legislature's defective phrasing of the Act' said Lord Brougham, in words similar to those which had been used by Lord Eldon [in *Weale v West Middlesex Waterworks Co* (1820) 1 Jac & Walk, 371]; ... 'we cannot add and mend and by construction make up deficiencies which are left there.'

For the same reason the intention of the Legislature is not to be inferred from any external evidence. If a statute is not clearly worded, its Parliamentary history is 'wisely inadmissible' to explain it. The Court cannot consider what was the intention of the member of Parliament by whom any measure was introduced. It cannot look at the reports of commissions which preceded the passing of statutes, and upon which those statutes were founded. ... The Court cannot look at the history of a clause, or of the introduction of a proviso, nor at debates in Parliament, nor at amendments and alterations made in Committee, nor at the principles which govern the Houses of Parliament in passing private bills, nor at the policy of the Government with reference to any particular legislation.

Wilberforce cited most of the cases cited by Maxwell and Hardcastle. It appears that he had searched his competitors' works for authorities. However, Wilberforce also cited a number of additional cases that had not appeared in the prior works.

One interesting case that Wilberforce brought to light is *Barbat v Allen*.⁶⁸ In this case, Pollock CB stated:

Lord Truro, in one of his judgments, explains how the third section of the 14 & 15 Vict. c. 99, came to be so framed. But while I allude to the subject, I must at the same time state, that the history of a clause in a statute is certainly no ground for its interpretation in a Court of Law; and I would guard myself against being considered as resorting to any such means.⁶⁹

Judgment was rendered in 1852, five years before Sedgwick's work was published.

The second edition of Maxwell's treatise, published in 1883, contained citations to *R v Hertford College*, and to Pollock CB and Bramwell B in *Sillem*. These two cases were becoming canonical English authorities for the rule. It seems likely that Maxwell learned about these cases

⁶⁷ Wilberforce (n 1) 103–05; footnotes omitted.

⁶⁸ (1852) 7 Exch 610.

⁶⁹ *ibid* 616.

from Hardcastle's or Wilberforce's treatise. The wording and authorities in Maxwell would be repeated without significant revision through to the eleventh edition, published in 1962. Maxwell continued to cite *Hemstead* and *Martin v Hemming*, which dealt with commissioners' reports, and thus continued to assert that these various types of documents were governed by a single principle.

What one observes in this series of treatises is a belief, commencing with Sedgwick, that the exclusionary rule was good law, and there was a quest for more and better authorities in support of it. Sedgwick was not aware of the best cases in England, and nor was Maxwell. It is in the treatises by Hardcastle and Wilberforce that one finds a robust set of cases appropriate for a rule as broad and strong as the exclusionary rule.

Based on the available cases in England, the earliest explicit support for the exclusionary rule is in *Cameron v Cameron* in 1834. In light of this, it is perhaps understandable that the rule was absent from Dwarris' first edition in 1831. There were no published cases that provided good support for the rule, and it is possible that the rule was not well-known at the time. Meanwhile, with the benefit of 17 years of reflection, the rule was not added in Dwarris' second edition. This treatise was long and rich in detail. One must either believe that Dwarris was remiss and failed to note a rule that was widely known and regarded as important; or one must accept the possibility that the rule was either not widely known or not held to be important by prominent lawyers in England in 1848.

Based on Lord Fitzgerald's statement in *Caird v Sime*,⁷⁰ it appears that late in the nineteenth century some members of the English judiciary believed that the rule commenced with *Millar v Taylor*. However, there are no reported cases suggesting that such an understanding was held by judges or lawyers earlier in the century, although the case was cited for a variety of other substantive and procedural matters for more than a century after it was decided. Given that judges never cited cases in support of the exclusionary rule, the question of whether or not judges were following a rule was probably not determined by precedent. It is therefore an empirical matter that cannot be settled by regarding *Millar v Taylor* as a precedent. It is possible that some or most of the senior judges in England decided that reliance on legislative history was a bad idea in the wake of *Millar v Taylor* and started following the rule. If this is what happened, they did not feel compelled to make their decision explicit in a case.

70 (n 24).

4.5 The Decline of the Exclusionary Rule in America

Bishop's enunciation of the exclusionary rule continued in a pattern that had occurred in the English treatises. Over time, the explanation was expanding to cover more detail, and there was an accumulation of stronger authorities in support. However, in the US, cases evidencing exceptions to the rule were also accumulating:

Excepting as thus explained, and inquiring for what may control the interpretation, the rule of law is distinct, that the courts cannot resort to the opinions of the individual legislators, the legislative journals, the reports of committees, or the speeches made at the time an act was passed.

Bishop cited the same cases as Sedgwick in support, and thus put emphasis on the plain meaning rule as the primary reason for rejecting legislative history. However, *Aldridge v Williams* was also cited.⁷¹ In this US Supreme Court case, Taney, CJ explicitly rejected legislative history:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

This case was decided in 1845, more than a decade before Sedgwick's treatise was published, yet it was not cited by him; nor was it cited in the second edition, revised by Pomeroy.⁷² Apparently neither Sedgwick nor Pomeroy were aware of this case.

The exceptions as explained by Bishop included the following:

it is evidently proper for them [ie judges] to look, if they choose, into discussions by lawyers in the legislative body, the views of the draughtsman of a bill, of the revisers of statutes, and of the legislature passing an act. As authority, this sort of matter is not admissible. As opinion to persuade, it varies with the particular circumstances."⁷³

This was an explicit general exception to the rule. The claim was supported by several state court cases⁷⁴ and *United States v Union Pacific Railroad*,⁷⁵ a Supreme Court case in which the rule

71 44 US 3 How 9 (1845).

72 Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* (John Norton Pomeroy ed, 2nd edn, Baker, Voorhis 1874).

73 Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* (Little, Brown 1882) 61.

74 *Barker v Esty* 19 Vt 131 (1847); *The State v Paterson* 6 Vroom 196 (1871); *Tynan v Walker* 35 Cal 634 (1868); *The State v King* 12 La An 593.

75 91 US 72, 79 (1875). The terms of bond financing for a railway were disputed. Davis J rendered judgement for the

against floor statements was upheld strictly.

Endlich was more conservative. He affirmed Maxwell's claim that the parliamentary history could not be referred to. However, he also cited several contrary cases including a US Supreme Court case and several state court cases in which the original bill and amendments made in the legislature were relied upon to determine the meaning of obscure statutory text.⁷⁶ He noted that the rule against recourse to commissioners' reports which prevailed in England "seems to be the same in this country, although perhaps not followed with universal consistency."⁷⁷ Endlich cited two state court cases in support, and two to the contrary.⁷⁸

Sutherland took the view that debates were impermissible while committee reports and similar documents could be considered: "if the reasons and objects of the law are made known by any other document equally authentic and certain, as the report of one of the heads of departments, it may be referred to to aid in the interpretation of doubtful or ambiguous language in the law."⁷⁹ This principle was supported by a Federal Circuit Court judgment, an English case and four state court cases.⁸⁰ Sutherland added that "[t]here has been occasional judicial reference to declarations of members of legislative bodies, but such aids are but slightly relied upon, and the general current of authority is opposed to any resort to such aids." This latter point was buttressed by the classic English cases, several state cases and *Aldridge v Williams*.

Within a period of nine years, Bishop, Endlich and Sutherland put forward divergent points of view about the exclusionary rule in America. This was probably the result of the accumulating exceptions in the reports. At the US Supreme Court, Madison's notes from Records of the Federal Conventions were cited and relied upon to determine the meaning of "ex post facto clauses" in the Constitution in *Carpenter v Pennsylvania* in 1854.⁸¹

court: "In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate nor to consider the motives which influenced them to vote for or against its passage." He did go on to say "courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it." He made many claims about the state of the nation at the time of enactment and the necessity of encouraging railroad construction. He cited no sources for this information.

76 *Blake v Nat Banks* 23 Wall 307 (1874); *McPhail v Gerry* 55 Vt 174 (1882); *Edger v Co Comm'rs* 70 Ind 331 (1880); and *Wood Mowing & Co v Caldwell* 54 Id 270.

77 Gustav Adolf Endlich, *A Commentary on the Interpretation of Statutes* (F D Linn 1888) 43.

78 *Southward Bank v. Commonwealth* 26 Pa St 446, 450 (1856); *Municipality No 2 v Morgan* 1 La Ann 111; *Baker's Appeal* 107 Pa 831 (1884).

79 Sutherland (n 2) 384.

80 *States v Webster, Davies* 38 Fed Circuit Ct (1840); *Perkins v Sewell* (1768) 1 Bl Rep 659; *Fosdick v Perrysburg* 14 Ohio St 472 (1863); *Moody v State* 48 Ala 115; *Clare v State* 5 Iowa 509 (1858); *Division of Howard Co* 15 Kan 194 (1875).

81 17 How 456, 463 (1854).

The debates in the federal convention upon the Constitution show that the terms ‘ex post facto laws’ were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Mad. Pap. 1399, 1450, 1579.

Floor statements and a committee report were relied upon in *Dubuque & Pacific Railroad v Litchfield* in 1859.⁸² It was held that floor statements were “entitled to respect as some authority for the meaning of words actually used in the enactment.” In 1875 changes made to a bill as it moved through Congress were relied upon in *Blake v National Bank*,⁸³ and a Senate Finance Committee report was referred to in *Arthur v Richards*.⁸⁴ In the same year, the rule against floor statements was upheld in *United States v Union Pacific Railroad Co*.⁸⁵ Three years later, in the unanimous decision in *Jennison v Kirk*, Field J relied on floor statements by the “author of the act” to interpret provisions of the two statutes governing the terms of bond financing for railroad construction.⁸⁶

These statements of the author of the act in advocating its adoption cannot, of course, control its construction where there is doubt as to its meaning, but they show the condition of mining property on the public lands of the United States and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act.⁸⁷

In *American Net & Twine Co v Worthington* the dispute concerned whether linen thread imported to manufacture fishing nets was it taxable as “linen thread” or as “gilling twine” under the Tariff Act 1883.⁸⁸ Floor statements were held to be inadmissible as an aid to construction, but permissible “to inform the court of the exigencies of the fishing interests and the reasons for fixing the duty at this amount”.⁸⁹

*Church of the Holy Trinity v United States*⁹⁰ was a unanimous decision concerning an act prohibiting “the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States[.]”⁹¹ The Church had contracted to bring a rector from England. Brewer J relied on *US v Union Pacific Railway Co* (and the rule against absurdity) to justify extensive recourse to legislative history including floor statements.⁹² He held that “labor” did not

82 23 How 66, 87 (1859).

83 23 Wall 307, 319–20 (1875).

84 Also referred to as *The Collector v Richards* 23 Wall 246, 258 (1875).

85 (n 75).

86 July 1, 1862, 12 Stat 489; July 2, 1864, 13 Stat 356.

87 98 US 453, 450–60 (1878).

88 22 Stat 488.

89 141 US 468, 473–74 (1891).

90 143 US 457 (1892).

91 February 26, 1880, 23 Stat 332, c 164.

92 At 461: “All laws should receive a sensible construction. General terms should be so limited in their application as

include those who laboured with their minds, such as priests.

*United States v Trans-Missouri Freight Association*⁹³ concerned whether or not an association of freight carriers operated in restraint of trade, contrary to the Trust Act.⁹⁴ Counsel for the defendant presented extensive extracts from the debates in Congress. Peckham J stated:⁹⁵

All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.⁹⁶

Given this series of cases, it is understandable that different scholars might reach different conclusions concerning the rule. It would be fair to conclude that the law was unsettled in the federal courts in the 1880s.

Conflicting cases had begun to accumulate several decades earlier in the state courts. Chancellor Walworth considered New York Senate and Assembly journals in *Coutant v People* in 1833.⁹⁷ Constitutional convention proceedings were relied upon with respect to the state constitution in *Clark v People*⁹⁸ in 1841, and in *People v Purdy*⁹⁹ in 1842. The journals of the state senate were relied upon to interpret a statute in *State v McCollister*¹⁰⁰ in 1842. *Purdy* was cited with approval by the Minnesota Supreme Court in *Pacific Rail Road v Sibley*¹⁰¹ and by the Supreme Court of Tennessee in *State v Cloksey*¹⁰² in 1858. In light of these decisions, it is difficult to maintain the claim that the exclusionary rule was followed universally in state courts by the 1840s. Based upon these authorities, Cooley made the following claim in 1868:

not to lead to injustice, oppression, or an absurd consequence.” For analysis see Carol Chomsky, ‘Unlocking the Mysteries of “Holy Trinity”: Spirit, Letter, and History in Statutory Interpretation’ (2000) 100 Col L Rev 901; Adrian Vermeule, ‘Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church’ (1998) 50 Stan L Rev 1833.

93 166 US 290 (1897).

94 An act to protect trade and commerce against unlawful restraints and monopolies; July 2 1890, 26 Stat. 209 c 647; Supp Rev St p 726.

95 166 US 290, 318 (1897).

96 The following authorities were cited: *United States v Union Pacific Railroad* 91 US 72, 79; *Aldridge v Williams* 3 How 9, 44 (1845); *Mitchell v Manufacturing Co* 2 Story 648, 653 (1843); *R v Hertford College* (1878) 3 QBD 693, 707.

97 11 Wend 511, 513–14 (NY).

98 26 Wend 599, 600, 602, 604–06, 609 & 611–12 (NY 1841).

99 4 Hill 384, 394 (NY 1842).

100 11 Ohio 46, 56 (1842).

101 2 Minn 13 (1858).

102 37 Tenn 482 (1858).

When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. These proceedings ... are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives.¹⁰³

Returning to the treatises on statutory interpretation, recall that Bishop, Endlich and Sutherland had each put forward a different description of the state of the law concerning the exclusionary rule. The next treatise by Black, published in 1896, concurred with Sutherland's position: committee reports and journals could be consulted but floor debates could not. Black said the following about journals and reports:

An obscure or ambiguous law is often rendered clear and intelligible by a consideration of the various steps which led to its final passage, as shown by the journals of the legislative body, and a resort to these sources of information by the courts, in the endeavor to ascertain the intention of the legislature and interpret the statute accordingly, is sanctioned by the great majority of the decisions.

This claim was supported primarily by state court cases.¹⁰⁴

The second edition of Sutherland's treatise, in 1904, repeated the claim: reports and journals could be considered but floor statements could not. However, Black's second edition in 1911 contained two significant additions. With respect to the rule permitting reliance on journals and committee reports, Black said "[t]he doctrine above stated does not pass entirely without contradiction [ie there are cases indicating that these materials cannot be considered.] ... But these decisions are opposed to the weight of authority." The list of cases evidencing judicial reliance on such materials had grown significantly.¹⁰⁵ With respect to floor statements and debates, a significant

103 Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Little, Brown & Co 1868) 66–67.

104 *Edger v Randolph County Commissioners* 70 Ind 331 (1880): "it has never been held by this court that, for the purpose of construction or interpretation, ... the courts may not properly resort to the journal of the two legislative bodies to learn therefrom the history of the law in question Where, as in this case, a statute has been enacted which is susceptible of several widely differing constructions, we know of no better means for ascertaining the will and intention of the legislature" *Walter A Wood Co v Caldwell* 54 Ind 270 (1876); *Hill's Adm'r v Mitchell* 5 Ark 608 (1844). Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* (2nd edn, West 1911) 224.

105 *ibid* 308 fn 92. *Stout v Grant County Com'rs* 107 Ind 343 (1886); *Klemm v. Fread* (Ind App) 91 NE 256; *State v Kelly* 71 Kan 811 (1905); *Ellis v Boer* 150 Mich 452 (1907); *State v Balch* 178 Mo 392 (1903); *Ex parte Helton* 117 Mo App 609 (1906); *State ex rel Hay v Hindson* 40 Mont 354 (1910); *Wyatt v State Board of Equalization* 74 NH 552 (1908); *State v Burr* 16 N Dak 581 (1907); *Slingluff v Weaver* 66 Ohio St 621 (1902); *Malone v Williams* 118 Tenn 390 (1907); *Ex parte Keith* 47 Tex Cr R 283; *State v Rutland R Co* 81 Vt 508 (1907); *Burdick v. Kimball*, 53 Wash. 198 (1909); *Scouten v City of Whatcom* 33 Wash 273 (1903).

exception was added: “The opinion of a member of the legislature, if he be a man of learning and of acute and discriminating intelligence, may be of quite as much persuasive force as the opinion of a judge delivered in a court of co-ordinate jurisdiction.” With these changes, Black was conceding that there was no longer an exclusionary rule in the US.

Some, including Justice Scalia, have asserted that the exclusionary rule was followed in the US until several decades into the twentieth century.¹⁰⁶ In light of the foregoing this assertion is difficult to accept. The exceptions began to accumulate in the state courts in the 1830s, and in the federal courts in the 1850s. By the turn of the twentieth century there were many judges willing to cite and rely on legislative history. The American treatise authors were more conservative than Cooley in their assessment of the significance of the exceptions; but however one regards them, it is difficult to argue that there was any substance remaining to the exclusionary rule in America by the time of Black’s second edition.

4.6 Disagreement About the Exclusionary Rule in England

In the final decade of the nineteenth century, there was also uncertainty about the state of the exclusionary rule in England. The second edition of Hardcastle’s treatise, which was edited by Craies and published in 1892, contained a significant revision with respect to Hansard: “until very recently, it was never allowable to refer to [the parliamentary history] in discussing the meaning of an obscure enactment[.]”¹⁰⁷ The direct implication was that it had become permissible to do so. Two cases were cited in support.¹⁰⁸

In *R v Bishop of Oxford*, the matter concerned whether it was mandatory or whether the Bishop had discretion to order an investigation into alleged wrongs under s 3 of the Church Discipline Act.¹⁰⁹ Bramwell¹¹⁰ and Baggallay LJJ cited a speech by the Lord Chancellor in the House of Lords as an authority. In a footnote, Craies noted that this judgment was criticised by Earl Cairns and Lord Selborne when the case was affirmed by the House of Lords on appeal.¹¹¹

In *SE Railway*, the lawfulness of an order by the Railway Commissioners compelling the

106 Antonin Scalia, ‘Common-Law Courts in a Civil-Law System’ in Amy Gutman (ed), *A Matter of Interpretation* (Princeton University Press 1997) 30.

107 Henry Hardcastle and William Feilden Craies, *A Treatise on the Construction and Effect of Statute Law* (2nd edn, Stevens & Haynes 1892) 143.

108 *R v Bishop of Oxford* (1879) 4 QBD 245; and *SE Railway v Railway Commissioners* (1880) 5 QBD 217 [*SE Railway*].

109 3 & 4 Vict c 86.

110 The same Bramwell J who presided in *Sillem*.

111 *Julius v Bishop of Oxford* (1880) 5 App Cas 214.

corporation responsible for several train stations to upgrade their facilities under the authority of the Railway and Traffic Act 1854 was challenged.¹¹² Cockburn CJ said, “[w]here the meaning of an Act is doubtful, we are, I think, at liberty to recur to the circumstances under which it was passed into law as a means of solving the difficulty[.]”¹¹³ He relied on proceedings in committee and speeches introducing the relevant Bill into the House of Commons and the House of Lords.¹¹⁴

With respect to commissioners’ reports, Craies moved in the opposite direction. The soft language, indicating that it was “not usual” to refer to such materials, was removed. Instead, Craies recited quotations from *Rankin v Lamone* and *Salkeld v Johnson*, and claimed that such materials were “scarcely legitimate” and irrelevant.¹¹⁵ In a footnote, Craies noted that the treatment of commissioners’ reports was inconsistent with the treatment of *Hansard*. Craies believed that all such materials should be governed by a single principle; however, he bowed to the principle of strong *stare decisis* which was embraced at the time.¹¹⁶

The *Bishop of Oxford* case provides insight into the procedural workings and the judicial understandings of the exclusionary rule at that time.¹¹⁷ The judges and counsel agreed that there was a rule against the use of legislative history as an aid to statutory construction. A party sought to present legislative history, the opposing counsel objected, and counsel was permitted to explain why the material should be admitted. These materials were being treated as inadmissible at this time.¹¹⁸ It was argued that the material did not touch on interpretation of the provision at issue and the material was admitted, presumably under the mischief exception. There was a precedent for this proposition, although it was not mentioned in the judgment.¹¹⁹

112 17 & 18 Vict c 31. The relevant provisions are numerous and long.

113 At 236.

114 At 236–37: “The Act was a government measure. Its main purpose, as explained on its introduction by Mr.

Cardwell, was to prevent the obstruction which had been opposed by some of the railway companies to a continuous through communication over different lines of railway, by throwing obstacles in the way of receiving and forwarding the traffic from other lines, at that time a subject of much complaint, and which had been the subject of investigation by a Committee of the House. ... [T]he assistance of engineers might possibly be of great utility in the event of a question of reasonable accommodation in respect of the number of trains running on a line of railway, especially if complicated with the use of the line by another company, or in the event of a dispute between two companies as to arrangements for the uninterrupted conveyance of the through traffic. Indeed it was on this latter ground that this provision was explained and justified by the Lord Chancellor in the House of Lords; and Mr. Cardwell, on introducing the bill, said that this provision had been imported into it by analogy to the 42nd section of the Chancery Procedure Bill of 1852, which contained a somewhat similar provision.”

115 *Hardcastle and Craies* (n 107) 144.

116 The canonical case was *London Street Tramways Co Ltd v London County Council* [1898] AC 375.

117 It is curious that this case did not appear in Maxwell’s 2nd edition.

118 The term “inadmissible” first appeared in 1878 with *R v Hertford College*, although the materials were admitted in that case.

119 (n 45).

It turned out that the materials did relate to interpretation, and Bramwell LJ asserted that the statement of a prominent jurist in a House of Parliament should have more authority than the passing dictum from a judge at Nisi Prius. He added, “I really do not know that there is any definite rule as to what may or may not be cited and acted on as authority.”¹²⁰ Baggallay LJ expressed doubt about whether the materials should have been admitted, but felt that recourse to statements by living jurists in Parliament were no different, in principle, from opinions by living jurists in textbooks, which were admitted and relied upon at that time.¹²¹ These statements were significant judicial challenges to the rule by prominent judges.

The third edition of Maxwell’s treatise was published in 1896, and it contained almost no changes with respect to extrinsic aids to interpretation.¹²² It maintained that legislative history and commissioners’ reports were inadmissible under a single principle.¹²³ The same cases were cited in support. However, the third edition of Hardcastle’s treatise, published in 1901, pushed the divergence even further. Craies continued to assert that reference could be made to “the parliamentary history” of a statute when interpreting a statutory provision. However, with respect to commissioners’ reports, Craies claimed it was “now established that reference may be made to previous statutes *in pari materia*, and to reports on their effect and defects.”¹²⁴ He cited *Eastman Photographic Materials Company v Comptroller-General of Patents, Designs and Trademarks*¹²⁵ as the main authority. In this case Halsbury LC said: “I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended

120 *Julius*, 549–50: “No doubt, we must act on general principles, and I suppose they would exclude what is said in debate in either House of Parliament. But to reject the opinion of the head of the law as to what is the law, given to advise the highest court of judicature in the country, sitting indeed in its legislative capacity, and at the same time admit the obiter dictum of a judge at nisi prius either in our own or an American court seems somewhat strange, more especially as it is certain that if it ought to be excluded, any judge knowing of it and excluding it, would as soon as he left the court consult the Hansard he had before rejected. I cannot think it was wrong to admit it.”

121 Hardcastle and Craies (n 107) 576–77: “The Courts have been in the habit of allowing reference to be made to text-books, the authors of which are living judges, and I am unable to distinguish, in principle, an expression of opinion by the Lord Chancellor as to the state of the law upon a particular subject, with which he is inviting the House of Lords to deal, from an expression of opinion upon the same subject by another judge in a treatise published by him. The weight to be attached to the opinion, whether expressed in the one form or the other, must of course depend upon the surrounding circumstances.”

122 Peter Benson Maxwell and Alfred Bray Kempe, *On the Interpretation of Statutes* (3rd edn, Sweet & Maxwell 1896). *Cox v Hakes* (1890) 15 App Cas 506 was added as an exception to the rule against reference to framers at 36.

123 The 3rd edition was expanded to include a very narrow exception for reliance on commissioners’ reports with respect to private acts: “for the purpose of construing it the Court would be at liberty to consider the position of the parties concerned, and whether they could or could not have been before the committee, and may come to the conclusion that a particular clause must have been inserted on the application of a party who was present, and for the protection of his interests alone.” *Taff Vale R Co v Davis* [1894] 1 QB 44 is cited as the authority. *ibid* 39.

124 Henry Hardcastle and William Feilden Craies, *A Treatise on the Construction and Effect of Statute Law* (3rd edn, Stevens & Haynes 1901) 140.

125 [1898] AC 571. [*Solio case*].

to remedy could be imagined than the report of that commission.”¹²⁶ Lords Herschell, MacNaghten, Morris and Shand concurred.¹²⁷ This was a unanimous decision by the House of Lords.

With the benefit of hindsight, it is easy to disregard the uncertainty surrounding the exclusionary rule in England in the final decade of the nineteenth century. However, with exceptions accumulating in the US, and with prominent appellate court judges challenging the rule in England, there was room for specialists in the field to arrive at differing points of view.

4.7 The Arrival of Scholarly Consensus

At the turn of the twentieth century, the case law militated in favour of the exclusionary rule. Judgments that upheld the rule outnumbered judgments that did not; legislative history was being treated as inadmissible in the absence of justification;¹²⁸ and judgments that relied on legislative history were becoming the target of judicial criticism in the House of Lords. The secondary literature also weighed in favour of the exclusionary rule: Beal published the first edition of *Cardinal Rules of Interpretation* in 1896, which addressed the topic via separate sections entitled “Commission Reports” and “Debates In Parliament”. Both sections supported the textualist view.¹²⁹

The fourth edition of Hardcastle, published in 1907, marked a return to the textualist position.¹³⁰ It was called *On Statute Law* by William Feilden Craies, with a subtitle indicating that it was “founded on and being the fourth edition of Hardcastle on Statutory Law.”¹³¹ The work stated plainly that “[i]t is not permissible in discussing the [meaning of an obscure enactment, to refer to ‘the parliamentary history’ of a statute.”¹³² The canonical cases cited in authority included *Sillem, R v Hertford College*, and *Herron v Rathmines*.¹³³ However, one new case was added as an authority: *R v West Riding of Yorkshire County Council* was cited.¹³⁴

West Riding appears to be a case that influenced Craies to change his mind about the exclusionary rule. This case would become another canonical authority for the exclusionary rule and it would be cited by scholars for decades to come.¹³⁵ It was best known for the opinion of

126 *ibid* 575.

127 As a unanimous House of Lords judgment, this was a serious impediment to textualism in England.

128 For example, in *J Lyons & Sons v Wilkins* [1899] AC 272, Lindley MR interrupted counsel and prevented him from citing Hansard at 262.

129 Edward Beal, *Cardinal Rules of Legal Interpretation* (Stevens & Sons 1896).

130 William Feilden Craies and Henry Hardcastle, *A Treatise on Statute Law* (1st edn, Stevens & Haynes 1907).

131 Craies had also edited the 2nd and 3rd editions.

132 Craies and Hardcastle (n 130) 122.

133 [1892] AC 498. This case was first mentioned in the 3rd edition.

134 [1906] 2 KB 676. [*West Riding*].

135 Charles E Odgers, *The Construction of Deeds and Statutes* (Carswell 1939) 221; Edward Beal, *Cardinal Rules of*

Farwell LJ:

it was suggested that the view taken by us of the Act is not in accordance with the intention of the House of Commons or with public understanding of the effect of the Act; and reference was attempted to be made to the debates and to passive resisters; but we have only to deal with the construction of the Act as printed and published. That is the final word of the legislature as a whole, and the antecedent debates and subsequent statements of opinion or belief are not admissible. But they would be quite untrustworthy in any case. In the case of an Act dealing with a controversial subject ambiguous phrases are often used designedly, each side hoping to have thereby expressed its own view, and the belief of each that it has succeeded is more often due to the wish than to any effort of reason. ... The principles of construction applicable to Acts of Parliament are well settled, and will be found stated in *Stradling v Morgan*,¹³⁶ and which has received approval of Turner LJ, in *Hawkins v Gathercole*,¹³⁷ and of Lord Halsbury in *Eastman Photographic Materials v Comptroller-General of Patents*,¹³⁸ and do not admit of any such considerations. The Court must, of course, in construing an Act of Parliament, as in construing a deed or will, do its best to put itself in the position of the authors of the words to be interpreted at the time when such words were written or otherwise become effectual; but this will no more justify us in admitting, as evidence on the construction of an Act, speeches in either House or subsequent statements in the public papers, or elsewhere, of the effect of an Act than it would justify us in admitting on the construction of a will the advice given to the testator by his solicitor before, or the statements of himself or his expectant legatees of the effect of his will, after he has made it. The mischief to be cured by the Act, and the aim and object of the Act must be sought in the Act itself. Although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are extremely slight, as is pointed out by Bramwell, B. in *Attorney-General v Sillem* I think that the true rule is expressed with accuracy by Lord Langdale in giving judgment of the Privy Council in the *Gorham Case*, in Moore, in 1852 edition, p. 462:¹³⁹ ‘We must endeavour to attain for ourselves the true meaning of the language employed [in the Articles and Liturgy], assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed’.

As with *Sillem*, and indeed, by incorporating *Sillem*, this passage about the interpretative practices of English judges emphasised tradition. It called upon history as a rhetorical justification for methods employed, which were purported to be centuries old—dating back to *Stradling v Morgan* in 1560—and approved by all the great legal scholars from the past. Even those judges who had challenged the exclusionary rule, Bramwell J and Lord Halsbury, were included. This was

Legal Interpretation (2nd edn, Stevens & Sons 1908) 290. Also see *Assam Railways and Trading Co v Commissioner of Inland Revenue* [1935] AC (HL) 445, 458 per Lord Wright; *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 621 per Viscount Dilhorne; *Edwards v Attorney General of Canada* (Canada) [1930] AC 124, 134 per Lord Sankey.

136 (1560) 1 Plowd 1999.

137 (1855) 6 D M & G 1, 21.

138 *Solio case* (n 125).

139 *Gorham v the Bishop of Exeter* (1850) Moore’s Special Reports 462.

another example of textualist revisionism.

It is significant that the *Solio* case was cited as an authority. The case was not invoked to support the notion of recourse to commissioners' reports. On the contrary, it was cited for the proposition that speeches in the House ought not to be considered. By saying that it "may, perhaps, be legitimate" to consider commissioners' reports, "but the inferences to be drawn therefrom are extremely slight . . . ," it appears that Lord Justice Farwell was attempting to downplay the *Solio* case. This was perhaps the only way forward for a textualist judge in an era of strong *stare decisis* when faced with a contrary case from the House of Lords. There was no point in denying admissibility, so Farwell argued that such materials should not be given weight.

The length of this passage is revealing. It was, and continues to be, unusual for anything more than a few sentences to be said about statutory interpretation in a judgment. Both parties sought to present commissioners' reports and Hansard in *West Riding*, so the issue was before the court. That such materials were regarded as suitable by counsel suggests that the cases which caused Craies to revise his stance about the rule had also been embraced by some lawyers as well. Farwell's apparent objective was to set matters straight with regard to the exclusionary rule with the strongest rhetorical statements he could muster within the confines of a judicial opinion.

Craies' treatise did not revert completely to the textualist position, however. Despite the comments in *West Riding*, Craies chose to embrace the *Solio* case with respect to commissioners' reports, and relied on it to claim that "[i]t is now generally agreed that reference may be made to reports on the effect and defects of previous statutes in pari materiâ."¹⁴⁰ The Hardcastle/Craies treatise would remain opposed by Maxwell and Beale on this point.¹⁴¹

4.8 The Significance of the Scholarly Consensus

Following the fourth edition of Hardcastle, there was consensus among the scholars and judges concerning the exclusionary rule insofar as that is possible in a common law jurisdiction of the size and complexity of England. An appeal based on judicial reliance on Hansard did not occur until 1958.¹⁴² However, it seems clear that such an appeal would have been obtainable much earlier—certainly by the first decade of the twentieth century. By this time, textualism was essentially law; and arguably, this was the case as far back as the 1850s (or as far back as the 1770s if one accepts

140 Craies and Hardcastle (n 130) 124. [*Emphasis added.*]

141 The second edition of Beal's compendium quoted the *Solio case* in support of the mischief rule, while only citing cases that opposed the use of commissioners' reports; Beal (n 135).

142 *London County Council v Central Land Board* [1958] 3 All ER 676.

the claims of scholars such as Baade).

The “mischief” exception for commissioners’ reports was a failure for textualism. A pure textualist regime would prohibit recourse to these materials under all circumstances. Insofar as it was permissible to consult commissioners’ reports, English textualism was diluted. However, a unanimous House of Lords judgment could be ignored by a judiciary that claimed to have no authority to make or change the law. In the grand scheme of things, it was a relatively minor failure.

4.9 The Influence of the Treatise on the Development of Textualism

Given the long-term success of the treatises by Craies and Maxwell, it is safe to assume that they provided well-reasoned perspectives on the law governing statutory interpretation for the English legal community. Whether or not these, or any of the other nineteenth century treatises played a more significant role in the development of textualism is a more difficult question to answer. There can be little doubt that the treatises helped to foster greater interest in statutory interpretation as an area of law. However, there are certain facts which suggest that these textbooks provided more than just a considered reflection of the views of judges.

As a result of the pressure to improve legal education in the middle of the nineteenth century, the library collections at the Inns of Court expanded rapidly in the Victorian era. As a crude measure, the catalogue of books at the Inner Temple library contained 139 pages in 1821 and 289 pages by 1833. The Middle Temple library catalogue from 1880 contained 943 pages.

As evidenced by these catalogues, Dwarris’ treatise was in the Inner Temple library in 1833; and in the Middle Temple by 1845. Maxwell’s treatise as well as the second edition of Sedgwick’s treatise (but not the first) were on the shelves by 1877. By 1880, the Middle Temple library had also acquired the second edition of Dwarris’ and the first edition of Hardcastle’s treatise. In 1838 Lincoln’s Inn Library had no treatises, but by 1859 it had the first edition of Dwarris’ treatise, Sedgwick’s treatise, and Smith’s American treatise on constitutional interpretation. This is remarkable given that Sedgwick’s treatise was published in 1857 and transatlantic communication took months. The library at Gray’s Inn had Dwarris’ second edition in 1872. By 1878 it had acquired Maxwell’s treatise as well. It can be concluded that the London Bar (of which most benchers were members in the nineteenth century) had access to these works.

The reported cases indicate that barristers were in fact reading and drawing from these works. Indeed, the treatises and the cases cited in them were cited by counsel shortly after

publication. Dwarris' treatise was cited by counsel in 1831.¹⁴³ The same can be said of Maxwell.¹⁴⁴ The reported cases also indicate that judges were relying on these treatises; and again, shortly after publication. Lord Melwin cited Dwarris in the case of *William M'Laren* in 1836.¹⁴⁵ The first reported case to cite Sedgwick was *Lady Emily Foley v Fletcher and Rose* in 1858.¹⁴⁶ In this case Bramwell J quoted Sedgwick at length, and concluded that "[t]hese are the principles and considerations which I think ought to govern me in considering this case."¹⁴⁷ In 1882, Huddleston B relied on the treatises by Maxwell and Sedgwick in *Coomber (Surveyor of Taxes) v Berkshire Justices*.¹⁴⁸ By the turn of the twentieth century, it was common for counsel and judges to cite both Maxwell and Hardcastle/Craies.¹⁴⁹

That some judges cited and relied on principles as enunciated in these treatises indicates that these works were regarded as authoritative. Dwarris' and Sedgwick's treatises were cited by judges while the authors were still alive, contrary to the "rule" sometimes put forward, that traditionally, English judges would not cite works by living authors.¹⁵⁰

It would be reasonable to infer that the treatises on statutory interpretation influenced the legal community to some extent in the nineteenth and twentieth centuries. However, the principles from these treatises that were cited and relied upon in cases were typically narrow and do not

143 *R v Justices of Middlesex* (1831) 2 B & Ad 818, 820: "The two Acts containing opposite provisions, that which last received the Royal assent must be considered as virtually repealing the other. The Attorney-General v. The Chelsea Water Works Company (Fitzgibbon, 195), (cited 2 Dwarris on Statutes, 675) ...". Also see *Mayor of Leicester v Burgess* (1833) 5 B & Ad 246, 251: "the title is no part of a statute, according to many authorities, cited in 2 Dwarris on Statutes, 653;" *Woodward v Cotton* (1834) 1 Cr M & R 44, 51: "That, being a penal statute, must be construed strictly; Dwarris on Statutes (page 376)"; *R v Inhabitants of Mabe* (1835) 3 A&E 531, 516: "It has been held that 'and,' in a statute, may be read 'or' [.]" Fn (a) cites Dwarris on Statutes, 722. Also see *Newton v Nancarrow* (1850) 15 QB 144, 150: "where the Legislature uses different words in different clauses, it is safe to presume that distinct effects are contemplated: Dwarris on Statutes, 578"; and *R v Guardians of Medway Union* (1868) 3 LRQB 383, 386: "the law does not favour the repeal of a statute by implication: Dwarris on Statutes, 533".

144 Maxwell's treatise was cited in *Ridsdale v Clifton (No.2)* (1877) 2 PD 276; and in *Tomlinson v Bullock* (1879) 4 QBD 230.

145 (1836) 1 Swin 219, 222: "I am of the opinion that that objection is untenable. In Dwarris on the Statutes, Part 2. p. 666, the law of England, on the subject, is thus laid down: Where a temporary statute, which has expired, is continued by a subsequent statute, it is sufficient to plead the former, without taking notice of the latter."

146 (1858) 3 Hurl & N 769.

147 At 781: "On this head I cannot help referring to that accomplished lawyer and jurist Mr. Sedgwick: he says, (... p. 334.)—'These decisions, as I have said, naturally modify the old rule that penal statutes are to be construed strictly. The more correct version of the doctrine appears to be that the statutes of this class are to be fairly construed and faithfully applied, according to the intent of the legislature, without unwarrantable severity on the one hand; or equally unjustifiable lenity on the other, in cases of the Court's inclining to mercy.'"

148 (1882) 9 QBD 17, 32.

149 In *Re Waverley Type Writer* [1898] 1 Ch 699, counsel cites Maxwell, and Wright J responds by saying "Hardcastle on the Construction and Effect of Statute Law is a very good text-book on the subject" at 700. Also see *Stewart (Surveyor of Taxes) v Thames Conservators* [1908] 1 KB 893; and *Gray v St Andrews District Committee of Fife CC* [1911] SC 266, [1910] 2 SLT 354.

150 According to Duxbury the rule was not strictly followed, and it amounted to little more than a convention. Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing 2001) 61–67.

evidence the larger doctrine of textualism. The concept of judge as faithful agent, and the role of Parliament as the only appropriate place for modification of the law were likely reinforced by the treatises, although these ideas did not only come from lawyers and judges concerned with interpreting statutes. These principles are consistent with positivism, and the concept of parliamentary sovereignty—ideas that had carriage because of proponents such as Austin and Dicey, who were well received in the late nineteenth century in England.¹⁵¹ It seems likely that treatises on statutory interpretation played no more than a corroborating role in the advancement of these values. With respect to the sophisticated plain meaning approach to text, most of the incorporated rules appeared in cases before the treatises were published. However, these rules were probably reinforced given that lawyers and judges could look them up in the treatises. Furthermore, the treatises advanced the notion that the rules formed a coherent system. Again, this notion would be reinforced within the English legal community if members were revisiting these treatises from time to time. The exclusionary rule is more difficult to connect to the treatises. There are no cases during the emergence of textualism in which judges or lawyers referred to these works. It appears that the treatises lagged behind the courts in England, although Craies may have helped to augment the judicial challenges to the rule at the end of the nineteenth century.

The true extent of the influence of the treatises in the development of textualism is a matter of speculation; there were many other factors involved which influenced the development and reception of textualism by the legal community in England. Some of these factors will be considered in the next section.

4.10 The Historical Context of Textualism’s Development

The appearance of the legal treatise in the late eighteenth century, and its rise in importance in the nineteenth century, coincided with an effort in England and America to make the law into a “science” and with efforts to improve the quality of legal education. At the same time, there were relevant developments concerning law reform in the UK. All of these occurrences affected the legal community in ways that are relevant to the emergence of textualism.

There was a movement within the legal communities of England and America (and on the Continent) to turn law into a science. The movement began in the eighteenth century and reached its apex late in the nineteenth century. This was an early-modern view of science that did not have the

¹⁵¹ Wilfrid E Rumble, *Doing Austin Justice: The Reception of John Austin’s Philosophy of Law in Nineteenth-Century England* (Continuum, 2005); Gil Anav, ‘Parliamentary Sovereignty: An Anachronism’ (1988) 27 Col J Transnat’l L 631.

modern connotations of rigorous empirical methodologies. Generally speaking, it was an Aristotelian view of science implying a body of knowledge assembled by experts in the field that is comprehensively taxonomised and governed by principles.¹⁵² There were different perspectives about what it meant for law to be a science, but, there were some common themes. One important theme was the belief that complex, seemingly unrelated areas of law could be distilled into a much smaller number of underlying principles. It was assumed that the law was rational—that reason and principle could explain and render the law coherent. Blackstone and Langdell are representative.¹⁵³ This belief motivated scholars to develop theories to explain various areas of law. In the process, cases that fitted were cited in support and effectively elevated in importance, while cases that did not fit well were criticised or downplayed as footnotes to the contrary. As theories became accepted, the theories rather than a neutral consideration of the available cases shaped the law.¹⁵⁴

Another theme was formalism. Langdell championed law as a system of logic—rules applied to the facts leading to the correct outcome—and while some scholars were more sceptical, formalism was widely accepted as forming an integral part of the science of law.¹⁵⁵

Textualism was a creature of its time insofar as it was a unified theory of interpretation that propounded a formalistic approach deploying rules developed in exactly the way that was venerated by common law lawyers at this time. It was a doctrine that fitted well with the predilections of many pre-eminent legal minds of the nineteenth century.

During the nineteenth century there was also a movement to reform legal education. In America, this played out in universities, and spawned the infamous case method pioneered by Langdell at Harvard.¹⁵⁶ In England, the reform of legal education took on a very different form because lawyers were trained through apprenticeships at the Inns of Court and not at universities. The Law Society was formed in 1825 for the explicit purpose of elevating the reputation of

152 Howard Schweber, 'The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education' (1999) 17 L & Hist Rev 421; MH Hoeflich, 'Law & Geometry: Legal Science from Leibniz to Langdell' (1986) 30 Am J Leg Hist 95; Stefan Vogenauer, 'An Empire of Light? Learning and Lawmaking in the History of German Law' (2005) 64 CLJ 481, 499.

153 Daniel J Boorstin, *The Mysterious Science of the Law* (Chic UP 1969) 22; Thomas C Grey, 'Langdell's Orthodoxy' (1983) 45 U Pitt L Rev 1.

154 See for example Brian Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 LQR 247; PS Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1991) 388–407; David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition', *Legal Theory and Common Law* (Blackwell 1986).

155 Grey (n 153).

156 Edwin W Patterson, 'The Case Method in American Legal Education: Its Origins and Objectives' (1951) 4 J Legal Educ 1.

solicitors;¹⁵⁷ and mandatory exams began in 1833. Following the report of a Parliamentary Committee in 1846 on the state of legal education in England, exams became a voluntary requirement for admission to the Inns and the Bar, and were mandatory by 1872.¹⁵⁸ It was entirely reasonable for such reforms to occur during a time when law was being “elevated” into a science. If the substance of the law is being systematised, it makes sense to systematise the manner of instruction at the same time.

Between the growth of law schools in the US, and the requirement of formal exams at the Inns of Court and the Law Society, there was a growth in demand for textbooks on legal matters on both sides of the Atlantic.¹⁵⁹ Because of the legal science movement, there was also a flourishing of “rationalised” or theorised treatments of various areas of law. It was not a coincidence that five treatises on statutory interpretation were published in England and America between 1870 and 1890; there was a proliferation of treatises in all areas of law in the second half of the nineteenth century.¹⁶⁰

Around the same time, there were a number of institutional reforms in England. The publishing of reports by the Incorporated Council, which began in 1865, enabled a more rigorous approach to *stare decisis*.¹⁶¹ The restructuring of the multifarious courts in England in 1873 established the House of Lords as the court of final appeal, and this too facilitated a more rigid approach to *stare decisis*. Although it may not be obvious to people at the present time who have lived with these structures already in place, without access to accurately reported cases, and without a clear hierarchy of courts, *stare decisis* cannot work in the strong, clear fashion that we know and accept today.¹⁶² With the structures and the doctrine in place, the House of Lords was able to use *stare decisis* to impose textualism on the courts of England.

The nineteenth century was also an era of law reform, and central to this movement was the reform of legislation. In the eighteenth and early nineteenth centuries, works by Bentham, Symonds and Coode, and numerous commissioners’ reports, were highly critical of the language and structure

157 Michael Burrage, ‘From a Gentlemen’s to a Public Profession: Status and Politics in the History of English Solicitors’ (1996) 3 Int J Leg Prof’n 45.

158 Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System* (Heinemann 1967) 168–70; also see Andrew Boon and Julian Webb, ‘Legal Education and Training in England and Wales: Back to the Future?’ (2008) 58 J Legal Ed’n 79, 83–85.

159 See for example AWB Simpson, ‘The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature’ (1981) 48 U Chic L Rev 632; Lawrence M Friedman, *A History of American Law* (2nd edn, Simon & Schuster 1985) 322–333.

160 Simpson (n 159).

161 The various appellate courts in the US also began producing official reports in the nineteenth century.

162 WS Holdsworth, ‘Case Law’ (1934) 50 LQR 180.

of statutes.¹⁶³ Lord Chancellor Brougham took up the cause and brought about a plain language movement which shifted the language of statutes from the prolix, highly repetitious style of the conveyancers to something much more simple and direct over the course of the nineteenth century.¹⁶⁴ The Office of Parliamentary Council was established in 1869 under the stewardship of Henry Thring, who advocated for a uniform approach to drafting legislation. As a result of these factors, the institutional approach to legislation changed: statutory text became more precise and more concise, lending itself to a more formalistic approach to interpretation.¹⁶⁵

The reforms also included a series of interpretation acts, the most significant and enduring of which was the Interpretation Act 1889.¹⁶⁶ As well as altering the common law with respect to a variety of interpretation issues, this Act defined a multitude of terms that were to be standard (subject to contrary intention) within all UK statutes. Halsbury and Ilbert both described it as a “dictionary” for legislative terms.¹⁶⁷ This Act was intended to clarify law for judges and the legal community. It, too, provided support for a more formalistic and unified approach to interpretation.

Around this time, the type of people appointed to the Bench also changed. In the nineteenth century the sons of professionals and merchants were being appointed rather than the sons of landed gentry.¹⁶⁸ Utilitarianism and laissez-faire liberalism were widely accepted doctrines by these people, and along with them, a belief that government should not interfere with interactions between people and businesses.¹⁶⁹ By the end of the nineteenth century, common law lawyers such as Blackburn and Bramwell had come to dominate the Law Lords; and they brought with them the formalistic,

163 Bentham, *Nomography* in JH Burns and HLA Hart (eds), *The Collected Works of Jeremy Bentham* (Clarendon Press 1996); Arthur Symonds, *The Mechanics of Law-Making: Intended for the Use of Legislators, and All Other Persons Concerned in the Making and Understanding of English Law* (E Churton 1835); George Coode, *On Legislative Expression; or, The Language of the Written Law* (W Benning 1845). According to Bowers, “[b]etween 1833 and 1875, no fewer than twenty-three government reports on the statute law saw the light of day.” Fred Bowers, ‘Victorian Reforms in Legislative Drafting’ (1980) 48 *Legal Hist Rev* 329, 342.

164 In addition, numerous obsolete statutes were repealed, and numerous related statutes were consolidated. See for example Sir William Holdsworth, *A History of English Law*, vol 11 (Methuen & Co 1938) 310–315. Also see Richard Heaton’s address to the Institute of Advanced Legal Studies, 14 May 2014: <<https://www.gov.uk/government/speeches/innovation-and-continuity-in-law-making>> accessed 6 January 2017.

165 Bowers (n 163); William Graham-Harrison, ‘An Examination of the Main Criticisms of the Statute Book and of the Possibility of Improvement’ (1935) 12 *J Soc Pub TL* 9.

166 The first was Lord Brougham’s Act 1850 (13 & 14 Vict c 21) (“An Act for shortening the language of Acts of Parliament”). Patrick Polden ‘The Education of Lawyers’ in William Cornish and others, *The Oxford History of the Laws of England*, vol XI (OUP 2010) 1175.

167 In Parliament, Halsbury described the act as a “dictionary which will enable them to understand the language used in statutes.” HC Deb, vol 338, col 1567, 29 July 1889; from Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (Weidenfeld & Nicolson 1979) 89.

168 *ibid* 101; Daniel Duman, ‘A Social and Occupational Analysis of the English Judiciary: 1770–1790 and 1855–1875’ (1973) 17 *Am J Leg Hist* 353, 355.

169 Abel-Smith and Stevens (n 158) 120–22.

technical approach of the common law courts.¹⁷⁰ At the same time, the principles of equity were being narrowed.

The factors discussed above—the rationalisation of the law through applying theories when writing treaties to make law “scientific”, the establishment of a clear hierarchy of courts, the systematising the publishing of cases, the more disciplined and direct style of drafting of legislation and the rising prominence of common law lawyers—all contributed towards the development, acceptance and persistence of textualism within the English legal community in the nineteenth and early twentieth centuries.

4.11 The Emergence of English Textualism as Viewed Through the Scholarly Literature

Some scholars have attempted to describe and analyse the changes in approaches to statutory interpretation over time in England. Plucknett, for example, dealt with this topic in broad strokes by describing the changes from medieval times through to his present time, the middle of the twentieth century. He claimed that the process began as an era of free interpretation in the early middle ages, moving to one of limited judicial discretion by the middle of the fourteenth century when judges began “to interpret statutes strictly”, a change which was accompanied by the separation of the legislature and the bench, and which initiated the “radical” separation of legislating from interpreting.¹⁷¹ As methods developed through the fifteenth and sixteenth centuries, into the time of Coke, Plucknett described the approach to interpretation as follows:

shorn of their powers of openly exercising discretion, the common law judges took refuge in logic. Attempts were made to devise rules whereby the grammatical structure of a sentence, combined with a general consideration of the nature of the act, could be used as a guide to the interpretation of the text in question. Some statutes confirmed or amended previous law; others prohibited certain actions; some statutes conferred benefits and others were penal. Combined with these general considerations a statute might be drawn in affirmative or negative terms, and out of all this the courts elaborated a system of great complexity. ... so great was their variety, and so diverse were the rules, that almost any conclusion might be reached, simply by selecting the appropriate rule. ... [T]he power of the courts to construe or misconstrue legislation was unimpaired and indeed increased.¹⁷²

From this era, Plucknett leapt into a discussion of the exclusionary rule which he claims commenced in the middle of the eighteenth century. He closed the chapter on legislation with a

170 Stevens (n 167) 105–32.

171 Theodore FT Plucknett, *A Concise History of the Common Law* (5th edn, Little, Brown & Co 1956) 323–33.

172 *ibid* 333–34.

description of the slow progress from free interpretation in the early medieval times through to his own time when literal interpretation was the norm:

As government and law develop, they become mechanised. Print and paper form a vast machine for the government of the nation. In search for precision ... oral or informal legislation have to be abandoned, and deeds and statutes are treated with more respect. It is important to realise how long this process took in the case of statutes. The courts professed at times to have a great respect for the letter of the statutes, and invented a maze of rules for their construction on grammatical lines. But they did not surrender their will absolutely to the legislator. There were limits, they asserted, sometimes defiantly, but later in veiled language. Until little more than a hundred years ago the courts were able, overtly or covertly, to exercise considerable discretion in dealing with statutes, and it is only in the last two or three generations that they have accepted the theory of their absolute submission to the word and letter of the legislature.¹⁷³

Whilst dealing with the matter in very broad strokes, Plucknett touches on the fundamental principles of textualism: the strict, grammatical approach to dealing with language, the submission of judges to the authority of Parliament and the exclusionary rule. Without using the term “textualism”, Plucknett describes its development in England. This historical examination also helps to contextualise the development of textualism. Its emergence occurred after centuries of movement away from judicial intervention towards judicial submission to the letter of the law.

Cornish described the development of textualism in a different manner that focused more directly on changes that occurred in the nineteenth century. Dwarris is credited for starting the idea of legislative intent, which was well supported by the mischief rule. Baron Parke is credited for qualifying this approach to prevent “a free-ranging search for what Plowden had once called the ‘soul’ of the law—its ‘internal sense’ and ‘reason’—by insisting, as modern judges do, that it is the words used that determine the legislature’s intent; and that accordingly it is often difficult to discern what that motive or purpose was.”¹⁷⁴ Interpretation acts were enacted to set out definitions “to reduce the need to delve around in order to discover the mischief that a statute was intended to eradicate.”¹⁷⁵ Meanwhile, “the judges stood out against hearing arguments as to what ministers, promoters and others said about meaning during the progress of a bill and rarely would they consider the reports of preceding Royal Commissions or Parliamentary or Ministerial Committees” and by the 1870s there was:

a tendency to resort to presumptions as starting points[.] ... A large portion of P. B. Maxwell’s *On the Interpretation of Statutes* was cast in this mould; likewise H.

173 *ibid* 340.

174 William Cornish and others, “Sources of Law” in Cornish and others (n 166) 53.

175 *ibid* 54.

Hardcastle's *The Construction and Effect of Statutory Law*. The Guidelines on how to construe statutes formed a web of rationalisation which judges used to justify their acceptance of one argument over another. Referring to such propositions could lend weight to what was no more than off-the-cuff preference."¹⁷⁶

There are well-known sources dating back to the sixteenth century which assert that statutory interpretation is about the quest for legislative intent,¹⁷⁷ and one should not take Cornish to be asserting that Dwarris was the first to make such a claim, but rather, that Dwarris was one of the leading advocates for a position that became widely accepted and often repeated in his time—a rote description of statutory interpretation as a quest for legislative intent.

Cornish's description provides a synopsis of the rise of textualism, which coincided with increasing references by members of the legal community to the canonical textualist treatises by Maxwell and Hardcastle. Cornish displays a rather sceptical view of textualism as a doctrine of interpretation. A certain amount of pragmatism is suggested by the notion that the nineteenth century approach to interpretation provided justifications for off-the-cuff preferences. This is a credible claim. Court hearings were primarily oral and tended to last hours rather than days in the nineteenth century. The House of Lords often heard appeals in half a day or less.¹⁷⁸ Under such time constraints, judges would not parse words in statutes and sift through authorities in a thorough manner. Textualism does provide ready-made justifications for interpretations in the context of adjudication, and it can be an efficient doctrine for judges seeking quick solutions in court.¹⁷⁹

Corry put forward a more detailed explanation for the development of what he refers to, rather critically, as the “canon of literal interpretation [which] enjoys an exaggerated authority and is believed to be far more productive of automatic solutions than it really is.”¹⁸⁰ He argued that a more purposive and equitable approach was taken when the monarch was the final authority for laws, and that the strict approach became the norm following the Glorious Revolution when the bargain struck in Parliament determined the law:

Prior to the revolution, the details of administration had been largely settled by the executive under the prerogative. With prerogative cut to the bone, and the command of

¹⁷⁶ *ibid* 54–55.

¹⁷⁷ See for example *Stradling v Morgan* (n 79), 204: “The judges of the law in all times past have so far pursued the intent of the makers of statutes ... which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.”

¹⁷⁸ Stevens (n 167) 324.

¹⁷⁹ This topic will be considered in greater detail in Chapter 6, Section 6.4.

¹⁸⁰ JA Corry, ‘Administrative Law and the Interpretation of Statutes’ (1936) 1 UTLJ 286, 292.

the king no longer a justification for governmental action, anything of moment that was done in the name of government had to be authorized by a statute passed by parliament. However, to have given an authority in general terms would have created a statutory prerogative. Hence the tendency to specify in detail the exact powers given. This spread to all branches of legislation and was accelerated by the judicial policy of strict construction. When the judges cut down the operation of general expressions, parliament had to attempt to achieve its object by specific enumeration of all that the general expression was meant to include. A vicious circle was established, and prolixity became a pronounced vice of eighteenth-century statutes.¹⁸¹

In essence, Corry was claiming that literal interpretation was the result of the ascendancy of Parliament as the supreme law-making body in the UK. Corry noted that Blackstone's claims about the sovereignty of Parliament were consistent with this state of affairs: "when the sovereignty of parliament became clear, the avowed application of rules of strict and liberal construction became impossible. If parliament may legislate anything it wishes and no other power may legislate at all, the duty of the judge is to determine what parliament has legislated and nothing else." He noted that some judges, such as Mr Justice Willes, deliberately applied narrow meanings when statutory provisions led to injustice. Corry also noted that there was some disagreement among judges about the rule against absurdity. There was a move towards a stricter approach towards statutes, but just how strict judges ought to be was not entirely settled.¹⁸² Nonetheless, Corry's claim that strict interpretation has roots in the democratic authority of Parliament is harmonious with the democratic fidelity which underpins textualism.

In *The Elements of Legislation*, Duxbury relies on the now widely accepted subtopics: the plain meaning rule, the golden rule and purposive interpretation (which subsumes Plowden's spirit/letter dichotomy and the mischief rule). He notes the ascendancy of the plain meaning rule, which began to be applied in the sixteenth century.¹⁸³ Duxbury also describes the ascendancy of the golden rule, and along with it, the absurdity doctrine. He describes the golden rule as a "debugged version of the plain meaning rule" which "came into its own in the mid-nineteenth century" This claim hints at the unified approach to statutory text that textualists perceived within the collection of rules of interpretation that were assembled in the treatises. Duxbury attributes the prolix, highly detailed style of the conveyancer-drafted statutes as a factor contributing to the rising reliance on the plain meaning rule, and this is a claim which has some force. It is interesting to couple this understanding with the work of Bowers.¹⁸⁴

181 *ibid* 297.

182 *ibid* 295.

183 Neil Duxbury, *Elements of Legislation* (CUP 2012).

184 Bowers (n 163).

Bowers' research brings to light the transition that occurred in the quality of legislation in the Victorian era. Through example, Bowers reveals how statutes shifted from the prolix, repetitious drafting style of the conveyancers to the more succinct style of professional drafters, as a result of influence from the ideas of Bentham, Symonds, Coode, Brougham, and Thring. Bowers is not concerned with interpretation, only with the nature of the language of statutes. However, the shift in interpretive practices that occurred in the nineteenth century is entirely consistent with the adoption of a more direct style of statutory text. The very legalistic, highly repetitious style of eighteenth century statutes would lend itself to a stricter approach to text than the minimalist approach of the "ancient" statutes. However, such a style would militate against two rules which held favour in the Victorian era and which continue to be important for modern American textualists. The application of ordinary *grammatical* meaning would not be entirely suitable for a highly technical style, and because of repetition, the rule against surplusage would also be of doubtful value. The increased importance placed on these two presumptions in the nineteenth century was probably influenced by the changes documented by Bowers.

Generally speaking, there has not been a lot of scholarship devoted to holistic trends in statutory interpretation in the Victorian era. The time period was too recent to attract the attention of twentieth century legal historians, and most other scholars were interested in the law of their own times. Scholarship on statutory interpretation in the nineteenth century was most comprehensively done by the authors of the treatises.

Within most of the treatises on statutory interpretation in the nineteenth century, a sharp distinction was made between the ancient statutes and modern statutes which explained away the heavy judicial interference that occurred with, for example, the Statute of Frauds.¹⁸⁵ The ancient statutes were short on detail and therefore required more judicial elaboration than the modern statutes, which were more specific and lent themselves to a more literal approach. Aside from this very broad distinction, there was not a lot of clear analysis about change over time within these works. Instead, there was an effort to reconcile the widely divergent claims of the legacy scholars—Plowden, Coke, and Blackstone—with the textualist conceptions propounded in these works. As a result of this quest to reconcile, it often appeared that relatively recent developments were quite old.

This is not to say that many of the rules and fundamental problems that these treatises addressed were recent. As the authors of the treatises, including Scalia and Garner, sought to show, many of the rules which have been incorporated into the sophisticated plain meaning approach can

¹⁸⁵ See for example Maxwell (n 2) 230; Sedgwick (n 72) 236 fn*.

be traced back for centuries.

Ibbetson makes a general observation which is highly relevant when he considers how statutory texts were approached during the medieval and early-modern periods:

The medieval and early-modern approach was essentially a literalist one. If the statute provided a writ in a specific form it was not for the judges to extend it by analogy to different situations. ... Similarly, if a statute provided for a remedy on the occurrence of certain conditions the courts would normally apply this rigorously.¹⁸⁶

This is a fair point. It coheres with Plucknett's claim that judges began to interpret strictly with limited discretion in medieval times. It also brings to the fore a very nearly timeless truth about the interpretation of statutes. Interpreting authoritative texts involves a fundamental activity: reading a text. Given the authoritative status of these texts, it is imminently sensible to look to the words of the statute and apply them as written, for the most part. If one conflates textualism with literalism, and then accepts Ibbetson's claim that the approach in England has been essentially literalist for centuries, one might be led to erroneously believe that textualism has been the basic approach to statutory interpretation for centuries. However, textualism, as defined in Chapter 1, consists of four core elements, the first element of which is the faithful agent view of judging. Meanwhile, Ibbetson's claim about judicial interpretation in medieval and early-modern times is followed up with an important qualification: judges in these times

did not claim, and so far as we can tell did not generally adopt, any far-reaching power to extend the operation of statutes outside of their intended ambit, though they were willing to extend the reason behind the statute—the 'equity' of the statute—into analogous areas not falling within the text itself.¹⁸⁷

This acknowledgement of interpretation by equity is one of the key features that distinguishes pre-nineteenth century approaches to statutory interpretation from the textualist doctrine that emerged in the nineteenth century. Whilst the authority was residual, it was in the nineteenth century that this residual authority was rejected outright, in accordance with the core principles of textualism.

It must also be kept in mind that textualism is not synonymous with literalism, and a jurisdiction cannot be presumed to be textualist if the judges predominantly interpret statutes literally. There are the underlying core principles and there is a very particular collection of rules of interpretation that comprise the doctrine. Many of the rules are much older, but they were assembled into explicit collections bounded by the underpinning principles of textualism in the

¹⁸⁶ David J Ibbetson, 'Case Law and Judicial Precedents In Mediaeval and Early-Modern England', *Auctoritates*, vol XIII (Voor Wetenschappen 1997) 57.

¹⁸⁷ *ibid* 58.

nineteenth century.

4.12 Conclusions

This chapter has set out, primarily, to reveal how the exclusionary rule emerged and developed in the United States and England; although it also provided an overview of the development of textualism in England. The beginnings of the rule are shrouded in judicial silence for the most part. One does not find clear enunciations of the rule in cases until several decades into the nineteenth century. Some state courts began to develop and rely on exceptions to the rule shortly thereafter, but in the US federal courts and the courts of England, the rule became explicit and predominantly followed towards the middle of the nineteenth century. The rule began to lose ground to accumulating exceptions in the US as the nineteenth century came to a close, and shortly after the turn of the twentieth century, the rule no longer had carriage. With the discarding of the rule, the US was no longer a textualist jurisdiction. (Recall that all four core features must be in place for a jurisdiction to be textualist.¹⁸⁸) In England the rule faced significant judicial challenges in the final decade of the nineteenth century, and the contrary cases resulted in divergent statements about the law with respect to the rule in the two dominant English treatises. This period of divergence came to a close early in the twentieth century following the landmark decision of *West Riding*. The three other components of textualism—the faithful agent view of judging, the insistence upon the separation of powers and the sophisticated plain meaning approach to statutory text—were firmly in place at this time, and with the uncertainties surrounding the exclusionary rule resolved, textualism became firmly entrenched as the orthodox approach to statutory interpretation in England. This marks the beginning of what will be referred to as the era of high English textualism. This period of time, which spans the better part of the twentieth century, will be the topic addressed in Chapter 5. It is a time when the rules and principles of textualism had essentially become dogma.

¹⁸⁸ Chapter 1, 24.

Chapter 5

The Era of High English Textualism

5.1 Introduction

This chapter will focus on English textualism in the twentieth century. The high watermark for the textualist era commenced around 1907 when doubts about the extent and force of the exclusionary rule were settled and textualism became firmly entrenched, as evidenced by the consensus that emerged in the dominant treatises by Maxwell and Craies. There were no more grounds for reasonable lawyers to disagree about the law in this area (but for the lingering doubts about commissioners' reports). This was an era when the rules and principles of textualism were widely known and entrenched to such an extent that they were effectively dogma.

A textualist jurisdiction requires the imposition of a contestable set of rules and principles by the majority of the senior judiciary onto their peers and those who preside in the courts below. Within the judiciary and the larger legal community, there were forces that served to reinforce the status quo, and opposing forces that challenged it. In this sense, it is a story about influential members of the legal community who favoured the doctrine collectively rebuffing challenges and adapting established rules to changing circumstances. However, as will be shown, textualism was as much about the dominant narrative for describing the judiciary's approach to statutory interpretation as it was about the actual practices of judges. Variation in judicial practice, and cases that seemed at odds with the rules, did little to shake the general belief within the legal community that textualism was the law that governed statutory interpretation. There was a complex set of interacting factors, compounded by the fact that different people viewed the doctrine in different ways. Within this web of disagreement, the doctrine of textualism persisted for decades, during a time of extraordinary social, cultural and political change, until the number of voices calling out for revision of the interpretive orthodoxy grew to be too numerous, and the rules finally gave way.

5.2 The Nature of a Textualist Jurisdiction

The claim that the textualism was entrenched must be understood in a realistic light, given the nature of the precedent-based English legal system. There is an uneasy fit between textualism and *stare decisis*. An appellate court judgment that transgresses the statutory text in a manner that is beyond a merely strained interpretation but has been upheld, must continue to be upheld in courts at the same level or below. In effect, judges become estopped from applying the ordinary rules of interpretation by *stare decisis*, particularly if the legislature appears to have accepted that the

precedents are law.

Judges often provide multiple reasons for their decisions and this can lead to a lack of clarity concerning which legal principle settled a case. In *Re Hart ex parte Green*¹ the word “void” in s. 47 of the Bankruptcy Act 1883 was read to mean “voidable” so that a good faith purchaser for value without notice would not be deprived of property, in accordance with the decision by Williams J in *Re Brall*, who wrote off the discrepancy as “a convenience of drafting.”² It should be noted that the provision was intended to prevent transfer of valuable assets to family members when bankruptcy might have been imminent.³ The provision had a reasonable legislative policy objective.

Williams J was applying the doctrine of scrivener’s error, presuming that the legislature could not have intended to overturn the long-standing rule protecting good faith purchasers. Lindley J followed this decision in *Re Carter and Kenderline’s Contract*, and described it as the avoidance of absurdity.⁴ In *Re Hart*, Cozens-Hardy MR followed the precedents and further justified this as a rule of equity more than 200 years old, implying that equitable principles were still, in fact, relevant to statutory construction. While this was obiter,⁵ it muddies the water for anyone seeking to claim that textualism was predominant at the time. It raises the question: did the long-standing principles of equity take priority over the plain language of statutes? Put another way, was something more than plain language required to set aside long-standing principles of equity? This type of reasoning could apply to common law principles as well, and it does not fit well with the textualist claim that the rule requiring statutes in derogation of the common law to be strictly construed was dead.

So long as the decision in *Re Hart* is understood to be rooted in the absurdity doctrine, and the further comment is obiter, there is no question about the fit between judicial behaviour and textualism. However, a precedent-based legal system is open-textured to a certain extent. Judges will often provide corroborating reasons for deciding any particular point of law, and these reasons remain in the reports, available for argument in future cases.⁶ Lawyers have a duty to raise all arguments that benefit their case, and this guarantees that various arguments put forward for any

1 [1912] 3 KB 6.

2 [1893] 2 QB 381, 384.

3 “A settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.”

4 [1897] 1 Ch 776. “to my mind good sense is shocked by such a startling construction as that.”

5 Kennedy LJ concurred on the issue. Arguably, since it was additional and not strictly necessary for the decision, it is obiter. Yet the concurrence adds weight to the claim.

6 For example, *Re Hart* was reaffirmed in the Privy Council case of *Al Sabah & Anor v Grupo Torras SA & Anor (Cayman Islands)* [2005] UKPC 1.

legal proposition will be revisited. This is perhaps one of the reasons why textualism relies on clear black-and-white rhetoric despite the obvious nuance that lies beneath its central rules and principles. It seeks to provide the dominant, overriding justifications in a rhetorical ecosystem that nurtures a wide range of competing arguments.

The authors of the Victorian treatises were comfortable with this tension. For example, Dwarris noted a series of cases in which “void” was held to mean voidable, essentially to avoid absurdity with respect to s 41 of the Statute of Artificers,⁷ which stated that all indentures of apprenticeship made contrary to the Act were “clearly void in law to all intents and purposes whatsoever.”⁸ Unscrupulous employers could evade enforcement of a contract which transgressed the statutory requirements, leaving good faith apprentices without a remedy. Sedgwick cited Lord Denman in *Pearse v Morrice* for a similar textual transgression.⁹ Maxwell discussed it as an example of avoiding construction that permitted advantage from one’s own wrong, whilst Wilberforce discussed this under the heading of “Operation of statutes restrained where words of prohibition are modified.”¹⁰ So even the treatises that spawned textualism explicitly acknowledged that “void” could be read as “voidable”.

This mode of “correcting” statutory words to cohere with common law and equity principles has a lineage in English common law. The statute governing apprenticeships was from an older era when the drafting was more minimalist, and therefore one could reasonably expect judges to adopt a more activist approach to interpretation. However, *stare decisis* arms judges with rules and precedents that can push and strain against what might appear to be plain language. The rules of textualism evolved within this system, and therefore it should be no surprise that the doctrine accommodates these forces despite the literalist rhetoric.

7 1563 (5 Eliz 1 c 4).

8 Sir Fortunatus Dwarris and William Henry Amyot, *A General Treatise on Statutes: Their Rules of Construction, and the Proper Boundaries of Legislation and Judicial Interpretation. Including a Summary of the Practice of Parliament, and the Ancient and Modern Method of Proceedings in Passing Bills of Every Kind* (2nd edn, W Benning 1848) 639–40.; *Gye v Felton* (1813) 4 Taunt 876 per Mansfield CJ, who cited *R v St Nicholas Ipswich* (1731) 1 Bott 525; *Winchcourt v Winchester* Hobb 166; *Barber v Dennis* (1666) 1 Salk 68; and *R v Evered* 1 Bott 530 in support.

9 (1834) 2 A & E 84, 94: “‘It is extraordinary,’ said Lord Denman, ‘that there should be cases in which it has been held that the words, ‘null and void,’ should not have their usual meaning; but the word void has certainly been construed as voidable, when the proviso was introduced in favor of the party who did not wish to avoid the instrument.’” Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (J S Voorhies 1857) 302. The relevant provision, 54 Geo 3 c cxxiv, provided that non-payment of rent for toll gates on a turn-pike would render the lease null and void; Sedgwick also cited *Inhabitants of Fordham* (1839) 11 A & E 83; *R v Justices of Leicester* (1827) 7 B & C 6; *R v Inhabitants of Birmingham* (1828) 8 B & C 29; *The King v Inhabitants of St Gregory* (1834) 2 Ad & Ell 99; *R v Inhabitants of Hipswell* (1828) 8 B & C 466; and the cases cited by Dwarris.

10 Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (2nd edn, Bradbury, Agnew & Co 1883) 250; Edward Wilberforce, *Statute Law: The Principles Which Govern the Construction and Operation of Statutes* (Stevens & Sons 1881) 211–12.

It is revealing that, despite the many decisions that transgressed the literal meaning of statutory provisions throughout the era of high English textualism, there was a tendency among scholars of the day to regard the English approach as dominated by strict literalism. The claim was often made as a criticism. In his widely-read textbook on jurisprudence that persisted, like Craies and Maxwell, through multiple editions over several decades, Pollock claimed that “[n]o case is known, in fact, in which an English Court of justice has openly taken on itself to overrule or disregard the plain meaning of an Act of Parliament.”¹¹ Rigid formalism was a recurrent theme for critics of the English approach to statutory interpretation¹² and this was not limited to English scholars. The notion that literal construction was the predominant approach in England became the general understanding among continental scholars as well.¹³

5.3 Textualism: the View of Stevens

In *Law and Politics*, Stevens comes close to delineating and describing the era of high English textualism. However, his theory revolves around what he calls the era of substantive formalism, and while the concept he is describing includes statutory interpretation, it is mostly concerned with *stare decisis* and the common law. He notes that rigid *stare decisis* and the restrictive approach to judge-made law that came into vogue in the late nineteenth century reached its apex from 1940–55. He also describes a concurrent, rigid approach to statutory interpretation.

Stevens describes the arrival and ascendancy of the era of substantive formalism as a series of time periods from the nineteenth and twentieth centuries. The foundations were laid from 1844 to 1910. The declaratory theory of law and the underlying belief that making and changing the law was Parliament’s job alone became entrenched during this time. During the period from 1911 to 1940

the law, with its emphasis on objectivity and logic became increasingly important. Not only were judges chosen more frequently from the professional judiciary, but they emphasized the more ‘scientific’ spirit of the English tradition. The internal self-sufficiency of the law was more readily accepted; political decisions were more carefully eschewed[.]

From 1940 to 1955:

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- 11 Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (Macmillan 1896) 252. The 6th edition was published in 1929 with few substantive changes. Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (6th edn, Macmillan 1929). Also see JA Corry, ‘Administrative Law and the Interpretation of Statutes’ (1936) 1 UTLJ 286.
- 12 Relevant works will be discussed at 139. There were some who took the contrary view that the regime was more flexible and prone to exceptions than the orthodox pronouncements would suggest. See for example Charles B Nutting, ‘The Relevance of Legislative Intention Established by Extrinsic Evidence’ (1940) 20 BUL Rev 601.
- 13 Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen*, vol 2 (Mohr Siebeck 2001) 780–962.

the approach that had helped preserve the lower courts from the rigors of political control, namely the declaratory theory of law, was not only about to be taken seriously by the law lords but also to be given a terrifying aura of certainty. Thus while legislation was used increasingly as a means of social control in the country at large, law—as understood by the English judges—was confined within increasingly narrow intellectual and practical bounds.¹⁴

It should be kept in mind that Stevens looked past the justifications in individual judicial opinions to arrive at a socio-legal assessment of the tendencies of the various Lords Chancellor and prominent Law Lords. As a result, while he observed overall trends in judicial rhetoric about the separation of powers and the faithful agent view of judging, textualism must be read between the lines of his analysis, which operated at a different level of generality than textualism.

There are three aspects of Stevens' findings that need to be reconciled with the claim that the era of high textualism spanned from 1907 through to 1980 (approximately). During this time there were overall trends in statutory interpretation that changed; there was a significant amount of differentiation between particular areas of law; and there was change within particular areas of law during the era of textualism.

It must be remembered that textualism is not a rigorous method that provides predictable outcomes in specific cases. The sophisticated plain meaning approach to texts establishes a diverse set of rules of interpretation without imposing a rigid structure upon them.¹⁵ One canon can always overcome another. Furthermore, the rules can accommodate differential treatment within different areas of law because it is permissible and indeed desirable for textualist judges to interpret statutes in light of the subject matter, the history of the law relevant to that subject matter and the relevant cases. Furthermore, a canon such as the rule of lenity is textualist-compliant despite requiring criminal statutes to be treated differently from non-criminal statutes.

The flexibility which enables differential treatment for particular areas of law also leaves room for change over time in any particular area of law. If a series of criminal cases arise in which the rule of lenity is applied, a trend towards strict interpretation can arise while remaining within the acceptable rules of textualism. Thus, if one accepts Stevens' claim that tax law became somewhat less literal and more principle-based during the two World Wars, then returned to a more literalist approach afterwards, this is not a clear refutation of textualism.¹⁶ It was a matter of giving more weight to context and purpose, and less weight to the grammatical, literal meaning of the particular provision at issue. So long as ambiguity is found and the words of the statute are not given a

14 Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (Weidenfeld & Nicolson 1979) 184.

15 Chapter 1, 27–30.

16 Stevens (n 14) 170–76.

meaning that they cannot possibly bear within the permissible textualist context through reliance on permissible textualist justifications (in the absence of absurdity), the rules of textualism are being followed.

The classic tax case cited for the literal approach in tax law that dominated the twentieth century is *Partington v Attorney General*, in which case Lord Cairns held that:

[i]f the person sought to be taxed comes within the letter of the law he must be taxed, however, great the hardship may appear to the judicial mind. On the other hand if the Court seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.¹⁷

However, Monroe pointed out that one can “find Lord Cairns commending adherence to the letter and neglect of the intendment of a fiscal act when in the same volume of the law reports he is to be found taking note of the intention of legislation.”¹⁸ He was referring to *Hammersmith and City Railway Company v Brand*, in which case Lord Cairns said “if there be any doubt or ambiguity in the words, the consideration ought not to be overlooked that, beyond all doubt, the intention of legislation of this kind is that, in some shape or other, compensation should be made to those who sustain loss or harm by the operation of the parliamentary powers.”¹⁹ Lord Cairns was not a rigid literalist.

The notion that tax law was dominated by literalism in the twentieth century can also be challenged. De Cogan points to *London County Council v Edwards (Surveyor of Taxes)* as an example of purposive interpretation:

[this case] is taken to have recognised the right of tax planners to rely on statutory deductions even when we might intuit their unavailability. ... Whilst Channell J’s reasoning was weak, I would not go so far as to suggest that he misunderstood the taxpayers’ contentions. Rather, he was confronted with a series of provisions that, taken together, did not work properly. He accordingly fudged the question in order to make them workable.²⁰

In reality, many English judges were taking a more sophisticated approach to statutes than strict literalism, even in tax law, in the early twentieth century.

With the foregoing discussion in mind, Stevens’ basic claim can be contextualised with respect to the era of high textualism. Stevens saw a rise in substantive formalism after 1911, and the period of 1940–55 as the high point of that era. While this is a well-defended claim, Stevens’ central concern was the common law. Statutory interpretation was a subsidiary issue with respect to his

17 (1869) LR 4 HL 100, 122.

18 Hubert Holmes Monroe, *Intolerable Inquisition?: Reflections on the Law of Tax*, vol 33 (Stevens 1981) 50.

19 (1869) LR 4 HL 171, 215–16.

20 Dominic de Cogan, ‘Purposive Interpretation in the Age of Horse Trams’ [2015] BTR 80, 88.

theory. He never discussed the rules of interpretation in a comprehensive manner. The era of substantive formalism occurred during the era of high textualism, and while the formalistic rules of textualism aided and abetted substantive formalism, they are an item of their own with their own history that stands apart from substantive formalism. Whilst there were trends in statutory interpretation as it was actually practised by the judiciary which changed over time, and with respect to particular areas of law, the general rules as propounded in the canonical works by Maxwell and Craies remained constant, as did the foundational cases cited in support, throughout the era of high textualism.

5.4 Secondary Literature in the Era of High Textualism

Secondary literature is of central significance to textualism. As stated earlier, textualism is more readily perceived in the secondary literature than in cases. However, the relationship goes deeper. The treatises on statutory interpretation probably contributed towards the development of the doctrine, and once the doctrine was entrenched the treatises undoubtedly helped to preserve it. There were other works which contributed to the entrenchment and persistence of textualism as well, including the jurisprudence textbook.

Jurisprudence became a mandatory topic of study for the Bar towards the end of the nineteenth century,²¹ and statutory interpretation became a standard subtopic within that field. Thus many judges and lawyers learned the basics of statutory interpretation from the jurisprudence textbook.

Salmond's work, *On Jurisprudence*, was one of the more successful legal theory textbooks of the early- to mid-twentieth century. The first edition was published in 1902, around the time when textualism was becoming entrenched. As with Maxwell's and Craies' treatises, this work would endure through multiple editions over the course of the twentieth century. Salmond described the English approach to statutory interpretation as follows: but for two types of exceptions, judges must rely on the "grammatical" approach, and follow the letter of the law because they are "not at liberty to add to or take from to modify the letter of the law[.]"²² The first exception concerns defects in the logic of a statute, whether due to ambiguity, inconsistency or silence on a relevant issue. The second exception concerns absurdity: "when the text leads to a result so unreasonable that it is self-evident that the legislature could not have meant what it has said." In such cases, judges are permitted to apply "logical interpretation ... which departs from the letter of the law, and seeks elsewhere for some other and more satisfactory evidence of the true intention of the

21 Harold Dexter Hazeltine, *Legal Education in England* (American Bar Association 1909) 900–15.

22 John W Salmond, *Jurisprudence; or The Theory of Law* (Stevens & Haynes 1902) 128.

legislature.”²³

At first blush, Salmond’s description seems at odds with textualism. There is no mention of the exclusionary rule, and it emphasises the circumstances under which judges can go beyond the ordinary grammatical meaning of statutory text. However, Salmond couches these exceptions as very strictly limited, with the grammatical approach being the default. Meanwhile, his chapter begins with a lofty praise of statutes, which he regarded as far superior to judge-made law. From the internal perspective of a textualist judge, textualism is more concerned with values such as the democratic authority of the legislature, and Salmond’s view was that of an outsider. The description is focused on a reasoned summary of judicial practices instead of the motivating principles. As a result, it explains what textualist judges do, as opposed to what they do not do. When understood in this light, Salmond provides an excellent synopsis of the sophisticated plain meaning approach to statutory text, even though he ignored the exclusionary rule.

Among the rather scant list of sources cited by Salmond, the only works that addressed statutory interpretation directly were the works by Maxwell, Hardcastle and Beale. This was a reflection of the times. In the era of high English textualism, the treatises by Maxwell and Hardcastle (which evolved into Craies) were the canonical works on the subject. For decades to come, when a scholar addressed the topic of statutory interpretation, these two works were essential sources.²⁴ This occurred in the dominant jurisprudence textbooks early in the twentieth century, and it continued in the legal process textbooks that rose to prominence with the increasing importance of law schools in England after World War II.²⁵ The two works would also be cited regularly in judgments, and often together.²⁶

Salmond’s description of statutory interpretation would remain unchanged through to the seventh edition published in 1924. The first substantive change made to the section on legislation was the addition of the exclusionary rule in the eighth edition, which was the first posthumous edition, published in 1930.²⁷

23 *ibid* 127.

24 See for example Courtenay Ilbert, *Legislative Methods and Forms* (Clarendon Press 1901) 237; Glanville Williams, *Learning the Law: A Book for the Guidance of the Law Student ...* (Stevens 1945) 110; Note on Commissioner Reports (1939) 120 LQR 488; Claud Mullins, *In Quest of Justice* (Murray 1931). Mullins called Maxwell “the standard book on the interpretation of statutes” at 117.

25 See for example Williams, *Learning the Law* (n 24); AKR Kiralfy, *The English Legal System* (Sweet & Maxwell 1954).

26 See for example Lord Dundas in *Millar & Lang Ltd v Macniven & Cameron Ltd* (1908) 16 SLT 56; per Swinfen Eady LJ in *Inland Revenue Commissioners v Marquess of Camden* [1914] 1 KB 641; per Coleridge J in *Yates, In the Estate of* [1919] P 93; per Sankey J in *Attorney General v Brown* [1920] 1 KB 773; per Sankey J in *R v McLain* (1922) 16 Cr App R 109; per McCardie J in *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 1 KB 539; per Lord Greer in *Mersey Docks and Harbour Board v Assessment Committee for West Derby Assessment Area* (No 1) [1932] 1 KB 40.

27 Sir John W Salmond and CAW Manning, *Jurisprudence* (8th edn, Sweet & Maxwell 1930). This phenomenon was described by MacCormick as a form of stagnation in English jurisprudence between 1900 and 1950: “a routine

A similar ossification occurred in the treatise by Maxwell and the treatise by Craies following the consensus in the 1907 edition: the claims within these works became relatively static. For example, the opening paragraphs describing the exclusionary rule in Maxwell did not change at all from the third edition published in 1896 through to the 11th edition, published in 1962, The section was reworded for the twelfth edition, but it remained nearly identical in substance, and the cases cited in support of the fundamental claim remained unchanged from the third edition.²⁸

In 1938, Odgers, a former editor of the Craies treatise, published a rival work called *The Construction of Deeds and Statutes* which would persist through to a fifth edition published in 1967. The portion dealing with statutes purported to be based on Craies' and Maxwell's treatises.²⁹ As the book was smaller than both Craies' and Maxwell's, and it covered a larger subject matter, it was condensed, in comparison. Nonetheless, the key ideas were conveyed in the manner typical of the twentieth century textualist English treatise. The intent of the legislature is to be found in words of the statute as understood according to their ordinary meaning within the context of the whole document.³⁰ Interpretations should avoid absurdity (although Odgers adopted the strict version of the rule: it was only available to resolve ambiguities). Twice he warned of the danger of misunderstanding legislative intent to mean something other than the meaning of the words of the statute.³¹ Finally, "[n]either the debates in parliament on the Bill by which an Act was introduced nor the history of the changes which the Bill underwent before being enacted nor the reports of commissions which shortly preceded the Act under consideration are admissible as showing intention"³²

The canonical status of the treatises by Craies and Maxwell coincided with the era of high textualism, and their influence upon the legal community no doubt played a role in the resilience of textualism in England. It would be fair to say that the era of high textualism was the era of Craies and Maxwell. The fact that the claims about statutory interpretation in the textbooks had become static indicates that this sub-discipline had achieved a state of maturity: the central claims had been worked out to the satisfaction of the legal community, and revision was only required to accommodate novel details that arose in newer cases.

reading and re-reading of a canon of texts and textbooks." Neil MacCormick, *H. L. A. Hart* (Arnold 1981) 19.

28 Sir Peter Benson Maxwell, *Maxwell on the Interpretation of Statutes*. (P St J Langan ed, 12th edn, Sweet & Maxwell 1969) 50.

29 Charles E Odgers, *The Construction of Deeds and Statutes* (Carswell 1939) iii. "[T]he debt I owe to the standard works of Norton, Maxwell and Craies will be at once apparent."

30 *ibid* 162–182.

31 *ibid* 162, 167.

32 *ibid* 220.

5.5 *Stare Decisis* and the Rules of Statutory Interpretation

As *stare decisis* grew to be applied more strictly over the course of the nineteenth century it was also extended to cover the rules of statutory interpretation more comprehensively and more explicitly. In the twentieth century, it became normal to cite cases, and often cases cited by Maxwell and Craies, in support of items such as the exclusionary rule, which had typically been asserted without authority in the past.³³

Lord Sankey's judgment in *Edwards v Attorney General of Canada* provides an example of this change:³⁴

As far back as *Stradling v. Morgan* (1560), 1 Plowd. 209, it was laid down that extraneous circumstances may be admitted as an aid to the interpretation of a statute and in *Herron v. Rathmines and Rathgar Improvement Commissioners* [1892], A.C. 498, Lord Halsbury said 'The subject matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act,' but the argument must not be pushed too far and their Lordships are disposed to agree with Farwell, L.J., in *Rex v. West Riding of Yorkshire County Council*, [1906] 2 K.B. 676, 'although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are exceedingly slight': see Craies Statute Law, Edit. Ill, p. 118.

In this passage, the canonical cases for the exclusionary rule (that appear to have been drawn from Craies' treatise) are cited for a related issue—extrinsic evidence of historical circumstances.

This passage repeats the claim from *West Riding* that the methods of statutory interpretation in England were established by 1560. This sentiment was repeated by others. In 1935 Eastwood said "while the last few generations have seen a considerable change in the contents of and the social and political motives for our statute law, our rules of interpretation have varied very little if at all, from the form in which they were expressed in the sixteenth century."³⁵ The era of textualism was accompanied by a reinterpretation of the history of statutory interpretation, or an erroneous presumption about that history.

The claim that the only acceptable "modes of interpretation" are the ones that had been established by the middle of the sixteenth century requires *stare decisis* to operate in a very unusual manner. Most of the rules of interpretation are presumptions, and precedents are therefore permissive rather than mandatory. If the absence of sixteenth century reliance upon a particular rule is held out as proof that there is no such rule, there is a kind of reverse *stare decisis* at work, based

33 See for example *Attorney General v Sillem* (1863) 2 H & C 431; and *R v Hertford College* (1878) 3 QBD 693.

34 [1930] AC 124, 134 [*Edwards*]

35 RA Eastwood, 'A Plea for the Historical Interpretation of Statute Law' [1935] J Soc Pub TL 1, 1.

on an unstated principle that the methods of interpretation had been perfected by the sixteenth century. Any innovation is implicitly regarded as unacceptable and therefore forbidden.

The concept of the “unchanging principles of interpretation” contains religious overtones reminiscent of the unchanging word of God; and it also conjures elements of ancient Greek philosophy about the perfect (and therefore unchanging) Platonic forms. The claim that these principles were old and venerable imbued them with a rhetorical force that would be lacking in principles that are changing and therefore fleeting (so long as the claims about unchanging principles are accepted).

As a result of these repeated claims, textualism came to be perceived as much older than it really was. When coupled with the claim that textualism was neutral with respect to politics and policy, the beliefs acquired a self-righteous, self-reinforcing quality. By implication, other methods were not neutral, and corrupted the perfectly developed ancient methods. No doubt, these claims contributed to textualism’s firm entrenchment.

5.6 Textualism in Court

The era of high English textualism was an era in which the core features of textualism were essentially dogma. Arguably, the rules were law, and therefore a violation of the rules of textualism in a judgment was grounds for appeal. However, this is not a straightforward claim to defend. A violation of the sophisticated plain meaning approach to language, unless particularly egregious, would probably end up mired in legal arguments given the flexibility of the collection of rules at issue. However, a violation of the faithful agent view of judging, for example, a statement in a judgment to the effect that judges can make the law when interpreting statutes, would be a credible justification for an appeal. The same would hold true for any explicit reliance on Hansard. However, whether that actually brings about an appeal is another matter entirely. Cases which are appealable do not always get appealed for a variety of reasons, for example, lack of funds or a change in circumstance which renders the legal dispute irrelevant. Meanwhile, there were lesser transgressions in cases which did not strike at the heart of the rules, but which posed a more subtle challenge to the textualist orthodoxy. Some of these judgements were handed down by the House of Lords and the Privy Council and thus could not be appealed and could be used as precedents. In *Edwards*, the Privy Council considered whether “qualified persons” fit to sit as senators as provided for in the British North America Act of 1867 included women.³⁶ Lord Sankey noted that:

when upon May 20, 1867, the *Representation of the People Bill* came before a committee of the House of Commons, John Stuart Mill moved an amendment to secure

36 British North America Act 1867 (30 & 31 Vict c 3).

women's suffrage and the amendment proposed was to leave out the word 'man' in order to insert the word 'person' instead thereof. See *Hansard*, 3rd series, vol. 187, column 817.³⁷

The inference to be drawn is that the drafters knew that the word "person" was gender inclusive. The *Hansard* concerned a different statute than the one at issue, but *Hansard* was relied upon as an aid to interpretation.

In *R v Commissioners of Customs & Excise*, Lord Blainsburgh stated: "I therefore thought it right for my own satisfaction to examine the Finance Bill of 1909–10 as it was presented to this House in 1909 and then rejected, in order to see whether §46 had any counterpart in that Bill"³⁸

Luxmoore J considered a Bill in its original form and amendments made in the House of Commons, as well as statements made during debate concerning the Adoption of Children Act 1926 in *Re C, an Infant*.³⁹ He did so "to show that the policy of the Act appears to have been to relax the universality of the restriction in the [relevant] subsection."

There were judges who disagreed with the strictness of the exclusionary rule and who sought to create exceptions.

Hansard was also referred to in support of a practice note which was promulgated:

to correct some misapprehension which appears to have arisen about the exercise of the power conferred by Section 44 of the Criminal Justice Act 1948 [concerning costs]. ... It was never intended, and it would be quite wrong, that costs should be awarded as of course to every defendant who is acquitted. Its use should be considered by the court on its own merits.

I may add that a reference to *Hansard* (449 HC Deb 5s 1294) shows that this is in accordance with what the Attorney General stated in Parliament was the intention of the clause when it was being considered in committee.⁴⁰

Whilst a practice note is not a case, one could sympathize with any lawyer at the time who regarded this as somewhat hypocritical coming from a Bench which, but for the occasional self-directed exception, flatly rejected counsels' attempts to use such materials.

One of the clear cases where an appeal was grounded on the violation of the rules of textualism was *Magor and St Mellons Rural District Council v Newport Corporation*.⁴¹ The issue began in *Seaford Court Estates Ltd v Asher*, in which case Lord Denning sought to explicitly break free from the judicial rhetoric concerning statutory interpretation which Lord Denning regarded as

37 (n 34) 143.

38 [1928] AC 402, 423.

39 [1937] 3 All ER 783, 787.

40 Practice Note [1952] WN 175

41 [1950] 2 All ER 1226.

being artificial and overly reliant upon literal meaning.⁴² In this case he asserted that, when statutes lack clarity, the judge must consider:

the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. ... A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.⁴³

Lord Denning further developed this conception of judging in *Magor and St Mellons Rural District Council v Newport Corporation*, and when the case was appealed, Lord Simonds took the opportunity to repudiate this violation of a core textualist principle.⁴⁴ In his judgment for the court, Lord Simonds was emphatic that "the criticism which I venture to make of the judgment of the learned Lord Justice is not directed at the conclusion that he reached."⁴⁵ He took issue with Lord Denning's claims about the proper role of the judge:

What the legislature has not written, the court must write. This proposition, which restates in a new form the view expressed by the Lord Justice in the earlier case of *Seaford Court Estates Ltd. v. Asher* (to which the Lord Justice himself refers), cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation.⁴⁶

The scholarly community was paying attention, and this case would become one of the canonical cases in support of the general judicial approach to statutory interpretation in England, thus adding to the curated collection of judgments which emphasised the orthodoxy of textualism.⁴⁷ The flexibility that textualism afforded was downplayed, as were the cases that might otherwise pose a challenge to the orthodoxy. In light of this, it is fair to consider the effect that textualism had on judging.

Textualism provides a relatively clear approach to adjudication. Within the reported cases in the era of textualism, one does find a relatively consistent "bottom-up" approach to statute-based issues: relatively early in the judgment, the relevant statutory provisions are quoted, and the various reasons for the decision follow, which will focus on the words of the provision, the context and prior adjudication as they apply to the circumstances of the case. The interpretation will be justified through reliance on the accepted modes of legal reasoning permitted by the textualist rubric.

42 [1949] 2 KB 481. Also see Lord Denning, *The Discipline of Law* (Butterworths 1979) 11.

43 *Seaford Court*, *ibid* 499.

44 [1952] AC 189.

45 *ibid*.

46 *ibid* 191.

47 See for example Maxwell (n 28) 29; William Feilden Craies and SGG Edgar, *Craies on Statute Law* (6th edn, Sweet & Maxwell 1963) 67 & 70.

Over time, the various acceptable rules appeared in new cases as restatements of pre-existing rules, or they added refinements, and over time the cases accumulated with the effect that the doctrine was reinforced. Like a snowball rolling down a hill, the accumulating body of restatements and refinements created a form of legal inertia. The exclusionary rule grew in such a manner from a simple principle into a comprehensive set of claims covering Hansard, commissioners' reports, white papers, green papers, and even practice notes.⁴⁸

As the various sub-rules of textualism accumulated, a series of conflicts arose over particular details, some of which grew into lingering controversies. The most significant conflicts concerned the admissibility of commissioners' reports and the rigidity of the plain meaning rule.

5.7 The Admissibility of Commissioners' Reports

The exclusionary rule with respect to Hansard was firmly established in the era of high English textualism, but there were unresolved issues with respect to commissioners' and committee reports. There is an inherent tension between the mischief rule, which justifies recourse to texts and information beyond the immediate statutory provision, and the exclusionary rule which seeks to strictly limit recourse to extrinsic information. The *Solio case*⁴⁹ was a unanimous House of Lords judgment. It was a precedent that justified recourse to commissioners' reports under the mischief rule at a time when the House of Lords claimed to be strictly bound by its own decisions. Craies and Maxwell adopted opposing points of view on the matter and judicial disagreement over the import of the case was inevitable.

Maxwell's treatises disregarded the *Solio case* and asserted that commissioners' reports could not be considered but for a very narrow exception—when construing private acts. Craies' treatises claimed that “it is now generally agreed that reference may be made to reports on the effect and defects of previous statutes *in pari materiâ*.”⁵⁰

Farwell LJ's pronouncements in *West Riding* sought to downplay the possibility of reliance on commissioners' reports through reliance on the *Solio case*. He cited the case, among others, as an authority for the exclusionary rule then stating that “[t]he mischief to be cured by the Act, and the aim and object of the Act must be sought in the Act itself. Although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn

48 See for example Maxwell (n 28) 50–54; and Craies and Edgar (n 47) 128–32.

49 *Eastman Photographic Materials Company v Comptroller-General of Patents, Designs and Trademarks* [1898] AC 571 [*Solio Case*].

50 Sir Peter Benson Maxwell and James Anwyl Theobald, *On the Interpretation of Statutes*. (4th edn, Sweet & Maxwell 1905) 40–41; William Feilden Craies and Henry Hardcastle, *A Treatise on Statute Law* (1st edn, Stevens & Haynes 1907) 124.

therefrom are extremely slight”⁵¹

Due to the natural forces within an adversarial legal system, lawyers had an incentive to test the extent of *West Riding*’s limiting effect on the *Solio case*. It was argued that the Report of the Committee of Privileges should be considered in *Viscountess Rhondda’s Claim*.⁵² However Viscount Birkenhead regarded the report as a judgment of a judicial body “governed by a pedantic and absolute adherence to the rules which govern procedure in Courts of law.”⁵³ The case was decided without recourse to the report; and the claim that the report was admissible, and the underlying reasons for the claim, were *obiter*.

The next significant case to address the issue was *Assam Railways and Trading Co v Commissioner of Inland Revenue*.⁵⁴ This was a tax case in which the appellant company contested the method of calculating the net amount subject to tax relief based on an anti-double-taxation rule for companies paying taxes within the Dominion, in accordance with the Income Tax Act 1918. Counsel for the appellant sought to rely on:

recommendations from a Report of a Royal Commission on Income Tax in 1920;⁵⁵ he argued that, as the Act of 1920 followed these recommendations, it should be presumed that the words of the section were intended to give effect to them and hence they could be used to show what was the intention of the Legislature in enacting the section.⁵⁶

In his opinion, Lord Wright restated the rule as enunciated by Farwell LJ in *West Riding*, and distinguished the *Solio case* in which a commissioners’ report was relied upon to “enquire into the working of the earlier Act” under the mischief rule: “It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.”⁵⁷ This claim is similar to Farwell’s insofar as the affirmation of the mischief exception in *obiter* was made in order to affirm the exclusionary rule. The majority concurred. Following this case, Maxwell’s treatise added a single sentence which made explicit a claim that had been implicit from the first edition: “Nor can the report of a Royal Commission be admitted to show the intention of an Act.” Craies’ treatise remained unchanged.

In 1939 the Privy Council consulted a commissioners’ report when deciding *Ladore v*

51 *R v West Riding of Yorkshire County Council* [1906] 2 KB 676 [*West Riding*]

52 [1922] 2 AC 339.

53 *ibid* 349.

54 [1935] AC (HL) 445.

55 Great Britain, *Report of the Royal Commission on the Income Tax* (Cmd 615, 1920); Finance Act 1920.

56 (n 54) 457 per Lord Wright.

57 *ibid* 459.

Bennett,⁵⁸ which concerned the British North America Act 1867.⁵⁹ In this case, several municipalities had been amalgamated and their debentures had been restructured in order to cope with the severe financial pressures of the great depression. Lord Atkin’s judgment relied on a report of a Royal Commission appointed to “inquire into the municipal and other local affairs of the four municipalities in question[.]” The report revealed the financial positions of the municipalities, and it was presented to the courts in Canada on the consent of both parties following objection and argument. Lord Atkin did “not cite this report as evidence of the facts there found, but as indicating the materials which the Government of the Province had before them before promotion in the Legislature the statute now impugned[.]” The issue to be settled concerned the vires of the legislation, and the report was relied upon as evidence concerning the mischief the legislation was enacted to address.

In *Shenton v Tyler*, the Master of the Rolls discussed the Second Report of the Common Law Commission when explaining the effect of amendments to the Evidence Act 1851 with respect to spousal privilege and witness compellability.⁶⁰ The central issue of the case concerned whether or not there was a common law spousal privilege prior to the Evidence Acts and recourse to the report was again a matter of uncovering the mischief.

The reliance on a Commission Report in *Shenton v Tyler*, and the divergence between Maxwell and Craies was discussed in a case note in the Law Quarterly Review by R M Jackson. Jackson sided with Craies, stating that the courts had “a wide choice of material upon which it may draw for information” under the mischief rule.⁶¹

It is worth noting that it was in 1939, three decades into the era of high textualism, that the mischief exception was explicitly relied upon.

In *Weatherly v Weatherly*, Evershed LJ said the following:⁶²

Our attention was drawn to the report of the Royal Commission on Divorce and Matrimonial Causes⁶³ It was argued on the authority of the *Eastman Photographic Materials* case it is permissible for the court, in interpreting a statute, to refer to a Royal Commission report for the purpose of discovering what were the evils or defects the remedy of which might be taken to have been intended by the statute. Assuming, but without deciding, that it is permissible for us to refer to the report of this Commission, the document, in my judgment, so far from assisting the appellant, increases his difficulties.

58 *Ladore v Bennett* [1939] AC 468.

59 (n 36).

60 *Shenton v Tyler* [1939] 1 Ch 620, 628.

61 RM Jackson, ‘Note (Shenton v. Tyler)’ (1939) 120 LQR 488.

62 [1946] 2 All ER 1.

63 Great Britain, *Report of the Royal Commission on Divorce and Matrimonial Causes* (Cmd 6478, 1912).

Evershed then quoted several passages from the report to elaborate on this point.

The Privy Council revisited the issue in 1953 with an appeal from Ceylon concerning the vires of a law requiring paternal descendency in order to qualify as a citizen under the Citizenship Act 1948.⁶⁴ Lord Oaksey expressed the matter as follows:⁶⁵

The appellant's counsel at first submitted that further evidence ought to be admitted as to the effect of the Act upon the Indian Tamil community, but in reply he expressly withdrew his application to introduce further evidence

In these circumstances, and in view of the admission before the revising officer of the affidavit of the appellant dated May 15, 1951, without objection, their Lordships do not find it necessary to decide if and how far evidence is admissible of facts which go to show the actual effect of an Act after it has been passed. It is common ground between the parties, and is in their Lordships' opinion the correct view, that judicial notice ought to be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed (cf. *Ladore v Bennett*), and both parties have referred to a number of paragraphs in the report of the Soulbury Commission of 1945.

These cases reveal a certain amount of judicial disagreement with respect to the admissibility of commissioners' and committee reports. There was a presumption of inadmissibility—the mischief exception would have to be argued or the opposing party would have to consent for such materials to be admitted. While some judges agreed with the textualist stance put forward in *West Riding* and refused to give weight to these types of documents, others supported the non-textualist position by embracing the mischief exception.

There was a shift in judicial sentiment that occurred between the mid-1960s and the mid-1970s. Prior to this time, the issue confronted the courts infrequently, and with rather unpredictable results. A document had been declared to be something more akin to a judicial opinion than a commissioners' report but was not be relied upon; on occasion the mischief exception was affirmed in obiter in support of the exclusionary rule; and occasionally a report was relied upon. Viscount Dilhorne summed up the change that had occurred in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg*:⁶⁶

Many instances were cited in the course of the argument where the Courts have had regard to the reports of such commissions or committees; e.g. in *Rookes v. Barnard* [1964] AC 1129 and *Heaton's Transport (St. Helens) Ltd. v. Transport and General Workers Union* [1973] A.C. 15 to the Report of the Royal Commission on Trade Unions and Employees' Associations, in *National Provincial Bank Ltd., v. Ainsworth* [1965] AC 1175 to the Report of the Royal Commission on Marriage and Divorce and in *Letang v. Cooper* [1965] 1 QB 232 to the Report of the Tucker Committee on the Limitation of

64 *Pilai v Mudanayake* [1953] AC 514.

65 528.

66 [1975] AC 591, 621.

Actions. Other instances could be cited and, despite the observations of Lord Wright with which Lord Thankerton agreed in *Assam Railways v. Commission of Inland Revenue* [1935] AC 445, it is now, I think, clearly established that regard can be had to such reports.

It is rather curious that newer cases in which commissioners' reports were relied upon were not mentioned in the editions of Craies and Maxwell published through to the 1960s. Craies continued to repeat the claim about admissibility based on the *Solio case*. It was not until the twelfth and final edition of Maxwell, published in 1968, that admissibility was reluctantly acknowledged and some of the relevant cases were cited.⁶⁷

5.8 The Import of Plain Meaning

Perhaps the most widely misunderstood element of textualism in England concerns the relationship between the plain meaning rule, the golden rule and the mischief rule. Textualists believe that there is a single theory being applied. Plain meaning binds. Ordinary meaning can be used as a rhetorical justification for applying the plain meaning rule, although in reality it is the starting point for resolving ambiguity. The mischief rule justifies consideration of the prior state of the law, and it is one of many permissible considerations when ambiguity has been found.

To the observer who does not see the larger system of rules, there may appear to be a flip-flopping between literal and purposive interpretation in any decision that hinges on statutory interpretation, rather than a balancing of competing factors.

Judgments are explanations of the series of procedural and substantive determinations required to settle legal disputes and generally, there is insufficient room for judges to explain larger matters concerning interpretive theory within the confines of a case. Although there are some exceptions, one typically finds the relevant rule of interpretation and authorities in support within a sentence or paragraph in an opinion. Through these brief explanations, the confusion about the relationship between the plain meaning rule, golden rule and mischief rule can be reinforced. *Vacher & Sons, Limited v London Society of Compositors*⁶⁸ provides an excellent example. In this case, a printer sued a trade union for libel for excluding their name from a list of "trusted printers". The issue to be decided was whether or not a union could be subject to such a suit given that s. 4(1) of the Trade Disputes Act 1906 stipulated that "an action against a trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be

⁶⁷ Maxwell (n 28) 52–54. *Ladore v Bennett* [1939] AC 468; *Cozens v North Devon Hospital Management Committee* [1966] 2 QB 318; *Weatherly v Weatherley* [1946] 2 All ER 1. The section closed with a quote from Lord Denning from *Letang v Cooper* [1965] 1 QB 233, 240: "You must interpret the words of Parliament as they stand, without too much regard to the recommendations of the committee."

⁶⁸ [1913] AC 107 [*Vacher*].

entertained by any Court[.]”

Viscount Haldane, LC chose to:

exclude consideration of everything except the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.⁶⁹

Lord MacNaghten held that:

it is ‘the universal rule,’ as Lord Wensleydale observed in *Grey v. Pearson*⁷⁰ that in construing statutes, as in construing all other written instruments, ‘the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense may be modified to avoid that absurdity and inconsistency, but no further[.]’⁷¹

Lord Atkinson cited Halsbury from *Cooke v Charles A Vogeler Co*⁷² for the proposition that:

If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results.⁷³

Each judge set out his own enunciation of the approach he adopted in the case. By doing a close doctrinal analysis, one could conclude that each judge is going about interpretation in a different manner. However, one could look at it through the lens of textualism and see a single system of rules, although each of the judges believed a different subset of those rules were most relevant in this particular case.

There are two inherent problems with textualism which add important dimensions to this apparent inconsistency: textualist doctrine provides no clear method or test to determine how much ambiguity is sufficient to justify straining at the meaning of words, and textualism provides no method or test to determine how much absurdity is required to justify a blatant violation of the meaning of words. If the plain meaning rule is taken to its logical extreme, textualism can be held to require that the plain meaning can never be violated no matter how absurd the result. Esher MR insisted that the absurdity doctrine could never be applied to unambiguous provisions in *R v The Judge of the City of London Court*.⁷⁴ Lord Atkinson appeared to be making the same claim in

69 *ibid* 113.

70 (1857) 6 HL Cas 61, 106.

71 (n 68) 117.

72 [1901] AC 102.

73 (n 68) 121.

74 [1892] 1 QB 273 (CA) 290: “If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question of whether the legislature has committed an absurdity.”

Vacher.

The same fault line was revealed in *Altrincham Electric Supply Ltd v Sale Urban District Council*.⁷⁵ In this case, upon the expiry of a statutory arrangement for the provision of electrical infrastructure, a local council that sought to purchase the infrastructure had to pay a price stipulated in an Order made under the Acts. The purchase price was “the total expenditure of the undertakers upon the undertaking including the cost of additions and alterations” plus 7½ % profit. The “undertaking” at issue was spread out over two separate districts, and only one district was seeking to purchase the infrastructure within their district. The Act only contemplated a single undertaking per district, and as a result, a plain reading of the provision would require each district to pay the total price of the entire undertaking for their respective halves.⁷⁶ At trial, Farwell LJ upheld the arbitrator’s decision to apply the plain meaning of the provision. Romer and Maugham LJJ overturned the decision on appeal and held that each district need only pay for their pro rata share of the infrastructure, on the basis that the outcome of the plain reading was unreasonable and could not have been the intended meaning of the Order. The House of Lords restored Farwell’s judgment, with Lords Blanesburgh, Thankerton, Russell and Macmillan concurring and Lord Roche dissenting. The majority held that absurdity was only permissible as a means of resolving ambiguity. While Lord Roche agreed that this was the case, he disagreed with the majority that the wording of the Order was without ambiguity in light of the legislative context.

Based on the two cases mentioned, one might consider that Lord Atkinson was a rigid literalist. However, in *Duncan v Aberdeen Council*,⁷⁷ Lord Atkinson applied the mischief rule to achieve a purposive interpretation. The central issue concerned the phrase “In affording out-door relief to any person a local authority shall disregard ... the first one pound of any wounds or disability pension of which he ... is in receipt.” Did it only apply to the determination of the *amount* to be supplied if a person is found to be entitled to relief under the Poor Law (Scotland) Act 1934, or did it also apply to the determination of *entitlement* of “out-door relief” as well. The appellant received a disability pension of £2 per month and the relevant authority determined that he did not qualify because of this income, while he would have qualified had they disregarded half of that. At first blush, the provision appears to address the assessment of amount of payment rather than the determination of qualification for support. However, Lord Atkinson argued that:

The trend of [the] legislation is unmistakable. Beginning with transitional payments in 1932 and passing to unemployment allowances in 1934, provisions have been enacted which make it plain that, in calculating the payments to be made, and in the latter case

75 (1930) 154 LT 379.

76 The Electric Lighting Act 1882 as amended by the Electric Lighting Act 1888.

77 [1936] 2 All ER 911.

in determining whether a payment is to be made at all, certain income of the proposed recipients is to be disregarded. They are obviously remedial provisions intended to make the position of the persons to whom they apply better than ordinary. ... The other view is, with respect, much too refined for use in ordinary public administration; it would be quite unintelligible to the persons who are in receipt of the payments named, and must be attended by the natural discontent of those who find that the supposed alleviation of their position is a mockery, and that they may be worse off than if they had earned and received only half their pension.⁷⁸

Some judges were more willing than others to find ambiguity so as to avoid absurdity. Cases occurred in which the plain meaning of the text was transgressed. In *R v Mitchell ex p Livesey*, “may” was held to be imperative.⁷⁹ In *Brown & Co v Harrison*, and again in *Green v Premier Glynrhonwy Slate Co*,⁸⁰ “or” was read to mean “and”. In *R v Oakes*, “aids and abets and does any other preparatory act” was read to mean “aids and abets or does any other preparatory act.”⁸¹ Remaining faithful to textualist doctrine, Maxwell’s treatise reported that the substitution of conjunctions “has been sometimes made without sufficient reason, and it has been doubted whether some of the cases turning ‘or’ into ‘and,’ and vice versa, have not gone to the extreme limit of interpretation.”⁸²

There were also cases such as *Re Sigsworth*⁸³ which, rather than being overturned, came to be enduring precedents. In that case, a man murdered his mother. This act invalidated her will, and in accordance with the laws of intestate succession under the Administration of Estates Act 1925, the man was entitled to the residue of her estate. Clauson J ruled that:

the principle of public policy which precludes a murderer from claiming a benefit conferred on him by his victim’s will precludes him from claiming a benefit conferred on him, in case of his victim’s intestacy, by statute. The principle ... must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to the principle must be read and construed as subject to it. This view of the law is adopted by Fry L.J. in *Cleaver’s case*⁸⁴ and by Farwell J. in *Re Pitts*.⁸⁵

In *Cleaver’s case*, Lord Esher MR concurred with Fry LJ. Recall that Esher asserted that the absurdity doctrine could not be applied to statutory provisions yielding a plain meaning in *R v The Judge of the City of London Court*. However, Esher was equally comfortable applying a public policy argument to cut down the plain meaning of s 11 of the Married Women’s Property Act 1882,

78 *ibid* 914–15.

79 [1913] 1 KB 561.

80 (1927) 43 Times LR 394; [1928] 1 KB 561 at 568: “You do sometimes read ‘or’ as ‘and’ in a statute. ... But you do not do it unless you are obliged”

81 [1959] 2 QB 350 (CA).

82 Maxwell (n 10) 289.

83 [1935] 1 Ch 98.

84 [1892] 1 QB 147.

85 [1931] 1 Ch 546.

which required a wife, if so named as the beneficiary of her husband's life insurance policy, to receive the funds. It contained no exception for murder.

In the case of *Re Pitts*, Farwell LJ stated the following:

If public policy prevents a murderer from taking under his victim's will, why should it not prevent him from taking under his victim's intestacy? If it had been necessary to decide the point I should have thought that the views of Fry L.J. in *Cleaver's case* would prevail and the provisions of the Administration of Estates Act, 1925, s. 46, however preemptory, would be read and construed subject to the public policy rule.

It was the application of these common law and equitable principles when interpreting statutes that should have caused the most significant problems for textualism. However, this practice, in such egregious contexts as *Re Sigsworth*, was accepted by treatise authors and textualist judges alike, even though such practices sit very uncomfortably alongside the black-and-white textualist rhetoric about the supremacy of statute law and the inviolability of plain meaning.

There were also cases in which the plain meaning rule was applied strictly. In *Ellerman Lines v Murray*,⁸⁶ the plain meaning of § 158 of the Merchant Shipping Act 1925 was applied in a manner contrary to the international convention that the legislation was enacted to implement. As a result, seamen who became unemployed because of a shipwreck were entitled to two months' wages regardless of how many days of work were actually lost because of the shipwreck. The convention that motivated the Act required compensation for loss only. Because the provision yielded a plain meaning, the underlying treaty was inadmissible as an aid to interpretation.⁸⁷ The case remained a precedent throughout the era of high textualism and it attracted significant criticism until it was finally overturned.⁸⁸

When considering the various cases as a collected whole, there is a legitimate choice. One could choose to see particular pronouncements as conflicting; or one could see a larger theory that accommodates the differences through a balancing of factors accompanied by disagreement over what constitutes a sufficient finding of ambiguity and absurdity. To adopt the latter position, one would necessarily have to accept that there are some inconsistent behaviours and "bad" cases—occurrences that are widely accepted in common law jurisdictions.

5.9 Textualism and its Discontents

During much of the era of high textualism in England, the legal community tended to frown on scholarly criticism of judges. Stevens noted that, earlier in the century, academics "saw their role

⁸⁶ *Ellerman Lines Ltd v Murray* [1931] AC 126.

⁸⁷ HC Gutteridge, 'Comparative View of the Interpretation of Statute Law' (1933) 8 Tul L Rev 1, 7–9.

⁸⁸ The prominent critics will be discussed in section 4.9.

as rationalizing the words of the judges rather than questioning them.”⁸⁹ There may have been a political aspect to this. Law school was not a requirement for study at the Bar in England and legal educators wanted this to change. It was expedient for scholars to contribute insights that were beneficial to the legal community without ruffling the feathers of those in positions of authority.

It is therefore unsurprising that the most biting criticisms came primarily from scholars who had ties to jurisdictions outside of England. An early commentary was penned by H A Smith of McGill University, Canada, in 1927. He began his article with a criticism of the strict grammatical approach: “[i]n so far as rules of interpretation are made rigid they frequently operate to defeat the intentions of the writer, just as the rigid application of rules of evidence amounts in countless cases to a device for preventing the Courts from ascertaining facts.”⁹⁰ He then levelled his sights at the exclusionary rule. He noted that “[t]his doctrine does not seem to have become firmly established until quite recent times” and then said “its obvious effect is to bring the rules of legal inquiry into direct conflict with the methods of all rational investigation in the historical or scientific field.”⁹¹ These two themes—excessive literalism and the anti-intellectual nature of the exclusionary rule—would be repeated over time.

The next person to speak out publicly was Professor Laski, one of the few English scholars to do so. This might be explained away by the fact that he was a political scientist, although he published several articles in law journals.⁹² He was sufficiently passionate to pen an appendix to the Donoughmore Committee’s Report on Ministerial Powers, a report whose subject bore an oblique relationship to statutory interpretation. His criticism focused on the rigidity of the “historical canons” which “exaggerate the degree to which the intentions of parliament may be discovered from the words of a statute ... [and] under-estimate the degree to which the personality of the judge, what Mr. Justice Holmes called his ‘inarticulate major premise’, plays a part in determining the intention he attributes to Parliament.”⁹³

The next to speak out was Gutteridge. Although a professor at Cambridge, he was born in Italy and was deeply immersed in comparative research. He penned a critique entitled “A Comparative View of the Interpretation of Statute Law”⁹⁴ that was published in a US journal in

89 Stevens (n 14) 194; Fiona Cownie and Raymond Cocks, *A Great and Noble Occupation!': The History of the Society of Legal Scholars* (Hart 2009) 68–72.

90 Herbert A Smith, ‘Interpretation in English and Continental Law’ (1927) 9 J Comp Leg & Int L 153, 154.

91 *ibid* 156.

92 Harold J Laski, ‘The Personality of Associations’ (1916) 29 Harv L Rev 404; Harold J Laski, ‘The Basis of Vicarious Liability’ (1916) 26 Yale L J 105; Harold J Laski, ‘The Responsibility of the State in England. To Roscoe Pound’ (1919) 32 Harv L Rev 447.

93 Lord Chancellor’s Department, Committee on Ministers’ Powers: *Report* (Cmd 4060, 1932) 135 [*Donoughmore Committee Report*].

94 Gutteridge (n 87) 7.

1933. He began by describing the general (mis)understanding about the difference between the approach of continental judges and English judges, and argued that the approach was largely the same insofar as the text is binding if clear (but for absurdity). The point of departure concerned the information that judges could consider in cases of ambiguity or obscurity. Although judges in both systems sought to ascertain the intention of the legislator, the continental judge could consider *travaux préparatoires* while the English judge “must confine himself to what the legislator has said in the statute, and can only take the surrounding circumstances into account so far as they are matters of common knowledge.”⁹⁵ In his critique, Gutteridge focused on the problem arising with domestic legislation enacted to comply with international conventions, as exemplified in *Ellerman Lines v Murray*.⁹⁶ This criticism would be repeated by others.

Amos also weighed in in 1933 with an article that was more diplomatic than the prior critiques. It was published in an English journal and it conformed with the cultural expectations of that jurisdiction. His basic claim was that the rules of interpretation were applied inconsistently, and that current rules provided a less-than-rigorous approach. In support he cited examples of extreme literalism and non-literal, highly nuanced interpretations in which the court brought “the most energetic goodwill to the aid of a very carelessly drafted statute[.]”⁹⁷ This is a reasonable criticism, perhaps, but it raises a methodological issue: how should one regard outlier cases? Any legal system based on the application of rules by humans will occasionally produce unusual determinations that do not fit the dominant modes of legal reasoning very well. It can be misleading to judge the efficacy of an interpretive regime based on the outliers alone.

Vesey-Fitzgerald put forward a similar critique to Gutteridge in 1935 when discussing interpretation of codes in British India. He noted that the Indian approach was the same as the British approach, and repeated the dogma that the English approach is “sharply distinguished from all those modern systems which traced their descent from Rome, by the importance it attaches to the exact use of words.”⁹⁸ He then quoted Maxwell’s iteration of the exclusionary rule. After citing some cases where consideration of commissions’ reports and other types of legislative history would have enabled a better outcome, in his opinion, he concluded that “[a]s the multifarious political business press on the attention of the legislatures, the need for the Judges to bear their part in keeping the law abreast of changing conditions is certainly not lessened. For this purpose they ought no longer to be deprived of any of the legitimate weapons of historical research, no matter

95 *ibid.*

96 (n 86).

97 Maurice Sheldon Amos, ‘The Interpretation of Statutes’ (1933) 5 CLJ 163, 175.

98 S Vesey-Fitzgerald, ‘The Interpretation of Codes in British India’ (1935) 68 Mad LJ 67, 68.

how few the cases to which those weapons may be appropriate.”⁹⁹

In an address to the Society of Public Teachers of Law in 1935, Eastwood echoed the sentiments of Vesey-Fitzgerald and Gutteridge about the exclusionary rule—that judges and lawyers ought to have access to the kinds of materials that historians are obligated to consider when statutory provisions are unclear.¹⁰⁰

Lauterpacht also addressed the subject in 1935 in an article in the *Harvard Law Review*, which yet again criticised the exclusionary rule for its impact on the adjudication of matters involving international treaties.¹⁰¹ He emphasised the need for recourse to treaties and preparatory materials regardless of whether or not the text of a provision contained an ambiguity, in order to properly harmonise domestic laws. He claimed that the application of the plain meaning rule to preclude recourse to a treaty was a twentieth century development in the law, and cited numerous Victorian cases to prove the point. He accepted that “there are many important reasons which necessitate caution in the use of parliamentary history of statutes, but, as has been suggested, the reasons which have in England become responsible for the tradition rule have been not so much reasons of convenience as historical peculiarities. This partly explains the imperviousness to criticism which has recently been levelled against it.” It is a rather curious that *Ellerman Lines v Murray* was not mentioned in the article. It is hard to believe that the case had played no motivational role.

In another 1935 article,¹⁰² Davies couched the problem as a divide between purposive and grammatical interpretation. He claimed the purposive approach was the older approach that was set out by Plowden, Blackstone and Coke. This approach emphasised the mischief and purpose of the law, and the “internal senses” of the law which may be at variance with the letter of the law. This was juxtaposed against the recent trend of grammatical, literal interpretation. He then discussed a number of “recent cases where the canons of construction have precluded the courts from giving full effect to the purpose of the legislature.”¹⁰³ He attributed this trend, in part, to the exclusionary rule and to the absence of preambles in modern legislation. He concluded by recommending that explanatory memoranda be attached to statutes in order to provide further insight into a statute’s purpose. He conceded that this would not solve all of the interpretive problems that come before the courts, but he argued that:

99 *ibid* 83.

100 Eastwood (n 35).

101 H Lauterpacht, ‘Some Observations on Preparatory Work in the Interpretation of Treaties’ (1935) 48 *Harv L Rev* 549.

102 DJ Llewelyn Davies, ‘The Interpretation of Statutes in the Light of Their Policy by the English Courts’ (1935) 35 *Col L Rev* 519.

103 *ibid* 524.

it would assist the court to carry out the purpose of Parliament in two respects. In those cases where the questions with which the court had to deal had actually been considered during the passage of the Bill through Parliament, it would show the sense in which the words were accepted by the Legislature, and even where the matter had not been contemplated by Parliament, by clearly indicating ‘the cause which moved the legislator to enact it,’¹⁰⁴

Arguably, Davies overstates the value of such memoranda. They would only be useful for provisions that are consistent with a statute’s policy or specifically addressed. They would not assist with provisions that provide exceptions that are not addressed or details that are tangential to the general policy. Despite these shortcomings, this recommendation would become another recurring theme among the critics. The Law Commission report on statutory interpretation would recommend explanatory memoranda decades later.¹⁰⁵

An article by Willis was published in the *Canadian Bar Review* and the *South African Law Journal* in 1938 that put forward the classic realist critique of statutory interpretation in England. Willis took aim at the canonical, “very defective” works by Craies and Maxwell: “Both books base their rules not on decisions, not on what the courts did in cases before them, but on dicta, the remarks let fall by a heterogeneous collection of judges in an unrelated series of situations. This is unsound.” In this critique, one finds the oft-repeated mantra that there are three basic rules of interpretation—the plain meaning rule, the golden rule and the mischief rule—followed by the accusation that judges would choose the rule that brought about the desired outcome. Willis appears to be the person who started this claim, which came to be repeated in legal process textbooks. The refrain that Willis repeats throughout the article is the realist claim: “[a] court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it.”¹⁰⁶

Nutting published an article comparing reliance on extrinsic interpretive aids in the US with England in 1940 that propounded a unique theory.¹⁰⁷ While noting the apparently disparate practices in England and America, he argued that extrinsic considerations were a necessary part of the process of interpretation, and that the actual practices of judges in both jurisdictions converged:

Extrinsic evidence of legislative intention may, then, be said to be relevant where more than one permissible interpretation may be given the words of a statute, but to be controlling only when not outweighed by other considerations of policy of the sort heretofore mentioned. It is believed that this is actually the position assumed by the courts and that this position is both theoretically and practically defensible.¹⁰⁸

104 *ibid* 534.

105 Law Commission, *The Interpretation of Statutes* (Law Com No 21, 1969).

106 John Willis, ‘Statutory Interpretation in a Nutshell’ (1938) 16 *Canadian Bar Review* 1, 11–15.

107 Nutting (n 12).

108 *ibid* 614.

Nutting's analysis is excellent in many respects, but the claim that English judges were relying on information from commissioners' reports and Hansard is not entirely convincing, given that it was contrary to the exclusionary rule, which English judges certainly professed to follow.¹⁰⁹ Yet, this was an interesting and bold challenge to the orthodoxy.

Whilst Willis' realist critique had a significant impact, it was Karl Llewellyn who set out the iconic "Frankified" realist criticism of canon-based interpretation in 1950.¹¹⁰ He famously claimed that "there are two opposing canons on almost every point. ... Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon"¹¹¹ The last six pages of the article, approximately 40 percent of the content, consisted of a table that set out twenty-six opposing canons of interpretation. This article raised an issue that all scholars of statutory interpretation must address. Do the canons provide more than justifications for the impressions the judge has formed about the right outcome in a particular case? This work was directed at the US legal community, and its influence in England appears to have been quite limited around the time of publication. However, it would eventually find its way into an English legal process textbook in 1976.¹¹²

Professor Friedmann published an article in 1948¹¹³ that was reworked into a chapter on statutory interpretation in *Law and Social Change in Contemporary Britain*, published in 1951. In this work, Friedmann noted that the orthodox approach in England was set out in the works by Maxwell and Odgers (while ignoring Craies), and he referred to this as the "pseudo-logical" approach. This was comprised of the literal rule, the golden rule and the mischief rule, about which he said the following: "[e]ven without the abundant illustration of contradictory judicial approaches to the interpretation of statutes, it is patent that these three rules cancel each other out. By emphasising either the one or the other, the judges can adopt a broad or narrow approach, a

109 Arguably, commissioners' reports were admissible under the mischief rule, but judges had treated this exception very conservatively. Commissioners' reports had been explicitly relied upon in two cases by the time that Nutting published his article. See Section 5.7. If Nutting was claiming that, despite the general tendency to refuse to admit such materials, judges were reading them of their own accord and being influenced by them, he provided no evidence in support.

110 Karl N Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1949) 3 Vand L Rev 395.

111 *ibid* 401.

112 William Twining and David Miers, *How to Do Things with Rules: A Primer of Interpretation* (Weidenfeld & Nicolson 1976). There are some scholars who argue that realism has had a very limited impact. See for example Neil Duxbury, 'Jerome Frank and the Legacy of Legal Realism' (1991) 18 Journal of Law and Society 175. The generally accepted view among US scholars is to the contrary. See for example Lisa Schultz Bressman and Abbe R Gluck, 'Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II' (2014) 66 Stan L Rev 725, 775; William Eskridge Jr, 'The New Textualism and Normative Canons' (2013) 113 Col L Rev 531, 536 & 545; Caleb Nelson, 'What Is Textualism?' (2005) 91 Virg L Rev 347, 435 & 451–53; Jane S Schacter, 'The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond' (1998) 51 Stan L Rev 1, 30; H Brent McKnight, 'The Emerging Contours of Justice Thomas's Textualism' (1999) 12 Regent UL Rev 365, 385.

113 W Friedmann, 'Statute Law and Its Interpretation in the Modern State' (1948) 26 Cdn B Rev 1277.

reformist or conservative attitude.”¹¹⁴ He then discussed the many canons of interpretation and claimed that the “[c]urrent textbooks do little more than to mix these various recipes without any serious attempt at reconciling them.”¹¹⁵

Friedmann described the actual approach in England as a vacillating between the pseudo-logical approach and the social policy approach, the latter of which seems to accord with what others might refer to as the purposive approach. He felt that the over-reliance on the pseudo-logical approach produced results which were overly rigid, and he proposed reform by building on the idea put forward by Willis, that statutes of different types should be treated differently. He claimed that there were three basic approaches to interpretation which should be applied: the pseudo-logical approach, the social policy approach and “free intuition”, as set out by Jhering and Géný, that was an intellectual exercise further removed from the text of the statute than the other two approaches. The continental influence is apparent. While he differentiated between constitutional, social purpose, taxation and specific reform statutes, he did not assert that one of the above three approaches was appropriate for each type of statute. Instead, he argued that each type of statute was susceptible to particular types of problems which had to be born in mind when seeking to apply one of the three approaches.

It is difficult to see how this overall approach would solve the problem of inconsistency given that his proposed reforms would add two more layers of complexity: one layer for the application of free intuition, and another layer for the thorny issue of categorising statutes. This would probably lead to the subcategorising of different provisions within single statutes that deal with different subjects, and would inevitably raise issues of taxonomy about which reasonable people could disagree.

Whilst hardly a landmark in legal scholarship, the jurisprudence textbook by Hughes and Dias did represent a shift in the intellectual landscape insofar as it was an introductory textbook that challenged the orthodoxy of the interpretive regime in England as put forward by Salmond. The work described the standard categories—the plain meaning rule, the mischief rule and the “functional approach” (which is presumably equivalent to the purposive approach). The authors noted the heavy reliance on the plain meaning rule and the eschewing of legislative history. As such, the work described the orthodox view, albeit from the point of view of a sceptic. The following conclusion was reached:

Salmond described the principles upon which judges act as if they were a logical set of principles, consistent with each other, and together making up a cohesive scheme. His

114 Wolfgang Friedmann, *Law and Social Change in Contemporary Britain*. (Stevens 1951) 240.

115 *ibid* 244.

treatment, however, appears to be a dangerous simplified analysis of a complicated practical issue. ... It would be nearer the truth if we said that there are principles to be discovered in the interpretation of statutes, but that these cannot be erected into a system.”

Although the first edition *Law in the Making*, was published in 1927, and CK Allen established himself as a critic of the textualist orthodoxy in England at that time, his account developed in subsequent editions and reached something akin to maturity in the fifth edition in 1951. He noted the orthodoxy “which may be found in many books of reference” which was described as “a most elaborate code, slowly and painfully built up, for literal interpretation, and there is not a comma or a hyphen which has not its solemn precedent.”¹¹⁶ He buttressed several claims about the orthodoxy with citations to Maxwell’s sixth edition, and then repeated the criticisms of the exclusionary rule first raised by Vesey-Fitzgerald and Lauterpacht. He then considered the numerous exceptions to each of the basic rules, and the internal tensions (or incompatibilities) between the plain meaning rule and the mischief rule, and the absurdity doctrine. He concluded by saying, “[o]n the whole, then, it cannot be pretended that the principles of statutory interpretation form the most stable, consistent or logically satisfying part of our jurisprudence.”¹¹⁷

The next important critique was an indictment of the exclusionary rule by Kilgour, published in the *Canadian Bar Review* in 1952.¹¹⁸ The “custom” which rendered commissioner reports inadmissible was described as a “dangerous half-truth” and judges were accused of using the rule against recourse to Hansard in a “Pickwickian sense”.¹¹⁹ By this decade, it had become widely accepted that *Millar v Taylor* was the precedent that established the exclusionary rule, and this was the first article to directly challenge that claim. The basic thrust of his argument was that the rule had been misunderstood, and that it was meant to address weight rather than admissibility. In effect, Kilgour argued that there should not be an exclusionary rule, but rather, a rebuttable presumption that the material is not probative.

The outpouring of criticism all but dried up after Kilgour’s article; although one of the few articles in defence of the exclusionary rule was published in 1954.¹²⁰ Scholars seemed to lose interest in the rules of statutory interpretation until the reform movement took hold in the 1960s. Given the comprehensive body of criticism contained within the works already published, further

116 CK Allen, *Law in the Making* (5th edn, OUP 1951) 485.

117 *ibid* 500.

118 DG Kilgour, ‘The Rule Against the Use of Legislative History: Canon of Construction or Counsel of Caution?’ (1952) 30 Cdn B Rev 769.

119 *ibid* 771, 773.

120 JA Corry, ‘The Use of Legislative History in the Interpretation of Statutes’ (1954) 32 Cdn Bar Rev 624.

criticisms would perhaps have been redundant. The emerging field of linguistics and issues pertaining to the philosophy of meaning were more attractive to scholars at the time.¹²¹ Meanwhile, judging remained firmly rooted in the orthodoxy.

The many critics of the interpretive regime in England all accepted textualism as the orthodoxy. However, there were two basic approaches to this acceptance. The first approach accepted the orthodox description as put forward by the treatises of Maxwell, Craies and Odgers, as essentially correct. Thus authors such as Vesey-Fitzgerald, Gutteridge, Lauterpacht and Davies described the approach then criticised it based on some element or shortcoming that resulted from the practices. The second approach was to regard the orthodoxy as a misleading description of judicial practice. This was the approach of Willis, Friedmann, Llewellyn and Allen. Both approaches have some merit. There were instances in which the rules of textualism were applied in earnest which produced results that attracted criticism for being too literal, for example *Ellerman Lines v Murray*; and there were cases such as *Edwards v Canada* which challenged the rules. Yet there was substantial agreement that the canonical treatises put forward the standard claims about the law that governs statutory interpretation.

5.10 The Resilience of Textualism

Textualism's resilience is truly remarkable. Despite the variation among judges in the application of the rules of interpretation, and despite comprehensive criticisms over decades, the basic doctrine as described in the dominant textbooks of the era remained unchanged for the better part of a century despite significant social, political and legal change. In this section, some of the more important historical developments will be touched upon in order to shed light on the breadth of the changes that occurred during textualism's tenure in England.

The high textualist era began shortly after the turn of the twentieth century—a time of immense political turmoil in England. Politics were dominated by the tension between economic liberalism and collectivism. The judiciary and House of Lords (as legislative body) remained strongly liberal (which is to say, ideologically conservative), and both exhibited a tendency to resist collectivist legislative reforms in the late nineteenth century. The judges applied common law principles, often criminal and civil conspiracy, when interpreting statutes so as to minimise the impact of legislative regimes designed to facilitate collective action. The most famous cases are

121 See for example Glanville Williams, 'Language and the Law—I' (1945) 61 LQR 71; Glanville Williams, 'Language and the Law—II' (1945) 61 LQR 179; Glanville Williams, 'Language and the Law—III' (1945) 61 LQR 293; Glanville Williams, 'Language and the Law—IV' (1945) 61 LQR 384; Glanville Williams, 'Language and the Law—V' (1946) 62 LQR 387; Douglas Payne, 'The Intention of the Legislature in the Interpretation of Statutes' (1956) 9 Curr Leg Probl 96. Hart's discussion about a rule prohibiting vehicles in the park was similarly concerned with meaning. HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 593, 607–11.

Quinn v Leatham,¹²² *Taff Vale Railway Co v Amalgamated Society of Railway Servants*,¹²³ and *Amalgamated Society of Railway Servants v Osborne*.¹²⁴ At the same time the House of Lords as a parliamentary body sought to block legislative reforms, and indeed, every major legislative effort of the left-leaning liberal government as of 1906. The political deadlock led to the constitutional crisis of 1911.

Primarily as a result of decisions such as *Taff Vale*, the judiciary came to be perceived as hostile to the interests of the working classes, and judges were even accused by some of fomenting class war.¹²⁵ There were also political issues, for example funding for religious education in state schools, that ended up being decided by judges interpreting statutes.¹²⁶ It is perhaps unsurprising that textualist doctrine became entrenched in this historical context. It was around this time that Loreburn, as Lord Chancellor, championed the declaratory theory of law and the textualist approach to statutory interpretation, while at the same time, packing panels to achieve politically desirable results in cases that had the potential to cause public outrage.¹²⁷

In the wake of the constitutional crisis, many within the government were concerned about the impact of judicial bias. The Attorney General wrote to the Prime Minister in 1911 to request that more liberal judges be appointed to the House of Lords because of “disputes that are legal in form but political in fact, and it would be idle to deny the resolute bias of many of the Judges ... there and elsewhere. That bias will probably operate more than ever in cases that are tough on labour, educational, constitutional and, for the future I might perhaps add, revenue cases.”¹²⁸

It is a truly remarkable fact that, despite pressure from within their own party, the Liberal-appointed Lord Chancellors, Loreburn and Haldane, appointed judges based on merit, with little regard for party affiliations.¹²⁹ There was a deliberate, counter-partisan effort to depoliticise the judiciary. Perhaps, in part, because of this, the claims about judges deliberately disregarding personal policy preferences when interpreting legislation came to be regarded as credible.

After the constitutional crisis was resolved through the significant shift in the power balance between the houses of Parliament brought about by the Parliament Act 1911, it was no doubt clearly understood by the judiciary that the electorate wanted the collectivist agenda of the government to

122 [1901] AC 495.

123 [1901] AC 426.

124 [1910] AC 87.

125 See JAG Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press 1997) 63–68; Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System* (Heinemann, 1967) 111–24.

126 See for example *West Riding*.

127 This is how Farwell LJ’s decision in *R v West Riding* case was overturned by the House of Lords. Stevens (n 14) 87–92.

128 Abel-Smith and Stevens (n 125) 115.

129 Stevens (n 14) 191–92; RFV Heuston, *Lives of the Lord Chancellors 1885-1940* (1964) 133–241; Donoughmore Committee Report (n 140) 128–32.

be respected. In such times, textualism would be expedient for judges because the doctrine provides politically neutral justifications for decisions regardless of whether it is the opposition or one's own party that is upset by a decision.

Thus, the political turmoil of the first decade of the twentieth century provided incentives for textualism to be maintained and reinforced in a manner that was bipartisan and had no connection to any particular political ideology. Politically sensitive decisions such as *Vacher* were handed down in which liberal and conservative judges concurred. In *Vacher*, it was held that a union could be liable for the torts of conspiracy and libel for acts furthering union interests that were not directly involved in a trade dispute. This imposed limits on the ability of unions to advance their interests. The decision was unanimous. The judges, regardless of their political affiliations, proclaimed to disregard the wisdom of the policy, and to decide based upon the words of the statute.¹³⁰

According to Abel-Smith and Stevens, by the 1930s, the English judge had become something akin to a paragon of virtue.¹³¹ The claims of political neutrality had become well-received if not universally accepted.¹³² There were probably many social and political factors that contributed towards this state of affairs, including the reluctance of members of the English legal communities to criticise judges. It had become possible to charge with contempt those who criticised the impartiality of a judge.¹³³ Judges were often employed to oversee studies into social problems and to propose legislative solutions.¹³⁴

The end of World War II inspired a heightened public sympathy for the working men who had sacrificed so much for King and country. The resulting collectivist movement spawned the creation of the NHS and the nationalisation of the rail transportation and energy sectors during the austere reconstruction period. In a speech in Parliament by Bevan, the Labour government “made it clear that it would allow no ‘judicial sabotage’ of its legislation[.]”¹³⁵ Despite this admonition, there was a generally held belief within the legal community that law was a technical exercise divorced from politics. Lord Greene expressed the sentiment as follows:

130 *Vacher*, 113, per Viscount Haldane, LC: “I do not propose to speculate on what the motive of Parliament was. The topic is one on which judges cannot profitably or properly enter. ... I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole.” Per Lord Atkinson, 120: “the sole question for decision in this case is, in my view, the proper construction of the first subsection of s. 4 of the Trade Disputes Act, 1906.”

131 Stevens (n 14) 192–95; Griffith (n 125) 67–68.

132 There were some critics. Laski accused the judges of being biased and political in Harold J Laski, ‘Procedure for Constructive Contempt in England’ (1928) 41 Harv L Rev 1031, 1031–32.

133 Stevens (n 14) 195; Abel-Smith and Stevens (n 125) 126; Laski, ‘Procedure for Constructive Contempt in England’ (n 132) 1035–36. *Rex v Editor of the New Statesman, Ex parte the Director of Public Prosecutions* 44 TLR 301 (1928).

134 See for example Stevens (n 14); Griffith (n 125).

135 Abel-Smith and Stevens (n 125) 283. HC Deb vol 425 col 1893, 23 July 1946.

The function of the legislature is to make the law, the function of the administrator is to administer the law and the function of the judiciary is to interpret and enforce the law. The judiciary is not concerned with policy. It is not for the judiciary to decide what is in the public interest. These are the tasks of the legislature¹³⁶

Around this time, the English legal community was becoming more insular. Judges became isolated and the legal community became isolationist in a peculiar way. The Kilmuir Rules were set out, which forbade judges from speaking to the news media,¹³⁷ and this placed a significant barrier between the public and judges at a time when radio and television enabled rapid, nationwide communication. The rules were predicated on the belief that public activities outside of adjudication would pose a risk to the appearance of impartiality and thus attract criticism.¹³⁸ The reputation of the judge was regarded as a paramount concern.

The belief in the mechanical nature of law was so strong that some Law Lords argued that the House of Lords as a judicial body should be abolished.¹³⁹ If one accepted the premise, the House of Lords served no practical purpose since it merely duplicated the work of the Court of Appeal. Legal educators sought to focus strictly on the law and, in particular, case law. There was antipathy among some legal educators towards the teaching of statute law, curiously, and there was outright hostility to teaching law within a sociological context.¹⁴⁰ This was the apex of what Stevens referred to as the declaratory theory of law. Judges insisted steadfastly that they did not make law. The law was a closed system, conceptually and intellectually.

The output of journal articles critical of England's interpretive regime slowed and then dried up after World War II, and this trend was harmonious with the spirit of the times. However, there were also undercurrents of resistance. Whilst the published critiques had all but disappeared, the sentiment that the judiciary was too willing to apply the literal meaning of a provision to the detriment of the greater good was growing. The sentiment was fuelled by older cases, for example, *Ellerman Lines* and *Altrincham Electric Supply Ltd v Sale Urban District Council*; but also by more recent cases like *Ayrshire Employers Mutual Insurance Association v IRC*¹⁴¹ in which the House of Lords applied a needlessly literal interpretation of s 31(1) of the Finance Act 1933 to avoid the obvious intent of the provision. It was in this case that Lord Macmillan famously proclaimed "[t]he Legislature plainly missed fire."¹⁴² Because literalism is textualism's vice, these kinds of outlier cases would inevitably accumulate over time. Under the growing weight of the outliers, the notion

136 Wilfred A Greene, *Law and Progress* (U of London 1944) 349–50.

137 John H Phillips, 'The Judiciary and the Media Address' (1994) 20 Mon UL Rev 12.

138 Based on a letter from Kilmuir to the Director-General of the BBC. *ibid* 12.

139 RB Stevens, 'The Role of a Final Appeal Court in a Democracy: The House of Lords Today' (1965) 28 MLR 509.

140 Cownie and Cocks (n 89) 82.

141 [1946] 1 All ER 637.

142 *ibid* 641.

that it was the legislature's job to correct the law via amendment began to appear more like a rationalisation of judicial sabotage than a noble pronouncement of judicial subservience.

There were influential people who felt strongly that this was the wrong approach. Lord Denning, for example, spoke out as much as was permissible at the time, and he actively worked to loosen up the judicial approach to statutes and the common law in his role as Lord of Appeal and Master of the Rolls.¹⁴³ As has been thoroughly covered in the previous section, there were critics. They included people such as LCB Gower, who criticised the legal community for its conservatism and resistance to innovation in a strongly worded article in the *Modern Law Review* in 1950.¹⁴⁴ Some Law Lords (whose names were not mentioned) were so incensed by the article that they met with the editor of the journal in private and "solemnly reproved him for publishing something that had ventured to criticise judges for the patronising attitude that they had been wont to adopt when addressing a group of academic lawyers"¹⁴⁵ Within the legal community, the tension between those who supported the orthodoxy and those who opposed it was growing.

5.11 The Decline of Textualism

The most obvious sign of textualism's decline was the erosion of support for the exclusionary rule. In the 1960s, after decades of fairly conservative treatment, the majority of judges at the House of Lords began to embrace the mischief exception for commissioners' reports. This occurred at a time when the legal community, and the judiciary in particular, were facing public criticism because of political scandals, and a series of highly publicised trials which collectively made adjudication appear to be political rather than formalistic.

In the early 1960s a formerly popular Conservative government became plagued by a number of scandals, several of which involved Russian spies or the police.¹⁴⁶ Public sentiment turned against them; and along with this came a precipitous decline in public sentiment towards the judiciary.¹⁴⁷ This was the result of several highly publicised legal matters. The murder conviction of Timothy Evans was put into doubt following his execution.¹⁴⁸ Contrary to public sentiment, several

143 See for example *Seaford Court Estates Ltd v Asher* (n 42); and *Magor and St Mellons Rural District Council v Newport Corporation* (n 41). Also see Denning (n 42) chapter 2.

144 LCB Gower, 'English Legal Training - A Critical Survey' (1950) 13 MLR 137.

145 Cownie and Cocks (n 89) 71.

146 The most notable was the Profumo Scandal. Abel-Smith and Stevens (n 125) 304; Iain Crawford, *The Profumo Affair: A Crisis in Contemporary Society* (White Lodge 1963). Regarding the police, there was corruption uncovered in Brighton, beatings in Sheffield, and Sergeant Challenor's evidence planting in London. Abel-Smith and Stevens (n 125) 304.

147 In a November 1961 Gallup poll 63% "found that English courts dispensed justice impartially" and by Sep 1963 the percentage had dropped to 47 percent ... [M]ore people were convinced that the English courts favoured the 'rich and influential.'" Abel-Smith and Stevens (n 125) 304.

148 *ibid* 301.

judges spoke out publicly in favour of corporal punishment and the death penalty.¹⁴⁹ In the cases of *Rookes v Barnard*¹⁵⁰ and *Stratford v Lindley*,¹⁵¹ the judge-made torts of intimidation and inducing breach of contract were applied against trade unions in a manner that threatened the right to strike. There was also a high-profile obscenity trial against Penguin Books for publishing *Lady Chatterley's Lover*. Although the author was eventually found to be not guilty, this trial was regarded by many as a struggle between the socially liberal public and a closed-minded, patronising legal order.¹⁵² It was a time marked by public inquiries, and accusations of judicial bias. The claims of judicial impartiality began to ring hollow.

In 1963, a collection of essays was published in a book entitled *Law Reform Now*, which was authored and edited by prominent jurists with ties to the Labour Party including a prominent Barrister, Gerald Gardiner.¹⁵³ *Law Reform Now* is important for several reasons. It broke with the English tradition of diplomacy, and levelled strong criticisms at the legal system in England. The essays also provided more comprehensive criticisms than had previously been published. Prior works tended to examine the various main subjects of law and then provide suggestions for improvements.¹⁵⁴ *Law Reform Now* did this, but it also went much further, decrying the conservatism of the legal community, the state of legal education, the ad hoc nature of law reform mechanisms, and the lack of a permanent institution whose mandate would be to update the law and simplify the sprawling English statute book.

The list of authors in *Law Reform Now* included prominent academics such as JAG Griffith, who would go on to pen a significant work on the relationship between law and politics.¹⁵⁵ There was also Lord Chorley, the former editor of the *Modern Law Review* who the Law Lords sought to censure for publishing an article that dared to criticise the judiciary. The list also included several prominent barristers, a solicitor, and a former Chief Inspector of the London Police. The significance of *Law Reform Now* is hard to underestimate. It represented a sea change—a revolution in English legal culture. The belief that the law was a purely technical, closed system that was above criticism was upended.

In 1964, Gerald Gardiner became Lord Chancellor, and he set out to implement the more

149 *ibid.*

150 [1964] AC 1129.

151 [1965] AC 269.

152 Gerald Gardiner was lead counsel for the defence. Lead counsel for the Crown was Griffith-Jones, who was scandalised by the revelation that he had had affairs during the trial. Geoffrey Robertson QC, 'The Trial of Lady Chatterley's Lover' *The Guardian* (22 October 2010) <<https://www.theguardian.com/books/2010/oct/22/dh-lawrence-lady-chatterley-trial>> accessed 9 February 2017.

153 Gerald Gardiner and Andrew Martin, *Law Reform Now* (Victor Gollancz 1963).

154 See for example Mullins (n 24); Glanville Williams (ed), *Reform of the Law* (Gollancz 1951).

155 Griffith (n 125).

important reforms that were recommended in *Law Reform Now*. The Law Commission and its Scottish counterpart were established in 1965 with a mandate to recommend revision, repeal and consolidation through legislation. Among those appointed as commissioners were Andrew Martin, a co-editor of *Law Reform Now*, and Professor Gower. Among the first orders of business of the new Law Commission was a report on statutory interpretation.¹⁵⁶ That such an otherwise obscure topic would command this kind of attention reveals the extent to which there was tension over the rules of textualism within the legal community. Lord Scarman and Norman Marsh published essays and delivered speeches outlining their work leading up to the report, which pushed the legal community to rethink aspects of the orthodoxy. Marsh argued that “the tendency of our tradition in statutory interpretation has been to make too many sharp distinctions, giving a misleading appearance of simplicity of the judicial function”¹⁵⁷ Lord Scarman used different words but expressed a similar sentiment when he said that “[i]f, as Felix Frankfurter has said, interpretation is an art and its answers will be found only in its exercise, let us acknowledge that there will be the occasional case where the soundness of the law must depend upon the good sense of the judge.”¹⁵⁸

The Law Commission report on statutory interpretation considered many of the criticisms that were raised by scholars in the 1930s and noted a tendency “less evident in some recent decisions of the courts but still perceptible, to over-emphasise the literal meaning of a provision[.]”¹⁵⁹ The recommendations appear very conservative by current standards. The report recommended that more consideration be given to context and purpose but did not go so far as to recommend loosening the exclusionary rule, noting that “a few commentators, including some with judicial or drafting experience, would appear ready to give the courts a discretion to admit such material, but the majority view is against its admission.”¹⁶⁰ Citing criticism of *Ellerman Lines*, the report did recommend recourse to international treaties when interpreting legislation implementing treaty obligations, and encouraged “the preparation in selected cases of explanatory material for use by the courts which may elucidate the contextual assumptions on which legislation has been passed.”¹⁶¹ Surprisingly, the Scarman Report was not well-received by the legal community. In 1980, Samuels noted that “the Law Commission Report on the Interpretation of Statutes is about the only report to have been rejected by Parliament, or at least firmly not acted upon for over 10 years.”¹⁶²

156 (n 105).

157 Norman S Marsh, ‘The Interpretation of Statutes’ (1966) 9 J Soc’y Pub Tchrs L 416, 417.

158 Leslie Scarman, ‘Law Reform-Lessons from English Experience Manitoba Law School Foundation Annual Lecture: 1967’ (1968) 3 Manitoba Law Journal 47, 60–61.

159 Great Britain, Law Commission, *The Interpretation of Statutes* (No 21, 1969) 48

160 (n 105) 36.

161 *ibid* 50.

162 Alec Samuels, ‘The Interpretation of Statutes’ (1980) 1980 Stat L Rev 86, 87.

The report was rejected by Parliament, but the issue was not set aside. Instead, the ‘problem’ of legislation was assigned to a departmental committee appointed by the Leader of the House of Commons in 1973 which became known as the Renton Committee. This obscure topic remained a cause of significant concern for law makers.

The Renton Committee produced a report called *The Preparation of Legislation* in 1975. Although it was more comprehensive in scope with respect to interpretation, the report repeated many of the recommendations in the Law Commission report, including the call for explanatory memoranda. The report also recommended less detail and more simplicity in legislative drafting. This was a criticism that placed blame for the overly literal practices of the judiciary on the methods of the drafters and legislators. As Drewry noted in a commentary on the report:

[a] Parliament which promulgates its laws in minute and ponderous detail is, *ipso facto*, encouraging judges to be rigid in their interpretative techniques; courts which stick firmly to literal codes of interpretation encourage Parliament to legislate in minute and ponderous detail. The chain must be broken: the quest for clarity and simplicity in statute law boils down, in the end, to the willingness of legislators to trust the judges.¹⁶³

Note that the solution to this cycle was a less detailed approach to statutes coupled with a role for judges that was more closely aligned with the cooperative partnership model.

The Renton Committee also found the exclusionary rule in its current form, with the narrow mischief exception for commissioners’ reports, was unduly rigid and deserving of reconsideration.¹⁶⁴ That such a suggestion would appear in a high-profile report indicates the shift in values that was taking place within the legal community. By 1975 it was acceptable to question this firmly established rule in an official government document.

5.12 The Decline of the Textualist Treatises and the Rise of Alternative Literature

The final edition of Maxwell’s treatise was published in 1969, and the final edition of Craies as a textualist treatise was published in 1971.¹⁶⁵ There was a changing of the guard, so to speak, with Rupert Cross taking up the mantle in 1976 with the first edition of his treatise, *Statutory Interpretation*.¹⁶⁶ Cross’ first basic rule required the application of the ordinary meaning, or the technical meaning, where appropriate. The second basic rule asserted that judges may apply a

163 Gavin Drewry, ‘The Renton Report: Statute Law and Personal Freedom’ (1975) 46 Political Q 443, 446.

164 Privy Council, *The Preparation of Legislation* (Cmd 5063, 1975)

165 There have been subsequent editions of Craies’ treatise to date, commencing with the 8th edition in 2004. However, it has been significantly revised and is not a textualist treatise. William Feilden Craies, Daniel Greenberg and Samuel GG Edgar, *Craies on Legislation* (8th edn, Sweet & Maxwell 2004); Daniel Greenberg and William Feilden Craies, *Craies on Legislation* (9th edn, Sweet & Maxwell 2008); Daniel Greenberg and William Feilden Craies, *Craies on Legislation* (10th edn, Sweet & Maxwell 2012).

166 Rupert Cross, *Statutory Interpretation* (Butterworths 1976).

“secondary meaning” that the words are capable of bearing to avoid absurd results. However, the third basic rule was as follows: “the judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable or totally irreconcilable with the rest of the statute.” Although this could be interpreted as a restatement of the absurdity doctrine, the tone is decidedly nontextualist. The language of “reading in”, whilst figurative, is a style of communication that would arouse the textualist fear of activist judging. Strictly speaking, judges are not reading in if something is necessarily implied by the words, and such a description could be misconstrued as authorising judges to read in that which is not fairly within the text. The power to add to, alter or ignore, although couched as a narrow authority behind a high bar, is also described in a non-cautionary manner. No textualist would be so forthright about such a dangerous topic as judicial law-making.

The discussion of a judicial law-making authority was also present in Cross’ claim that “[b]y the use of some kinds of general words Parliament inevitably confers considerable legislative power upon the courts.”¹⁶⁷ Cross mentioned as example “just and equitable”, but also terms such as “accident arising out of and in the course of employment”, and “driving”.¹⁶⁸ Judicial law-making occurred in a wide variety of contexts, according to Cross.

With respect to the exclusionary rule, Cross recommended that “the judge’s existing power to refer to pre-parliamentary materials when he has real doubt about the meaning of a statutory provision should be extended so as to enable him to rely on those materials, not merely as evidence of the mischief against which the statute was directed ... but also as a pointer to the meaning which he should attach to the particular provision.” Cross was pushing for the further relaxation of a fundamental textualist rule.

It should be noted that the textbooks by Maxwell and Craies were not unseated instantly. There was a gradual transition from their being the two canonical authoritative works in the field to being two older but well-respected works among many. The versions of Maxwell and Craies from 1969 and 1971 respectively, were republished without revision for another decade. There were supporters. Lord Diplock commenced his speech to the House of Lords about the Legislation Bill 1980 as follows: “My Lords, before I came into the Chamber, I took the opportunity of looking at the standard text book on this subject, of which the first edition was published in 1875. The twelfth edition is now in force.”¹⁶⁹

167 *ibid* 70.

168 *ibid* 70–71.

169 HL Deb 13 February 1980, vol 405, col 288.

Around this time, judges began to reject the claim that they merely applied the words of the text that Parliament enacted. It was Lord Diplock, a believer in the orthodoxy of Maxwell, who said: “whoever has final authority to explain what Parliament meant by the words that it used makes law as much as if the explanation it has given were contained in a new Act of Parliament. It will need a new Act of Parliament to reverse it.”¹⁷⁰ Lord Radcliffe claimed that:¹⁷¹

In our history of judgment-making too many decisions have begun by insisting that particular words have one particular meaning and then deducing that, if they have, certain consequences must necessarily follow. ... It is the unexpressed assumptions which are nevertheless very much present, that are often the real hinges of decisions.

The legal process textbook was also undergoing significant change. These works were intended to teach first-year law students about the basic mechanics of legal process, and traditionally, these works emphasised *stare decisis* and the reading of cases.¹⁷² There would be a chapter, in the middle or towards the end, devoted to statutory interpretation and the role of legislation. In 1976, Miers and Twining published a legal process textbook which presented the subject matter within an entirely new structure.¹⁷³ The subject was treated as a singular issue of problems rooted in rule-following, and the distinction between case law and statutory interpretation was treated, conceptually, as a subsidiary issue.

Zander’s textbook, published in 1980, was less radical but still represented a significantly departure from the traditional approach. Rather than starting with cases and *stare decisis*, the first chapter concerned legislation and the second chapter concerned statutory interpretation. His treatment of statutory interpretation acknowledged the legacy of the textualist orthodoxy. It began with a discussion of the literal, golden and mischief rules, then cited Maxwell in support of his claim that “[t]here seems to be little dispute that for most of the past hundred years or more the literal rule has been the dominant one.”¹⁷⁴ However, Zander closed the chapter by considering the formerly forbidden issue: “what is the proper limit to the creative function of the interpreter?”¹⁷⁵ He concluded that “the greater the range of choice open to the judge, the greater his law-making as opposed to his law-finding function. If the statute is a Bill of Rights with broad, open-textured provisions, the scope for judicial legislation would be vast compared with the opportunities offered by the tight provisions of, say, an income tax Act.”¹⁷⁶ In this way, Zander explicitly acknowledged a

170 Address to the Holdsworth Club, University of Birmingham, 26 March 1965. Rt Hon Sir Kenneth Diplock, ‘The Courts as Legislators’, *The Lawyer and Justice* (Sweet & Maxwell 1978) 5–6.

171 Viscount Cyril John Radcliffe, *Not in Feather Beds: Some Collected Papers* (Hamilton 1968) 214–15.

172 See for example RJ Walker, *The English Legal System* (Butterworths 1967).

173 Twining and Miers (n 112). For a synopsis, see RA MacDonald, ‘Review of How to Do Things with Rules’ (1977) 27 UTLJ 119.

174 Michael Zander, *The Law-Making Process* (Weidenfeld & Nicolson 1980) 39.

175 *ibid* 99.

176 *ibid* 100.

judicial law-making function.

It does not appear that Zander and Cross were exposed to significant criticism for their statements. It had become acceptable to make such pronouncements, and the strict faithful agent view of judging, as delineated by textualist doctrine, was no longer insisted upon by members of the English legal community. The perspective did not go away—some judges continued to support it. However, contrary points of view were becoming acceptable.

The influence of legal scholarship within the English legal community was on the rise, in part, because many aspiring lawyers were choosing to study law at universities prior to their training contracts. Before World War II, this was a rare occurrence, but by the middle of the 1970s approximately 65% of newly called barristers and approximately 70% of new solicitors had an LLB.¹⁷⁷ Over that time period, the number and size of law programmes in England had increased dramatically.¹⁷⁸ As a result, textbooks were shaping the understanding of many young lawyers; and many of these textbooks were presenting non-textualist perspectives.

Around this time, there was also an emerging trend in legal scholarship to examine the interdisciplinary relationship between law, politics and sociology. The movement was led by such scholars as Stevens, Abel-Smith, Paterson, Drewry, and Blom-Cooper.¹⁷⁹ The pattern remained, that the most insightful works came from outside of England initially, although the scholars were often expats or foreigners who had studied and lived in England for many years. Within these works, one can find direct challenges to strict assertions about separation of powers and the role of the judge as law-maker. Blom-Cooper and Drewry, for example, noted that “[m]uch of the consternation provoked by any supposed violation of ‘separation of powers’ stems largely from the manifest unreality of attempting to draw a hard and fast distinction between ‘legislation’ and ‘adjudication’.”¹⁸⁰

Around this time there were important developments in jurisprudence which influenced the reception of textualism in the English legal community. Scholarly challenges were directed at two dogmas: the Diceyan view of Parliamentary sovereignty and legal positivism.

The first articles to question the adequacy of the Diceyan view of Parliamentary sovereignty initially considered the issue of devolution with respect to former British colonies.¹⁸¹ However, by

177 Andrew Wilson Green, ‘Legal Education in England’ (1976) 28 J Legal Educ 137, 138–40.

178 There were approximately 2500 law students attending programs in the 1933/34 academic year, and almost 7000 in the 1973/74 year. *ibid* 157–158.

179 Abel-Smith and Stevens (n 125); Stevens (n 14); Louis Blom-Cooper and Gavin Drewry, *Final Appeal: A Study of the House of Lords in Its Judicial Capacity* (Clarendon Press 1972).

180 Blom-Cooper and Drewry (n 179) 197.

181 Geoffrey Marshall, ‘Parliamentary Sovereignty: A Recent Development’ (1966) 12 McGill LJ 523; Patrick Fitzgerald, ‘The Paradox of Parliamentary Sovereignty Modern Jurisprudence’ (1972) 7 Irish Jurist 28.

the 1970s the debate grew to encompass the impact of European Community law as a result of the European Communities Act 1972.¹⁸² The claim that Parliament could make or unmake any law, and therefore could not bind subsequent parliaments was challenged as a description that did not fit well with the political and legal realities of the United Kingdom in the late twentieth century. This issue was addressed by Lord Denning in *Bulmer Limited and Anor v Bollinger SA and Anor*,¹⁸³ and also by Lord Scarman in the Hamlyn Lectures. Whilst statutes such as the European Communities Act were not referred to as constitutional statutes, their effect was noted: “Parliament may be deliberately made to yield to an International Bill of Rights[.]”¹⁸⁴

Dworkin was one of the more influential legal theorists at this time, and his theory of legal interpretation was a frontal attack on both legal positivism and the faithful agent view of judging.¹⁸⁵ That judges must apply political and moral values that are not encoded in statutes when interpreting statutes, and bring about results that are contrary to the text of statutes on occasion, in order to make the law the very best that it could be, was a clear enunciation of a cooperative partnership view of judging. He relied on examples such as *Riggs v Palmer*¹⁸⁶ to argue that moral values can supersede the text of statutes—that the formal sources of the law were incomplete. It seems likely that this theory would have been summarily rejected by the English legal community a few decades earlier.

Around this time English scholars such as Griffith and Bell were examining the connections between law and politics in greater detail than the relatively conservative scholars who had preceded them.¹⁸⁷ Adjudication was no longer regarded as purely technical and insulated from politics. Many were embracing the view that judging was inseparable from politics, a view that is incompatible with textualist doctrine.

Tax law was also subject to a change in treatment that reflected the decline of the textualist regime. In 1981 the *Ramsay* case was decided, and it has been held out as evidence, by judges and scholars, that tax exceptionalism was dead.¹⁸⁸ Tax statutes were no longer to be read strictly, in a series of discrete steps. Instead, they were to be read in a manner similar to any other statute—purposively.¹⁸⁹ More recently, this concept has become subject to doubt,¹⁹⁰ and as with statutory

182 Gil Anav, ‘Parliamentary Sovereignty: An Anachronism’ (1988) 27 Col J Transnat’l L 631.

183 [1974] 2 All ER 1226.

184 *The Hamlyn Lectures*, vol 26 (Stevens 1974) 21.

185 Ronald Dworkin, ‘Law as Interpretation’ (1981) 60 Tex L Rev 527; Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986).

186 115 NY 506 (1889). This case confronts the same issue as *Re Sigsworth*.

187 JAG Griffith, *The Politics of the Judiciary* (Manchester UP 1977); John Bell, *Policy Arguments in Judicial Decisions* (Clarendon Press 1983).

188 *Inland Revenue Commission v Ramsay* [1982] AC 300.

189 See for example *USB AG v Commissioners for Her Majesty’s Revenue and Custom; DB group Services Ltd v Commissioners for Her Majesty’s Revenue and Custom* [2016] UKSC 13 [61] (Lord Nicholls). Also see John Tiley and Stephen Oliver, ‘Tax Law’, *The Judicial House of Lords 1876–2009* (OUP 2009) 729–741.

190 Tiley and Oliver (n 189).

interpretation in all areas of law, the reality is more complex than these simple descriptions might suggest. However, the fact that tax law was perceived to be significantly loosened indicates that a cultural change had taken place. The need to loosen the judiciary from the strict grammatical approach had been accomplished rhetorically if not in practice, in an area of law that had traditionally been regarded as requiring a very strict grammatical treatment.

Arguably, Bennion took over the mantle as author of the de facto authoritative statement of the rules of statutory interpretation in England. His landmark work, *Statutory Interpretation—A Code* was first published in 1984, and revised editions have been produced regularly since that time.¹⁹¹ His work was explicitly built on the claims of Maxwell, whom he cited as a key influence in the introduction.¹⁹² In this work Bennion provided carefully-enunciated rules including a refined version of the plain meaning rule: “where, in relation to the facts of the instant case—(a) the enactment under enquiry is grammatically capable of one meaning only, and (b) on an informed interpretation of that enactment the interpretive criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, the legal meaning corresponds with that grammatical meaning.”¹⁹³ This enunciation of the rule explicitly acknowledges that context and extrinsic elements can justify strained interpretations. This could be regarded as a merger of the plain meaning rule and the rule against absurdity. At the very least, it eliminates the obvious tension between these two rules.

One can also find evidence of a move away from textualism within Bennion’s textbook. On a fundamental level, Bennion believed that the interpretive regime had undergone a fundamental transformation in England:¹⁹⁴

Our courts have moved on from the old simplistic view. No longer is a problem of statutory interpretation settled by applying some talisman call the ‘literal rule’, or the ‘golden rule’ or the ‘mischief rule’. Nowadays we have purposive construction, coupled with respect for the text and a recognition by judges that interpreting a modern Act is a matter sophisticated and complex.

This could be regarded as a more generalised enunciation of a change that was believed to have occurred in tax law following the *Ramsay* decision. There was a belief that interpretation had changed with respect to all areas of law and senior members of the judiciary were making similar

191 FAR Bennion, *Statutory Interpretation: Codified with a Critical Commentary* (Butterworths 1984).

192 *ibid* xxxiii–xxxiv: “As the ultimate concentrate, we can do no better than offer the opening words of Maxwell’s great work – ‘Statute law is the will of the legislature; and the object of all judicial interpretation of it is to determine what intention is either expressly or by implication conveyed by the language used, so far as necessary for the purpose of determining whether a particular case or state of facts which is presented to the interpreter falls within it.’”

193 *ibid* 264.

194 *ibid* xxvii.

claims around this time. For example, in an address to the Statute Law Society in 1981, Lord Roskill said:

I think we have now almost reached the stage ... where the courts will resort to every legitimate extrinsic means to ascertain the right answer to a point of statutory construction, and will no longer be the unemancipated slaves of rules of construction which may all too often serve to obscure, and even to defeat rather than enlighten, the true judicial path.¹⁹⁵

With this change, textualist rhetoric about the binding nature of statutory text and the fear of activist judges usurping the legislature's law-making function were no longer the central preoccupations of the discipline of statutory interpretation. Instead, there was a belief that a literalist regime frustrated the will of the legislators, and therefore judges had to seek the purpose of legislative provisions fully informed by the available contextual and extrinsic information.

Within his textbook, Bennion also countenanced judicial creativity. "It is sometimes suggested by judges that only necessary implications may be legitimately drawn from the wording of Acts. ... This is too narrow." Instead, it was a question of what was "necessarily *or properly* implied".¹⁹⁶ Bennion elaborated on the meaning of "proper" by disagreeing with judges who insist that judges should not put glosses on the words of statutes. "The fact is that such glosses are not to be ignored. On the contrary they form an important element in the law, from which neither taxation nor any other area is exempt." He went so far as to direct pointed criticism at Warner J in *Page v Lowther*¹⁹⁷ for asserting that "... the well-established principle that in tax cases, the words to be interpreted and applied are those of the relevant statutory provision, not those of glosses put on them by judges." Bennion stated, bluntly, that "[s]uch a judicial remark betrays an unfortunate ignorance of both statutory interpretation and stare decisis."¹⁹⁸

To appreciate the significance of this change in the dominant textbooks, it is useful to compare Bennion's claims to that of Craies': "words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning." In the context of tax law statutes, the treatise devoted three pages to various judicial pronouncements to make the point resoundingly clear that "[t]here is no equity in tax. There is no presumption in tax. Nothing is to be read in, nothing is to be implied."¹⁹⁹

Within Bennion's textbook the exclusionary rule was also further diluted by a significant

195 Lord Roskill, 'Some Thoughts on Statutes, New and Stale' [1981] Stat L Rev 77, 82.

196 Bennion (n 191) 245.

197 [1983] 57 TC 199, 209.

198 Bennion (n 191) 246. *Emphasis* original.

199 Craies and Edgar (n 47) 113–14.

exception.²⁰⁰ It was well established by this time that commissioners' reports were admissible under the mischief rule.²⁰¹ However, the governing principle of "informed interpretation" went further. Hansard, amendments to a Bill as it moved through Parliament, and various explanatory memoranda such as white papers were "not in general admissible for purposes of statutory interpretation. Nevertheless the court, as master of its own procedure, retains a residuary right to admit them where, in rare cases, the need to carry out the legislator's intention appears to the court to so require."²⁰² This principle was reinforced in a statement that followed: "[t]he court has the inherent power to inspect any material brought before it. ... It is never possible to say to the court 'you must not look at this.'"²⁰³ It is difficult to overstate the importance of this claim as evidence of textualism's decline. Textualists do not doubt the authority of courts to examine any documents presented but they will not countenance any justification for doing so with legislative history. Such materials are considered, on principle, to be of no value and a violation of the separation of powers.

5.13 Legislation Implementing International Treaties

Another matter that had changed by the 1980s concerned recourse to international treaties and preparatory materials when interpreting legislation enacted to comply with international treaties and conventions. Lord Denning had attempted to bypass *Ellerman Lines* and consult treaties to interpret the implementing statutes regardless of ambiguity since the 1960s, beginning with *Salomon v Commissioners of Customs and Excise*.²⁰⁴ Despite his efforts, it was not until *Buchanan & Co Ltd v Babco Forwarding and Shipping Ltd*²⁰⁵ that the House of Lords began to relax their approach. This case did not establish a broad exception but it did permit reliance on international agreements that were incorporated by reference in the statute. Consideration of foreign language versions was only permissible in cases of ambiguity.²⁰⁶

This stance was loosened further in *Fothergill v Monarch Airlines Ltd.*, albeit in obiter.²⁰⁷ The issue in this case concerned whether or not items that had gone missing from a suitcase during travel were "damage" or "loss". Claims for damage were time-barred by the Carriage by Air Act 1961, whereas claims for loss were not. The legislation was put in place in compliance with a treaty, the French version of which was authoritative. The issue was settled through reliance on the French text and French jurisprudence, but Lord Denning had also considered the preparatory materials at

200 Bennion (n 191) 520–550.

201 *ibid* 526. *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696.

202 *ibid*.

203 *ibid* 542.

204 [1967] 2 QB 116; also see *HP Bulmer Ltd v J Bollinger SA* [1974] 2 All ER 1226.

205 [1978] AC 141.

206 There was dissent on this point. See for example the opinion of Lord Dilhorn, 158 [F].

207 [1980] 2 All ER 696.

the court below, and the Law Lords weighed in. The majority endorsed the view expressed by Lord Wilberforce, who stated in his opinion that, in the interests of harmonizing interpretive practices with other parties to a treaty:

it would be proper for us ... to recognise that there may be cases where such travaux préparatoires can profitably be used. These cases should be rare, and only where two conditions are fulfilled. First, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention.

This stance was remarkably cautious given that the Vienna Convention had come into force in the UK. Article 32 provides that recourse can be had to the preparatory materials when interpreting a treaty in order to confirm an interpretation “in accordance with the ordinary meaning”, and also to assist with interpretation when an article is “ambiguous or obscure”, or “leads to a result which is manifestly absurd or unreasonable.” This conservative approach reveals how deeply the exclusionary rule was ingrained in the English judicial mind. The judges were moving incrementally.

5.14 The Demise of the Exclusionary Rule

Over the course of the 1970s and 1980s, the exclusionary rule came under significant pressure in court. The rule was a central matter in *Black-Clawson*. Section 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 sought to prevent the same issue from being litigated in multiple jurisdictions. This statute implemented a treaty obligation, and a commissioners’ report was annexed to the statute along with a draft Bill and commentary. The relevant provision was recommended in a draft Bill which had been enacted without amendment. Lords Reid, Wilberforce and Diplock sought to preserve the narrow mischief exception for commissioners’ reports; whilst Lord Simon and Viscount Dilhorne found it acceptable to rely on the report to uncover the intent of the relevant provision. In this context, the exclusionary rule is again revealed to be deeply ingrained. Despite the materials being annexed to the statute—incorporated by reference—a majority of the panel believed that the materials could only be consulted for ascertaining the mischief and not for the purpose of arriving at a better understanding of the meaning of the relevant provision.

Lord Reid affirmed the status quo in *Black-Clawson*. However, in *Warner v Metropolitan Police Commissioner* he considered whether “possession” in s. 1 (1) of the Drugs (Prevention of Misuse) Act 1964 was a strict liability offence and said the following, in dissent.²⁰⁸

the layman might well wonder why we do not consult the Parliamentary Debates, for we

208 [1968] 2 WLR 1303, 1316.

are much more likely to find the intention of Parliament there than anywhere else. ... [B]ut I am bound to say that this case seems to show that there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other.

Lord Simon made the following statement in *Race Relations Board v Dockers' Labour Club and Institute Ltd*, which also suggested that there was some value in Hansard:

In *Race Relations Board v. Charter* [1973] A.C. 868, 899–900, I speculated on the probability that during the debates in Parliament on the Bill which led to the Race Relations Act 1968 the question was raised whether the Act extended to working men's clubs. If so, it must have been in contemplation that such clubs were bound together in a union giving rise to associated membership: this is a matter both of common knowledge and of official cognisance.²⁰⁹

After noting the current state of the exclusionary rule, he went on to propose a textualist solution:

there is one way of avoiding forensic misinterpretation of the parliamentary meaning to which I venture to refer in the hope that it may have consideration. Where the promoter of a Bill, or a Minister supporting it is asked whether the statute has a specified operation in particular circumstances and expresses an opinion, it might well be made constitutional convention that such a contingency should ordinarily be the subject matter of specific statutory enactment—unless, indeed it were too obvious to need expression.²¹⁰

This was one of the cases cited by Lord Denning in *Davis v Johnson*²¹¹ in support of reliance on Hansard. The issue concerned whether or not an unmarried couple were “living together as husband and wife” for the purposes of the Domestic Violence and Matrimonial Proceedings Act 1976, in which case the court could order one of the parties to be excluded from the home if they had committed acts of violence against the other. Lord Denning relied on the relevant prior reports. However, he also relied on statements made by the MP in charge of the Bill when introducing the Bill to the House of Commons for second reading. Lord Denning justified this as follows:

In some cases Parliament is assured in the most explicit terms what the effect of a statute will be. It is on that footing that members assent to the clause being agreed to. It is on that understanding that an amendment is not pressed. In such cases I think the court should be able to look at the proceedings.²¹²

On appeal, the House of Lords affirmed Lord Denning's outcome (that the court could make such an order) and unanimously condemned the use of Hansard. Among other sources, Viscount Dilhorne cited Craies' treatise in support of the exclusionary rule.²¹³

209 *Race Relations Board v Dockers' Labour Club and Institute Ltd* [1976] AC 285, 298.

210 *ibid* 299.

211 *Davis v Johnson* [1979] AC 264 (This is the citation for the HL decision, but it also includes the judgement from the court below.)

212 *ibid* 277.

213 *ibid* 337.

In *R v Local Commissioner for Administration, ex parte Bradford Metropolitan City Council*,²¹⁴ Lord Denning sought to determine the meaning of “maladministration” in s 34 (3) of Local Government Act 1974:

The construction of that word is beyond doubt a question of law. According to the recent pronouncement of the House of Lords in *Davis v. Johnson*, we ought to regard Hansard as a closed book to which we as judges must not look. ... By good fortune, however, we have been given a way of overcoming that obstacle. For the ombudsman himself in a public address to the Society of Public Teachers of Law quoted the relevant passages of Hansard as part of his address: and Professor Wade has quoted the very words in his latest book on Administrative Law. And we have not yet been told that we may not look at these writings of the teachers of law. ... I hope therefore that our teachers will go on quoting Hansard so that a judge may in this way have the same help as others have in interpreting a statute.²¹⁵

One cannot help but be impressed by Lord Denning’s tenacity and audacity.

Around this time, a belief was spreading that parliamentary privilege, as set out in the Bill of Rights, had provided a historical prohibition to the presentation of Hansard in court. Farrar and Dugdale, for example, claimed that:

until recently there were limitations on the extent to which judges could even have access to Hansard. However, by resolution of the House of Commons on October 31st 1980, a general permission was granted and it is now no longer necessary to petition the House for leave to place Hansard before the court.²¹⁶

This is a curious claim. Privilege was intended to prevent legal action from being taken against members of Parliament, particularly for statements made in the House of Commons, and consulting Hansard as an interpretive aid does not expose MPs to a risk of litigation. Permission had not been sought by lawyers when such materials had been presented to the courts and the issue of leave was never raised in any case in which Hansard was presented by counsel. According to Miers, “there was nothing in the background to the 1980 resolution which suggests that the Committee of Privileges was itself concerned about the impact of its recommendation upon judicial practice with regard to interpretation”.²¹⁷ Yet, there was speculation about the impact of this resolution on the exclusionary rule at the time,²¹⁸ and there was a newly emerged belief that the permission of the House had always been required in order to present Hansard in court.

The next significant case in which Hansard was addressed was *Hadmore Productions v*

214 [1979] 2 All ER 881.

215 *ibid* 898.

216 JH Farrar and AM Dugdale, *Introduction to Legal Method* (3rd edn, Sweet & Maxwell 1990) 158.

217 David Miers, ‘Citing Hansard as an Aid to Interpretation’ (1983) 4 Stat L Rev 98, 104.

218 Miers (n 217); JFAJ, ‘Note (The Leedale Affair)’ [1983] BTR 70; Michael Rawlinson, ‘Tax Legislation and the Hansard Rule’ [1983] BTR 274.

Hamilton.²¹⁹ Video programmes created by Hadmore Productions had been prevented from being broadcasted because the company was not included on a list of union-approved production companies, despite having received a letter of assurance from the union organiser that the programmes would meet union standards. At issue was whether or not the “blacking” was pursuant to a “trade dispute” as defined in s 29 (1) of the Labour Relations Act 1974. If not, Hadmore Productions could seek damages. Lord Denning decided that the blacking was not pursuant to a trade dispute, and said the following about Hansard:

In most of the cases in the courts it is undesirable for the Bar to cite Hansard or for the judges to read it. But in cases of extreme difficulty, I have often dared to do my own research. I have read Hansard just as if I had been present in the House during a debate on the Bill. And I am not the only one to do so. When the House of Lords were discussing Lord Scarman’s Bill on the Interpretation of Legislation on 26th March 1981, Lord Hailsham LC made this confession (418 HL Official Report (5th series) col 1346):

‘It really is very difficult to understand what they [the Parliamentary draftsmen] mean sometimes. I always look at Hansard, I always look at the Blue Books, I always look at everything I can in order to see what is meant and as I was a Member of the House of Commons for a long time of course I never let on for an instant that I had read the stuff. I produced it as an argument on my own, as if I had thought of it myself. I only took the trouble because I could not do the work in any other way. As a matter of fact, I should like to let your Lordships into a secret. If you were to go upstairs and you were a fly on the wall in one of those judicial committees that we have up there, where distinguished members of the Bar ... come to address us, you would be quite surprised how much we read ... The idea that we do not read these things is quite rubbish ... if you think that they did not discuss what was really meant, you are living in a fool’s paradise.’

Having sat there for five years, I would only say: ‘I entirely agree and have nothing to add.’

Within his opinion, which examined the history of trade dispute legislation at length, Lord Denning cited the speech of Lord Wedderburn before a committee examining the Bill.

Once again, Lord Denning was rebuked by the House of Lords. Viscount Dilhorne spoke for the court. He affirmed the ruling in *Davis v Johnson*, and elaborated on it. In effect, he used his opinion in *Hadmore* to engage in a judicial dialogue in obiter in order to address the fact that counsel did not present Hansard in *Davis v Johnson*, and that Lord Denning had done so of his own volition:

[u]nder our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is.²²⁰

219 [1981] 1 AC 191.

220 *ibid* 233.

*Pickstone v Freemans Plc*²²¹ provides evidence of changing judicial attitudes. Subsection 2A (1) had been added to the Equal Pay Act 1970 via regulation under the authority of the European Communities Act in order to comply with the terms of the Treaty of Rome concerning pay equity. At issue was whether or not the fact that one male worker was employed at the same rate of pay as women in a particular job prevented this job from being rated as “work of equal value” to a similar job at which only men worked and which received a higher rate of pay. Lord Keith quoted from the speech of Lord Templeman introducing the proposed regulations for debate in the House of Commons to reveal the intent of the relevant provision. This was his justification:

The draft Regulations of 1983 were presented to Parliament as giving full effect to the decision in question. The draft Regulations were not subject to the Parliamentary process of consideration and amendment in Committee, as a Bill would have been. In these circumstances and in the context of section 2 of the European Communities Act 1972 I consider it to be entirely legitimate for the purpose of ascertaining the intention of Parliament to take into account the terms in which the draft was presented by the responsible Minister and which formed the basis of its acceptance.²²²

In comparison to the cautious approach a decade prior, this case reveals a shift in judicial attitudes. Lord Keith felt comfortable carving out this exception, and his action did not attract condemnation from his colleagues. Lord Templeman presided, and he penned a concurring opinion in which he too relied on the formerly highly questionable materials by quoting the Under Secretary of State for Employment’s statements in the House of Commons for the intention of the provision amended by regulation.²²³ While deciding based on other reasons, Lord Oliver said “[i]t is comforting indeed to find, from the statement made by the Minister to which my noble and learned friend has referred, that this construction does in fact conform not only with what clearly was the parliamentary intention but also with what was stated to be the parliamentary intention.”²²⁴

This case also reveals a shift with respect to issues concerning the separation of legislating and interpretation. Lord Templeton did not feel the need to recuse himself or even disclaim his involvement as potentially tainting his ability to interpret the relevant legal text. Instead, his involvement was regarded as beneficial. The legislator was a welcome participant in the process of legal interpretation.

The final case with respect to Hansard, for the purpose of understanding the decline of textualism, was *Pepper v Hart*.²²⁵ In this famous tax dispute, the children of high-ranking employees could attend a private school at a discount and this discount was a taxable benefit.

221 [1989] AC 66.

222 *ibid* 112.

223 *ibid* 121–22.

224 *ibid* 128.

225 [1993] AC 593.

Section 63(2) of the Finance Act 1976 stated that “the cost of a benefit is the amount of any expense incurred in or in connection with its provision” The employees argued that the “cost” was the marginal cost of each additional student (which was negligible given that the school had excess capacity) whilst the government argued that the cost was the average cost per student. A “traditional” reading of the statute led a majority of the judges to decide in favour of the government. However, the Law Lords found the Hansard evidence compelling enough to justify reaching the opposite conclusion and they decided to hear the case a second time so that counsel could address Hansard-based arguments. The statements made by the Finance Secretary in committee and when introducing the Bill to the House of Commons directly addressed the issue by discussing the children of teachers as an example, and the statements unequivocally favoured the employees in this dispute.

The opinion of Lord Browne-Wilkinson attracted the concurrence of the majority. The issue of privilege was addressed, and it was affirmed that interpretation did not involve “questioning” or “impeaching” freedom of speech in Parliament.²²⁶ With respect to Hansard, a rule was set out in order to carve out a narrow exception to the rule against Hansard. There were three requirements: statutory text that was “ambiguous or obscure or the literal meaning of which leads to an absurdity”; a statement from the record which “clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words”; and the statements must come from “the Minister or other promoter of the Bill”, which is to say, someone bearing responsibility for the Bill.

Lord Oliver declared himself a “somewhat reluctant convert”²²⁷ while the remainder, excepting Lord Mackay, endorsed the new rule. Lord Mackay disapproved of the rule because of the impact on the cost of litigation.

This case, and the rule delimiting the exception to the exclusionary rule have generated a significant amount of scholarly debate; however, the decision has not been reversed. Indeed, there are cases in which the rule in *Pepper v Hart* was ignored altogether and Hansard was simply admitted and considered.²²⁸ As evidence of the effect of this decision, the eighth edition of Craies includes a section explaining how to go about researching Hansard. It opens by noting that “[t]he Explanatory Note for the Act in question will contain at the end a table listing each of the Parliamentary states of the Bill for the Act and giving dates for each. That will enable the researcher to find easily those passages in Hansard most likely to be of relevance.”²²⁹ It goes on to explain the

226 *ibid* 683.

227 *ibid* 619.

228 *Scotland v Romein* [2018] UKSC 6, 8; *Miller v Secretary of State (Rev 3)* [2017] UKSC 5 [195], [263]; *Ali v Secretary of State* [2016] UKSC 60 [20].

229 Craies, Greenberg and Edgar (n 165) 685.

types of statements most likely to meet the requirements and noteworthy exceptions.

Within Browne-Wilkinson's opinion there are a number of reasons provided for setting aside the rule against *Hansard*. He mentioned that it was illogical to consult documents such as commissioners' reports but not *Hansard*. He noted the use of *Hansard* in textbooks, as pointed out by Lord Denning in *Hadmore*. He also noted the fact that New Zealand and Australia had recently permitted reliance on *Hansard* without adverse consequences.

A factor that was not discussed seems relevant. There had been considerable turnover in the membership of the appellate committee over the prior decade, and the new generation of judges were probably more comfortable with this incremental change than older judges who had already adapted to the exceptions that were embraced in the 1960s. There is an inherent conservatism at work, and judges appear to have limits to the amount of change they can accept.

5.15 Conclusions

The era of high English textualism spanned the better part of the twentieth century. During this time, there was a general consensus within the English legal community that the four core elements of textualism formed part of the law. This consensus persisted despite contrary cases and despite changes in the way that different areas of law were approached over time. The treatises by Maxwell and Craies, which propounded the textualist position, were accepted as authoritative enunciations of the law governing statutory interpretation throughout this period. There were a variety of points of view about textualism—whether it was a coherent theory or a poorly theorised collection of disparate rules; whether it facilitated judicial respect for legislation or enabled judges to thwart the intent of the legislature; and whether all of it, or parts of it should remain the law in England. There were scholars and judges who sought to challenge various elements of the doctrine, the most notable of whom was Lord Denning, who challenged almost every aspect of the doctrine. Despite scholarly criticism and judicial challenges, the doctrine managed to maintain its place as the orthodoxy until the final decades of the twentieth century.

The decline of textualism was gradual, and resulted from a variety of pressures which began to gather momentum in the 1960s. There was a general belief which gained traction as the twentieth century progressed, that judges had been placing too much emphasis on literalism. The increasing number of treaties and conventions and the closer ties with Europe which developed after World War II created some pressure to harmonise interpretive practices in England with continental jurisdictions. At the same time, international integration and devolution began to reveal the traditional conceptions of positivism and parliamentary sovereignty, upon which textualism is

based, to be inadequate. Collectively, these pressures undermined textualism in a comprehensive fashion, striking at the whole of the doctrine rather than selectively eroding particular elements of it. The decline of each core element is intertwined with the decline of other elements, although the decline of each element can be identified (and not all elements experienced decline).

The decline of the exclusionary rule was the most obvious and easiest to identify. It began in the 1960s when the judiciary embraced the mischief exception, and it ended with *Pepper v Hart* in 1993 which set aside the sole remaining element of the exclusionary rule.

Insofar as legislative history became an acceptable consideration, the textualist conception of the separation of powers declined in lock-step with the exclusionary rule. However, in another important way, the separation of powers became more important over time. The Constitutional Reform Act 2005 brought about the creation of the United Kingdom Supreme Court in 2009. As a result, the judges at the UK's top court no longer sat in Parliament. In addition, the office of Lord Chancellor no longer included judicial activities. Some have noted that the separation is not as robust as it appears to be,²³⁰ but there is institutional separation between judges and legislators. Prior to this time, the separation was partly a fiction.

It was in the 1970s that the strict enunciation of the faithful agent view of judging became subject to doubt by some judges and scholars. In a variety of ways, some more subtle, others more brazen, scholars such as Dworkin, Cross, Zander and Bennion challenged the traditional view by propounding non-textualist conceptions of the judicial role; and these conceptions were embraced by some members of the legal community rather than being summarily rejected. The textualist insistence upon the necessity of abiding by the plain meaning in order to avoid usurping the legislative function was no longer the starting point for understanding statutory interpretation. Instead, the emphasis was on the opposite proposition—the necessity of avoiding of strict literalism in order to facilitate the legislative intent. The central motivation was no longer the textualist fear of activist judging. Instead, there was a fear of judging that was insufficiently activist. It became acceptable to acknowledge that judges had a law-making function when interpreting statutes, and a narrow but genuine authority to stray from the words of the text. The faithful agent view of judging was no longer the orthodoxy, arguably by 1976 with Cross' treatise, and certainly by 1984 with Bennion's now canonical "Code".

When scholars and judges embrace a cooperative partnership view of judging, even modestly, fundamental textualist rules such as the plain meaning rule will inevitably be regarded as having less force to bind. The traditional textualist rules that form the sophisticated plain meaning

230 Diana Woodhouse, 'The Constitutional Reform Act 2005—Defending Judicial Independence the English Way' (2007) 5 Int J Const L 153.

approach to text were modified to incorporate non-textualist considerations by scholars such as Cross and Bennion. There were rules permitting judges to explicitly transgress the meaning of text based on considerations that did not require the high bar of the absurdity/scrivener's error canon. This occurred in lock step with the decline of the faithful agent view of judging.

The importance of these traditional rules and presumptions of statutory interpretation would face another pressure in the decades that followed. European Community law would continue to increase in importance in the 1980s and 1990s, and along with it, there was an increasing need to consult and apply the jurisprudence from the Court of Justice for the European Union. Despite the fact that the European Convention on Human Rights had been in force for decades, the Convention acquired a new sense of importance when the Human Rights Act 1998 was enacted and judges were compelled to consult and take into account the cases from the European Court of Human Rights when interpreting domestic legislation. With the increasing importance of these two non-domestic primary sources, the traditional rules of statutory interpretation became less useful for the simple reason that legal issues involving human rights or EU law had to be dealt with by other means. The traditional rules of interpretation were capable of settling a diminishing share of the legal issues coming before the courts.

Depending on the weight attached to the decline in the various components of textualism, the doctrine was unseated as the orthodoxy some time between the mid-1970s and the mid-1980s. Whether or not one accepts the claim that England was no longer a textualist jurisdiction within that time span, at the very least, one could accept that the era of high textualism had come to an end. This is not to say that textualism was completely set aside. It was demoted from its place as the orthodoxy, but there were still lawyers and judges who embraced it, and Maxwell's treatise could be found in any respectable English law library. However, textualism had to compete with the theories of Cross and Bennion for acceptance by members of the legal community. Textualism was no longer accepted as the singular authoritative description of statutory interpretation in England.

Having discussed and explained the era of high English textualism, the central elements of this dissertation have been covered. Textualism has been traced back from its modern American iteration to its gestation in the Victorian era through to its long tenure in England. Having covered these topics, it is possible to arrive at a more considered understanding of this doctrine with the benefit of the information and analysis contained in the first five chapters. This will be the concern of the next and final chapter.

Chapter 6

The Nature of Textualism

6.1 Introduction

The purpose of this dissertation has been to demonstrate that the core principles and practices of the modern American textualists developed into a unified doctrine of statutory interpretation in the Anglo-American legal communities in the Victorian era, and this development can be observed in the treatises on statutory interpretation published at that time. Whilst the legal communities in the US came to reject textualism, the doctrine became entrenched in England where it remained the orthodoxy for much of the twentieth century. Over the course of defending this claim, some issues were passed over for the sake of concept containment, whilst other issues were raised which could benefit from further consideration. This chapter will consider some of these issues in order to arrive at a more comprehensive understanding of textualism.

Four main issues will be considered. The first issue is geographical. It will be shown that jurisdictions throughout much of the British Commonwealth adopted textualism, and the doctrine had carriage far beyond England and America. The second issue concerns textualism's resilience. There is a relationship between the method of scholarship that developed textualism and its success as a doctrine. Third, some important differences between English and American textualism will be considered. The fourth and final issue concerns the relationship between politics and interpretive theory. It will be shown that textualism has no necessary theoretical connections with any particular political ideology. Furthermore, it will be shown that the doctrine has an ambiguous relationship with the left and right ends of the political spectrum.

6.2 “English” Textualism and Fragmentation of the Common Law

I have used the term “English textualism”, but the doctrine was applied throughout the United Kingdom. In the era of high textualism, there were more citations to Maxwell and Craies in Scottish cases than in English cases.¹ This was done in a manner that respected differences in substantive law that resulted from the different legal heritages. This is entirely consistent with the

¹ For example, Lord Dundas cited Craies and Maxwell in *Carmichael v Greenock Harbour Trustees* (1908) 15 SLT 931, 935; *Millar & Lang Ltd v Macniven & Cameron Ltd* (1908) 16 SLT 56, 59; and *Roger v Hutcheson* [1921] SC 787, 803. Lord Constable cited Craies in *Campbell v Sutherland and the Royal Burgh of Dornoch* [1925] SLT 611, 613. *Cormack's Trustees v Inland Revenue Commissioners* [1924] SC 819, 824. Lord Moncrieff cited Maxwell and Craies in *Aberdeen Suburban Tramways Co v Aberdeen City Council* [1927] SC 683, 686.

doctrine, which treats any statute as incorporated into the related areas of law in any particular jurisdiction. Appeals from anywhere within the United Kingdom were decided by the House of Lords, and it would make sense for courts within Scotland,² Ireland (before home rule), and Northern Ireland to interpret legislation via the same approach that the highest court of appeal would employ. Furthermore, prior to devolution the statutes at issue were enacted by Westminster, and there would be no reason to interpret such statutes in any other way.

Textualism was also a phenomenon of the former colonies that comprise the Commonwealth. There were distinguishing features of each jurisdiction's legal system to which the interpretive doctrine was adapted. In India, for example, Vesey-Fitzgerald noted that there was a British Code and no common law. As a result, he argued that "the typically English doctrine of statutory interpretation has even greater force in India than it has in England."³ He relied on Maxwell for authoritative statements of the rules, and engaged with English scholars concerning the reasonableness of the exclusionary rule.⁴ In a lecture published in 1909, Bonnerjee cited the treatises by Craies, Maxwell and Wilberforce along with a relatively even split between English and domestic cases in order to describe the textualist approach to statutory interpretation in India. He emphasised the faithful agent role of the judge and the sophisticated plain meaning approach to text.⁵ Curiously, the exclusionary rule was not mentioned, although the dispute between Craies and Maxwell had been resolved recently, at the time of publication, and the rule may have been perceived as insufficiently settled to warrant inclusion.

Odgers was Indian: he was born, educated, then served as a judge and professor there.⁶ His treatise on deeds and statutes, which relied on Maxwell and Craies for the fundamental rules of interpretation,⁷ was published in England and India. It was regarded as authoritative in both jurisdictions.

Maxwell's treatise was also regarded as authoritative in India. The twelfth edition was published in India by N M Tripathy Ltd in 1976.

The introduction to *Interpretation of Statutes* by Chatterjee, in 1977, stated "[i]t is true that

2 Criminal appeals being an exception.

3 S Vesey-Fitzgerald, 'The Interpretation of Codes in British India' (1935) 68 *Mad LJ* 67, 68. This was because India was subject to a British Code and no common law. He cited and quoted Maxwell's treatise, which he tacitly accepted as authoritative.

4 Vesey-Fitzgerald (n 3).

5 K Shelley Bonnerjee, *The Interpretation of Wills, Deeds and Statutes in British India* (Thacker, Spink & Co 1909) 181–221.

6 C Hayavando Rao, *The Indian Biographical Dictionary* (Pillar 1915) 310.

7 Charles E Odgers, *The Construction of Deeds and Statutes* (Carswell 1939).

the Indian system of law is patterned on the English system and our approach even after Independence since 1947 has been the approach of Anglo-Saxon jurisprudence, so much so that there are numerous instances where the superior courts of India bodily lifted passages from Craies and Maxwell into their judgments.”⁸

The treatises by Maxwell and Craies were also regarded as authoritative in Canada. They were cited in support of various rules of interpretation in judgments by the Supreme Court of Canada throughout the twentieth century.⁹ Corry did not point to any Canadian cases when he wrote his critique of the excessively literalist approach to statutory interpretation as a professor at the University of Saskatchewan in 1936. The matter was addressed entirely using English cases, and scholarship relevant to the English approach to statutory interpretation, including Lauterpacht’s critique of the exclusionary rule.¹⁰

Barry’s description of statutory interpretation in Australia relied primarily on Australian cases, and whilst the role of the Acts Interpretation Act provided for some differentiation from England, the approach he set out aligned with the central rules of textualism.¹¹ Again, one can find references to the English treatises in High Court cases, although it appears that Craies was cited more frequently than Maxwell.¹²

A recent textbook on legal systems in the West Indies notes that the English rules of statutory interpretation “have been adopted wholesale in the Commonwealth Caribbean and we should not, therefore, expect to find more than minor deviations from English precedents and jurists in our case law.”¹³ The chapter on interpretation begins with an explanation of literal, golden and mischief rules, all of which are supported by references to English cases.¹⁴

Many of the authors of the Victorian treatises on statutory interpretation had strong ties to various English colonies. Dwarris was born in Jamaica, and served as a commissioner to study the laws in the colonies of the West Indies. Maxwell served as Chief Justice of the Straits Settlements

8 AP Chatterjee, *Chatterjee on Interpretation of Statutes* (Eastern Law House 1977) 5.

9 Both were cited together in the following cases: *Canadian Northern Railway Co v Robinson* (1910) 43 SCR 387; *Martinello and Co v McCormick and Muggah* (1919) 59 SCR 394; *Upper Canada College v Smith* (1920) 61 SCR 413; *International Harvester Co of Canada v The Provincial Tax Commission* [1941] SCR 325. Maxwell, Craies and Odgers’ treatise were cited in *R v Ali* [1980] 1 SCR 221.

10 JA Corry, ‘Administrative Law and the Interpretation of Statutes’ (1936) 1 UTLJ 286.

11 John Vincent Barry, ‘Statutory Interpretation in Australia’ (1956) 42 Am Bar Assn J 668.

12 Craies’ treatise was cited in *Maxwell v Murphy* [1957] HCA 7; *Commonwealth v Cigamatic Pty Ltd (In Liq)* [1962] HCA 40; and *Johnson v The Queen* [1976] HCA 44. Maxwell’s treatise was cited in *Smith v Corrective Services Commissioner of New South Wales* [1980] HCA 49.

13 Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2nd edn, Routledge 2008) 243–44.

14 *ibid* 245–55.

prior to authoring his treatise.¹⁵ This colony became a common law jurisdiction through a series of royal charters and subsequent court decisions between 1807 and 1835 which collectively abrogated all other law and established the law of England there (with modifications to accommodate local customs).¹⁶ This colony would eventually be split into several separate nations including Malaysia and Singapore. An introductory textbook on Malaysian law says the following about statutory interpretation: “The principles evolved by the courts of England in interpreting statutes are adopted and applied with local modifications by the Malaysian courts in interpreting local legislation. These principles incorporate: the so-called ‘rules’ of statutory interpretation; language rules; [and] internal and external aids to interpretation.”¹⁷

Textualism was a phenomenon of the United Kingdom and the Commonwealth. As Craies put it, “[s]peaking generally, the rules of interpretation of dominion and colonial legislation are the same as those accepted for statutes of the United Kingdom.”¹⁸ As with textualism, this is an idea that dated back to the middle of the nineteenth century. In 1848, Dr Lushington said the following:

I must construe the Act of New South Wales ... as an Act in *pari materia*. ... And I conceive (though I know of no direct authority for the position) that an Act of a colonial legislature where English Law prevails must be governed by the same rules of construction as prevail in England.¹⁹

As noted in Chapter 5, many of the important critics of textualism were from Commonwealth nations.²⁰ Willis was from Canada.²¹ Vesey-Fitzgerald was from India.²² Friedmann was born in Germany. He had spent some time studying and working in England and Australia, but he was working in Canada when he published his critique.²³ Smith was born in India.²⁴ He was teaching at the McGill University at the time that his article on common law interpretation was published.²⁵ Textualism and the debate about its merits were Commonwealth affairs.

It is noteworthy that several of the former English colonies dealt with the move away from textualism in different ways. In Canada, the federal Supreme Court developed a series of narrowly

15 This fact is noted in the long title of his treatise.

16 Helen HM Chan, *The Legal System of Singapore* (Butterworths 1995) 4–12; Seri Zaki Tun Azmi, ‘Singapore Academy of Law Annual Lecture 2011 - The Common Law of Malaysia in the 21st Century’ (2012) 24 *Singapore Academy of Law Journal* 1, 5–7.

17 Wan Arfah Hamzah, *A First Look at the Malaysian Legal System* (Oxford Fajar 2009) 64.

18 William Feilden Craies and SGG Edgar, *Craies on Statute Law* (6th edn, Sweet & Maxwell 1963) 486.

19 *Catterall v Sweetman* (1845) 9 Jur 951, 954.

20 At 139–145.

21 John Willis, ‘Statutory Interpretation in a Nutshell’ (1938) 16 *Canadian Bar Review* 1.

22 Vesey-Fitzgerald (n 3).

23 W Friedmann, ‘Statute Law and Its Interpretation in the Modern State’ (1948) 26 *Cdn B Rev* 1277.

24 *Who Was Who 1961–70* (A&C Black 1979) 1049.

25 Herbert A Smith, ‘Interpretation in English and Continental Law’ (1927) 9 *J Comp Leg & Int L* 153.

construed exceptions to the prohibition of *Hansard* between 1976 and 1982. The rule was finally set aside in 1998²⁶ when the narrow exceptions were replaced by an open-ended willingness to consider *Hansard*. In Australia, the Acts Interpretation Act²⁷ was amended in 1984 to permit reliance on *Hansard* with an important restriction—it could not be used to contradict the plain meaning of a statutory provision. The modification was made following a seminar on statutory interpretation attended by senior members of the legal community.²⁸ Judges in New Zealand stopped following the rule in the 1980s, and a 1990 Law Commission report stated that there never had been an exclusionary rule in force there.²⁹ The Interpretation Act in Singapore was amended to add a provision similar to that of the Australian Acts Interpretation Act in 1993.³⁰ Hong Kong acted more slowly, and the available literature is not clear about how and when the rule was relaxed.³¹ With respect to this particular rule, the various members of the Commonwealth acted independently. They did not adopt the English rule from *Pepper v Hart*. Thus, with the move away from textualism, many of the former colonies claimed a form of interpretive sovereignty—a willingness to develop their own approach to statutory interpretation.

There is a discernible pattern that has been followed on the path to interpretive sovereignty by the more populous former colonies such as India, Canada and Australia. One sees discussion primarily of English cases earlier in the century. Lawyers could consult the standard English treatises by Maxwell and Craies, as would the scholars authoring domestic works on the subject. Following devolution, the states began hearing final appeals within domestic courts. As the years passed it became more probable that domestic cases would be cited and discussed. Domestic treatises on statutory interpretation were published which focused more heavily on domestic legislation. There were works by Driedger in Canada and by Pearce in Australia, both of which

26 John Magyar, 'Hansard as an Aid to Statutory Interpretation in Canadian Courts from 1999 to 2010' (LLM, University of Western Ontario 2010) 40–41; Stéphane Beaulac, 'Parliamentary Debates in Statutory Interpretation' (1998) 43 McGill LJ 287, 291–92.

27 Acts Interpretation Act (Australia) 1901; Acts Interpretation Amendment Act (Australia) 1984 No 27.

28 JF Burrows, *Statute Law in New Zealand* (2nd edn, Butterworth 1999) 167.

29 See, for example, *Proprietors of Atihua-Wanganui v Malpas* [1985] 2 NZLR 468. NZ, Law Commission, *The Interpretation of Statutes* (Law Com No 21, 1969), *A New Interpretation Act* (Report No 17, 1990). Also see Beaulac (n 26) 298–99.

30 Singapore, Interpretation (Amendment) Act 1993. Also see Goh Yihan, 'A Comparative Account of Statutory Interpretation in Singapore' (2008) 29 Stat L Rev 195.

31 A Law Reform Commission Report claims that *Hansard* became admissible in 1997 as a result of *Pepper v Hart*. Law Reform Commission of Hong Kong, *Extrinsic Materials As An Aid To Statutory Interpretation* (Report, 1997). A 2001 journal article claims that the materials were prohibited in 2001. Anton Corray and Anthony Law, 'Legislative Guidelines on the Use of Extrinsic Materials in Statutory Interpretation: Is Hong Kong Ready?' (2001) 9 Asia Pac L Rev 23.

were published in 1974.³² Sarathi's textbook was published in India in 1975.³³ As a basic narrative, one can observe that domestic cases and domestic textbooks came to supplant English cases and English textbooks. Many of these jurisdictions had become relatively autonomous by the 1980s and it is unsurprising that the members of these legal communities felt comfortable deciding how to deal with preparatory materials around this time. It is fair to say that interpretive sovereignty is a result of devolution.

Although textualism was a Commonwealth phenomenon, I will continue to refer to English textualism to distinguish it from modern American textualism.

6.3 European Textualism

Textualism is an Anglo-American phenomenon. However, some civil code jurisdictions in Europe had their own experiences with a jurisprudential approach to statutes and codes that was analogous to textualism in certain respects. For example, several French treatise-writers in the middle of the nineteenth century developed what became known as the *école de l'exégèse*. They took the view that the Napoleonic Code was self-sufficient. According to Gordley:

Doubtless, there was a natural law of some sort, Demolombe explained, but from the point of view of a jurist the one true law was the positive law. His motto, he said, was 'the texts before all else.' The jurist, according to Troplong, should measure his work against the inflexible text of the Code. According to Laurent, if the jurist observed defects in the positive law, he should leave to the legislature the task of bringing it into accord with the natural law.³⁴

According to this school, "the initial procedure is to make a profound examination of the provision itself. ... The second step is to consider the context of the provision to be construed."³⁵ In cases where there is a gap in the legislation, the Code provided that judges could suspend a proceeding and submit the matter to the legislature.³⁶ The legislature could then respond with legislation. Thus, the *école de l'exégèse* exhibited a reverence for democratic fidelity to duly enacted texts and a faithful agent role for judges.

According to Bell, there were similar developments in Austria and Prussia:

32 Elmer Driedger, *The Construction of Statutes* (Butterworths 1974); Dennis C Pearce, *Statutory Interpretation in Australia* (Butterworths 1974).

33 Driedger (n 32); Pearce (n 32); Vepa P Sarathi, *The Interpretation of Statutes* (Eastern Book Co 1975).

34 James Gordley, 'Myths of the French Civil Code' (1994) 42 Am J Comp L 459, 491; John Bell, 'Continental European Jurisprudence 1850–2000', *The Impact of Ideas on Legal Development*, vol 7 (CUP 2012) 107.

35 Yvon Loussouarn, 'The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law' (1957) 18 La L Rev 235, 240–41.

36 2 Encyclopédie Dalloz, Droit Civil, V ° Interprétation N° 10. *ibid* 239.

The Prussian Allgemeines Landrecht of 1794 declared that the opinions of law teachers and the previous decisions of judges should not be taken into account when interpreting that code (introduction, § 6), and paragraph 12 of the Austrian Civil Code of 1811 had a similar stipulation. The aspiration of much legal writing was to find coherence either within the relevant code or within the scholarly restatement of Roman law. The character of the legal writing paralleled the French *école de l'exégèse*.³⁷

Savigny was highly influential in the German context. While he argued that knowledge of the Code's historical development was essential for an understanding of the contents of the Code, and that scholarship is a necessary component when interpreting the Code,³⁸ his approach was technical and rule-based. According to Samuel:

Savigny and his school constructed their own code on the basis of Roman law ... leading to a direct development from the Natural Law movement (*Vernunftrecht*) to the Pandectic science of Roman law (*Pandekistik*) ... In this doctrine law appeared as a closed system—a pyramid—of concepts rigorously defined and hierarchically arranged from where, by way of reasoning alone, logically exact rules could be deduced. Legal method thus became a matter of technical application, analogous to mathematics, obeying only the logic of abstract concepts and having nothing whatsoever to do with social, moral, political or economic values or policies.³⁹

Savigny's approach was perhaps more closely aligned with the concept of mechanical jurisprudence—the belief that rules can be applied formalistically to produce just outcomes in a manner analogous to mathematics. This was a conception which had some traction among members of the Anglo-American legal communities in the late nineteenth and early twentieth centuries.⁴⁰ Savigny's approach shared certain traits with textualism including the insistence upon application of rule-based concepts and the rejection of subjective policy assessments.

In the final decades of the nineteenth century, at the time when Anglo-American textualism reached maturity, continental legal scholars began to reject the “exegetical” approach, and embraced the “free interpretation” approach propounded by authors like Gény, Kohler, Ehrlich, Zitelmann and Kantorowicz.⁴¹ This approach recognised the many factors outside of the text which are brought to bear and give rise to the need for judicial determinations. The claim that the code was complete

37 John Bell, 'Wolfgang Friedmann (1907–1972)', *Jurists Uprooted: German-speaking Emigré Lawyers in Twentieth-century Britain* (OUP 2004) 111.

38 Reinhard Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law,' (1996) 112 *Law Quarterly Review* 576, 579.

39 Geoffrey Samuel, *The Foundations of Legal Reasoning* (MAKLU 1994) 59.

40 Thomas C Grey, 'Langdell's Orthodoxy' (1983) 45 *U Pitt L Rev* 1; MH Hoeflich, 'Law & Geometry: Legal Science from Leibniz to Langdell' (1986) 30 *Am J Leg Hist* 95; Gregory Casey, 'The Supreme Court and Myth: An Empirical Investigation' (1974) 8 *Law & Society Review* 385; Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605.

41 Bell (n 34).

became regarded as a myth in these continental jurisdictions, and according to Zimmermann, “it appears to be generally recognised today that a code has to be brought to life by active and imaginative judicial interpretation and doctrinal elaboration.”

Based on the foregoing, there is a larger picture to be perceived. Throughout much of what we know as the developed world today, there was a fairly widespread trend within the respective legal communities to develop formalistic interpretive approaches rooted in democratic formalism in the nineteenth century.

The acceptance of the “free interpretation” approach in many European jurisdictions is significant when seeking to contextualise textualism. The ability of the legal systems in continental jurisdictions to function reasonably well for more than a century demonstrates that there are viable alternatives to the faithful agent view of judging.

6.4 The Legacy of Anglo-American Textualism

Textualism has demonstrated a remarkable ability to attract adherents who support and defend the doctrine despite intense criticism. The legacy of textualism is a legacy of persistence and resilience. Textualism had become mature, so to speak, and described with compelling authorities in the treatises by the 1870s. It is around this time that the exclusionary rule became subject to significant judicial challenge in England and America. While it failed to overcome the challenge in the US, textualism managed to withstand judicial attempts to set aside the rule in England and it became entrenched for the better part of the twentieth century. This alone is remarkable. However textualism did not come to an end when the English legal community began to reconsider the most appropriate description and the underlying nature of judicial interpretation. At the same time that textualism lost its place as the orthodoxy in England in the 1980s, a prominent American judge, Justice Antonin Scalia, was reviving the doctrine in the United States. It was at this time that the doctrine acquired a name and thus became identifiable as something more concrete than “English common law statutory interpretation”. Through the application of strong originalism, this doctrine contributed to a reinterpretation of the American Constitution which, among other things, restructured the way elections are financed, and therefore how politics works in the US.⁴² It helped to curtail affirmative action programmes and to slow a progressive push towards the legalisation of

42 *Citizens United v Federal Election Commission* 558 US 310 (2010). Opinion is divided about the impact of this case. Walker argues that the change will have a corrupting effect. Molly J Walker Wilson, ‘Too Much of a Good Thing: Campaign Speech after *Citizens United*’ (2009) 31 *Cardozo Law Review* 2365. Levitt argues that the changes will not be as problematic as critics suggest. Justin Levitt, ‘Confronting the Impact of “*Citizens United*”’ (2010) 29 *Yale L & Pol’y Rev* 217. Both agree that election finance was altered significantly.

gay marriage.⁴³ Having acquired a name, textualism also inspired a spirited scholarly dialogue within the United States which led to the publication of several thousand journal articles, and involved interdisciplinary analyses from a range of disciplines including philosophy, linguistics, theology and political science.⁴⁴ The dialogue attracted the attention of some of the most important legal scholars of the late twentieth century including Ronald Dworkin and Stanley Fish. Justice Scalia passed away and Justice Easterbrook has retired, leaving Justice Thomas as the last of the original American textualists on the Bench. A casual observer might conclude that textualism is on the wane but such a conclusion would be erroneous. There are judges who claim to be textualists at various federal and state courts.⁴⁵ Early in his term of office, President Trump appointed Justice Neil Gorsuch to the Supreme Court. Gorsuch is a self-described textualist who models his judicial approach on Justice Scalia's.⁴⁶ As Gluck's research has shown, the state courts in Oregon, Texas and Connecticut, for example, are strongly influenced by textualism.⁴⁷ Textualism is alive and well in America.

In England, textualism is no longer the orthodoxy, and by all appearances, there is little appetite for its return.⁴⁸ The more vocal critics of the new regime have retired,⁴⁹ and decisions incorporating reliance on Hansard appear regularly.⁵⁰ However, arguments based on plain meaning

43 These issues are discussed with reference to the relevant authorities in Chapter 1, 38–39.

44 John Magyar, 'The Controversial Intellectual Giant of Our Time: A Note on the Late Justice Antonin Scalia' (2016) 45 *Common Law World Review* 257.

45 An unpublished essay by US law professors analysed the lists of judges named by Trump during the election campaign for "Scalia-ness." The article identified Lee, Pryor, Gorsuch and Willet JJ, among others, as subscribing to textualism to varying degrees. Jeremy Kidd, Riddhi Sohan Dasgupta, Ryan Walters & James Phillips "Searching For Justice Scalia: Measuring The "SCALIA-NESS" of the Next Potential Member Of The U.S. Supreme Court" (unpublished) Online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874794> accessed 31 Jan 2017.

46 See for example Neil M Gorsuch, 'Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia' (2015) 66 *Case W Res L Rev* 905, 908–09.: "Respectfully, it seems to me an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function. That, yes, judges should be in the business of declaring what the law is using the traditional tools of interpretation[.]" Max Alderman and Duncan Pickard, 'Justice Scalia's Heir Apparent: Judge Gorsuch's Approach to Textualism and Originalism' (2016) 69 *Stanford Law Review Online* 185.

47 Judges in Texas and Connecticut have behaved in a textualist fashion, collectively. In Texas, the judiciary refused to follow legislation stipulating that legislative history be permitted as aids to statutory interpretation. In Connecticut, the judiciary refused to follow legislation prohibiting reliance on the plain meaning rule. Abbe R Gluck, 'The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism' (2010) 119 *Yale LJ* 1750, 1785–94.

48 This is not to say that a revival will not occur. As Scalia and Thomas JJ demonstrated, it would only take two determined judges on the Supreme Court to alter the current situation. Given the regular turn-over, a revival is possible.

49 See for example Johan Steyn, 'Pepper v Hart; A Re-Examination' (2001) 21 *Oxford Journal of Legal Studies* 59; Francis Bennion, 'Executive Estoppel: Pepper v Hart Revisited' [2007] *Pub L* 1. In *Quintavalle v Human Fertilisation and Embryology Authority* [2005] UKHL 28, Lord Hoffman said "[a]s is almost invariably the case when such statements are tendered under the rule in *Pepper v Hart* [1993] AC 593, I found neither of any assistance."

50 See, for example, Lord Reed's dissent in *R v Secretary of State for Exiting the European Union* [2017] UKSC 5, [175] [Miller]; also see Lord Sumption's opinion in *Abd Ali Hameed Al-Waheed v Ministry of Defence; Serdar*

and ordinary meaning continue to arise in recent judgments at the UK Supreme Court.⁵¹ If there is a renewed sense of frustration with spurious reliance on Hansard by advocates in court, the pendulum could swing back towards textualism.⁵²

It is worth considering why textualism has been so successful as a legal doctrine. The way that the doctrine was developed—the research method that created it—provides one plausible answer. The selection bias inherent in the method used to develop textualism ensured that the doctrine will be practical and efficient for judges.

The treatises on statutory interpretation, and indeed most other treatises in common law jurisdictions, were developed via a method that is simple on its face: the author assembles the relevant cases, analyses them, then derives underlying principles from them. It is an attempt to “theorise” or “rationalise” a particular area of law within the level of generality of that area of law. Because the corpus being subjected to analysis consisted of cases in which judges noted interpretive problems, this method would emphasise the kinds of interpretive problems that appear in court repeatedly over time. As a result, the rules and principles derived from them would be virtually guaranteed to be useful to judges.

Once the material has been assembled, and the relevant principles have been established, the main problem concerns how to structure the resulting information. Perhaps because of the nature of judicial decision-writing, the treatise writers tended to categorise interpretive problems based on the judicial solution applied rather than the nature of the problem that gave rise to the need for an interpretive solution. Thus the emphasis is on a “rule” that resolved the problem, for example the plain meaning rule, the mischief rule or a particular Latin maxim.

There were some scholars of the hermeneutical school like Lieber who sought to analyse language-based problems more directly. Whilst Sedgwick acknowledged Lieber’s work, he found it lacking in “doctrinal” value.⁵³ Arguably, the discipline of statutory interpretation demands a results-oriented focus. If one starts with a comprehensive analysis of the various sources of vagueness in

Mohammed v Ministry of Defence [2017] UKSC 2, [34].

51 See for example *Hastings Borough Council v Manolete Partners Plc* [2016] UKSC 50; and *Yemshaw v London Borough of Hounslow* [2011] UKSC 3.

52 There are non-textualist alternatives that could be pursued. The judiciary could reinstate something like the exclusionary rule while remaining sceptical about the strict enunciation of the role of the judge and the sophisticated plain meaning approach to text; or, the judiciary could simply apply the rule in *Pepper v Hart* more strictly.

53 “Ours is eminently a practical science. It is only by an intimate acquaintance with its application to the affairs of life, as they actually occur, that we can acquire that sagacity requisite to decide new and doubtful cases.” Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (J S Voorhies 1857) 227.

statutory language, the project will resemble an exercise in linguistic philosophy, and such a taxonomy would likely provide an inelegant structure for explaining the rules of interpretation.

There was a concerted effort by jurists and legal scholars in the Victorian era to develop the law as a science. Whilst the methods deployed were influenced by the “scientific” approaches used in other disciplines,⁵⁴ it was an effort to develop law as its own discipline. The focus was on adjudication—on cases. For the treatise writers, there was a quest for coherence, and the natural fulcrum in statutory interpretation is the plain meaning rule. By starting with that rule, then providing possible solutions for statutes that lacked such clarity, a structure resembling a simple flow-chart is established. This is a structure that would make intuitive sense to a judge.

With exceptions for rules that are specific to particular areas of law, the solutions were presented in a way that cut across different areas of law. Judging is similar in this regard. Even judges at specialist courts tend to preside over several areas of law, and often move to higher, less specialised courts as their careers progress. As various statutory provisions come before them, similarities between interpretive problems across different areas of law will become more apparent, and the problems take on the appearance of singular problems of statutory interpretation.

The judicial solutions are presented and elaborated upon through quotes from judicial opinions. These descriptions will therefore be presented at a level of detail that is tailor-made for judges deciding cases. The addition of an overarching layer of theory based on democratic fidelity and the interpretive authority of the judge provides a singular, unified justification for what might otherwise appear to be a disparate collection of judicial tools, most of which had already proved useful over time.

The doctrinal approach—the process of assembling the relevant cases, and structuring the explanation of this collection of cases via an overarching theory—will almost inevitably establish a doctrine that is highly functional for working judges in this context. The plain meaning rule shuts down needless argument when, from the point of view of the judge, the meaning of the relevant statutory provision is clear. The adversarial nature of litigation virtually guarantees that counsel will frequently ask judges to interpret in a manner contrary to a fairly obvious meaning of a statutory provision for the benefit of the client.

Textualism also enables the judge in his or her role as the interpreter. It is the constitutional duty of the judge to interpret and apply the law as the judge finds it, and it is a moral failing to the

54 Howard Schweber, ‘The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education’ (1999) 17 *L & Hist Rev* 421; Hoeflich (n 40).

detriment of the greater good if a judge does otherwise. If an interpretation yields troubling results, the doctrine provides a clear defence for the judge: it is the fault of the legislature. If the plain meaning leads to an outcome that is morally offensive to such an extent that application of the rule against absurdity is justified for a particular judge, he or she need not consider the implications for the role of the judge as a faithful agent. It is enough to believe that the outcome of the plain meaning is so outrageous that it could not possibly have been what the legislature had intended.

That the rules and principles of textualism exist in tension with each other, and seem to have movable goal posts, particularly with respect to plain meaning and absurdity, is a problem for the full-time legal theorist, and not the full-time judge. For the judge, the balance between formalism and practicality is enough.

Whilst strictly anecdotal, I have found judges far more likely to appreciate statutory interpretation as a subject of study than lawyers and academics who focus on practice-related areas of law. By all appearances, academic lawyers in England tend to feel that statutory interpretation is unnecessary as an independent course of study (although, to be fair, the requirements of the relevant regulatory agencies are such that there is little room in the curriculum for such a course). Judges, on the other hand, (or some of them, in the very least) tend to lament the lack of emphasis on the subject in English legal education.⁵⁵ In light of this, it is perhaps unsurprising that there is a correlation between judging and the treatise writers. Dwarris, Potter, Maxwell, Wilberforce, Endlich and Sutherland all worked as judges, and many of them served on the Bench prior to authoring their treatises.⁵⁶ Justice Scalia can also be included on this list. Thus four of the nine original authors of the textualist treatises on statutory interpretation served as judges, and both of the annotated treatises were edited by judges. To a significant extent, textualism is a doctrine that was developed by judges for judges.

55 See for example Lord Justice Sales' lecture at the Society of Legal Scholars conference, Oxford University, September 2016: "Most of the law which the courts are called on to apply is statutory. Yet statutory interpretation languishes as a subject of study. For the most part, law students are expected to pick it up by a sort of process of osmosis. It's more fun and engaging to study cases, as vignettes of real life. So the common law and common law method wins out." It is interesting to note the similarity with Scalia's lament in Antonin Scalia, 'Common-Law Courts in a Civil-Law System' in Amy Gutman (ed), *A Matter of Interpretation* (Princeton University Press 1997) 14. "There are few law-school courses on the subject, and certainly no required ones; the science of interpretation ... is left to be picked up piecemeal, through the reading of cases (good and bad) in substantive fields of law"

56 Dwarris was a Master of the Queen's Bench and Recorder of Newcastle-under-Lyme. William Prideaux Courtney, *Dictionary of National Biography*, 1885–1900, Volume 16 (Smith, Elder & Co 1888) 273. Maxwell was Chief Justice of the Straits Settlement. Wilberforce was a Master of the Supreme Court: 'Legal Obituary' (1914) 136 LT 312. Sutherland was a judge of the Tenth Circuit Court of Michigan: Harold M Stephens 'Mr. Justice Sutherland' (1945) 31 ABAJ 446. Platt Potter was a judge at the Supreme Court for the State of New York. Fortunatus Dwarris, *A General Treatise on Statutes: Their Rules of Construction, and the Proper Boundaries of Legislation and Judicial Interpretation* (Platt Potter ed, Gould & Sons 1871) title page. Endlich was a judge for the Court of Common Pleas in Berks County Pennsylvania. 'Tribute to Judge Endlich' *The Reading Eagle* (19 October 1924).

Textualism is more than a doctrine. It is also a judicial ideology which is analogous to, for example, neoliberalism in economics. It does not merely solve problems for judges. It provides a normative framework for judging based on fidelity to the democratic process that, if accepted, is unambiguously righteous. The core principles of the supremacy of the legislature and the separation of interpreting from legislating are normative, and this can have a polarising effect: it can give rise to passionate support for the doctrine and scathing criticism of contrary conceptions. No doubt this normative component contributes towards textualism's ability to persist.

Given its attractiveness to benchers, it is interesting to note that the judiciary was firmly at the top of the hierarchy of the legal community during the time of textualism's domination in England. Full-time scholars/educators played a decidedly subsidiary role in the legal community. The doctrine lost its place at a time when the influence of universities and the full-time legal scholars they employed were on the rise. This is entirely reasonable. When judges are the sole authorities, a doctrine which is more practical than theoretically robust can be maintained as the orthodoxy. When the views of full-time theorists are valued, the doctrine will be exposed to significant contrary points of view.

A similar pattern can be observed in the US. Setting aside the state courts where the picture is much less clear, the doctrine was essentially law in the federal courts for much of the nineteenth century. The decline occurred approximately between the 1880s and 1910. In most US states, law schools became increasingly important in the latter half of the nineteenth century.⁵⁷ The rising influence of full-time scholars coincided loosely with the decline of the doctrine in America.

There are some other factors which, in all probability, influenced the movement away from textualism in the US. The widespread adoption of the case method towards the end of the nineteenth century meant that case books became the dominant textbook for students learning the law.⁵⁸ As a result, the treatises became less influential in the US, and along with them, unifying theories like textualism. The concept of legal realism became an important topic of scholarship early in the twentieth century, following widespread adoption of the case method.⁵⁹ It is plausible that the rejection of theory-based textbooks in favour of collections of cases curated to explore legal issues in a manner that presents ambiguities on occasion, might have contributed to this development.

57 Susan Katcher, 'Legal Training in the United States: A Brief History' (2006) 24 *Wis Int LJ* 335, 347–353.

58 AWB Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *U Chic L Rev* 632, 677; Edwin W Patterson, 'The Case Method in American Legal Education: Its Origins and Objectives' (1951) 4 *J Legal Educ* 1.

59 G Edward White, 'From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America' (1972) 58 *Virginia Law Review* 999.

Another important factor is geography. The US population was spread out over a much larger expanse of land than the English population. Furthermore, it is a federation of states, each of which possesses significant legal and political autonomy. The senior judiciary within each state court are free to choose their own interpretive doctrine, collectively.⁶⁰ It would therefore be difficult to maintain uniform practices among the many states. Meanwhile, the practices within the state courts are relevant to the federal courts when adjudicating matters governed by state law. In such cases, federal courts are bound by the relevant state precedents.⁶¹ If the majority of states accept legislative history, non-textualist federal judges would have repeated opportunities to challenge the a cornerstone rule of the doctrine. Under such circumstances, it would be reasonable to expect cases both for and against the exclusionary rule in the federal courts, and this is what occurred in the latter decades of the nineteenth century. All of the American treatise writers tacitly accepted the importance of state court practices. They cited such cases frequently.⁶²

The ability of textualism to attract the support of judges means that textualism will have more “doctrinal impact”, so to speak—it will have more impact on the legal profession in common law legal systems—than a theory of interpretation which is less attractive to judges but more attractive to scholars. Dworkin’s theory of law as integrity is an example of such a theory.⁶³ It is not as easy to translate this theory into justifications for individual decisions. As a result, it lacks the practicality of textualism.

Textualism is an excellent example of a legal doctrine that resulted from a virtuous relationship between scholarship and judging. A very particular type of scholarly literature was required to make the doctrine visible, and this literature has been an important component of textualism’s ongoing persistence. It is a counterexample for those who criticise legal scholars for being consumed by theory and disregarding the practical. The ability of textualism to affect judging is its core strength. It is because of this ability that textualism has had so much influence in England, the Commonwealth and America. Its ongoing legacy is a testament to the power of doctrinal legal scholarship.

60 Gluck (n 47).

61 Benjamin G Shatz, ‘Gimme 5--What Every Lawyer Should Know About Stare Decisis’ [2010] *California Defender* 70, 71.

62 See for example Chapter 4, 87, 94–95 & 97–98.

63 Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986).

6.5 Textualism in the Context of Nineteenth Century Legal Scholarship

There was a logic to the emergence of the various legal treatises the mid-nineteenth century. It can be regarded as an evolutionary process—a process of bringing the doctrines and practices surrounding the law and legal process from a very private and closed community into the public sphere. The common law legal system developed through an opaque, unsystematic process of deciding cases heard in a foreign language by a very small, closed community of specialists and in which cases were not formally reported.⁶⁴ Over time there was a move towards a more open system. Cases were heard in English and cases were published, albeit unsystematically, by private reporters.⁶⁵ By the seventeenth and eighteenth centuries, important cases were usually reported; and a variety of treatises and commentaries were available for lawyers in training.⁶⁶

Advances in printing technology in the nineteenth centuries brought about lower costs,⁶⁷ and this was accompanied by increased demand for material to facilitate legal education, from universities in the US, and from the legal communities in both America and England.⁶⁸ As a result, there was a proliferation of textbooks in the nineteenth century.

By this time, the very well-respected commentaries by Blackstone and Kent were widely acknowledged as important statements of the law which sought to cover the field.⁶⁹ Necessarily, these works were analogous to encyclopaedias, covering a great deal of material at a relatively low level of detail. The treatises were directed at more narrow subtopics within the law and would therefore facilitate a much greater amount of detail. They were the next step in the process. This occurred in conjunction with more widely available reporters which provided the source material. In a real sense, the law was becoming more accessible to the legal community and to the public.

As can be seen within the treatise on statutory interpretation, the creation of such a work is not always a neutral observation and description of the law. It is often an attempt to fit the relevant cases into explanatory theories with the result that cases supporting the preferred theories become authorities while the cases that do not conform become outliers that are relegated to footnotes

64 Peter Tiersma and Lawrence Solan, *The Oxford Handbook of Language and Law* (OUP 2012) 19–25.

65 Sir William Holdsworth, *A History of English Law*, vol 11 (Methuen & Co 1938) 101–04.

66 *ibid*; Michael Lobban, 'The English Legal Treatise and English Law in the Eighteenth Century', *Auctoritates*, vol XIII (Voor Wetenschappen 1997).

67 Bernard J Hibbitts, 'Last Writes – Re-Assessing the Law Review in the Age of the Cyberspace' (1996) 30 *Akron L Rev* 175, 176.

68 Simpson (n 58); Hibbitts (n 67).

69 Katcher (n 57) 344.

containing contrary examples.⁷⁰ There would inevitably be a relationship between the types of theories imposed on the material and the scope—and therefore the level of generality—of a treatise. There are many possibilities which pertain to the fluid nature of human thought. There could be a number of subtheories within the treatise to cover the chosen topic. In the alternative, the theory could be larger than the subject matter of the treatise whilst focusing on that subject. Regardless of the scope of the theory, the theory would necessarily have to encompass the higher level of detail and a large number of cases that the treatise requires. Within this range of possibilities, textualism is a theory that is holistic relative to the subject matter of the treatise on statutory interpretation. The treatise does invite theorising at this level. If one sets out to write a textbook covering a topic, there is a natural tendency to attempt to conceive of a single overarching theory of that topic.

The fact that textualism is a holistic theory of statutory interpretation—that it provides a single theory for the entire collection of relevant cases—is both its weakness and its strength. For those who seek a unified theory of statutory interpretation, textualism is among the few that work at a doctrinal level—the level of individual cases. Given the indeterminate nature of the rules of textualism, the diversity of laws and the diversity of circumstances that come before the courts, and the fact that different judges will see things differently, variation within the cases is inevitable. There is a spectrum that one confronts. At one end of the spectrum is the strong and clear theory that is unable to accommodate cases at the margins that do not fit; at the other end of the spectrum is the theory that is sufficiently open-ended that the marginal cases fit, and as a result, is vulnerable to the criticism that the theory lacks explanatory power. Textualism strikes a balance that leans towards the open-ended end of the spectrum.

6.6 The Impact of the Nineteenth Century Treatise on the Development of the Law

One must take care not to generalise without doing the hard research to back it up, and the following claim must be understood as an interesting possibility rather than a substantiated claim. It does seem reasonable to expect a certain amount of theory-fitting within any treatise, particularly in the nineteenth century. Simpson, Sugarman and Duxbury have noted this phenomenon in a variety of contexts.⁷¹ The nature of scholarship is such that any would-be theorist will read the prior

70 Simpson, Plucknett and Horwitz have described this process in relationship to other areas of law. Brian Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 LQR 247, 251; Theodore FT Plucknett, *A Concise History of the Common Law* (5th edn, Little, Brown & Co 1956) 19; Morton J Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (OUP 1992) 13–15.

71 Simpson (n 70); David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition', *Legal Theory and Common Law* (Blackwell 1986).

theories and be influenced by them. Confirmation bias being central to human thought, theorists will be likely to see what they expect to see when they do their research, to some extent.⁷² Add a community-wide desire for theory, which was present during the time when the legal community sought to develop law as a science, and you have a fertile environment for shaping the law around theories. This occurred among some French treatise writers in the nineteenth century. Several scholars wrote about the “three pillars” of the Napoleonic Code, and according to Gordley, “these principles were not those of the drafters. They were the principles of French nineteenth century treatise writers who read them into the Code.”⁷³

The legal science movement encouraged the types of theories that worked within the level of detail required by the treatises. Rather than presenting the broad and thin theories appropriate for the commentary, these theories focused on subtopics within the law. Differentiated theorising among the subtopics was possible. However, whilst many treatises were concerned with practice-related classifications of legal actions, for example contracts and torts, there were also treatises that focused on legal categories like damages, statutory interpretation and interpretation more generally. These are legal categories that cut across practice-related categories. With the law being systematically examined and rationalised through the various legal categories that aroused sufficient interest to inspire a treatise, there would have been subtle but comprehensive pressure put upon the entire legal system to embrace the more compelling theories that the legal science movement spawned. As such, the legal treatise could be understood as a medium in a McLuhanian sense—as a subtle but powerful force that comprehensively restructured the law, whilst the people involved in the process were unaware of the larger impact on the whole of the law.⁷⁴

It should be noted that theorising is not essential when authoring a treatise. One could simply assemble the relevant cases into a digest of sorts without attempting to fit them into any theories. According to Duxbury, Pollock’s treatises fit this mould.⁷⁵ Arguably, this is the current state of the hulking Sutherland treatise which now extends to eight volumes.⁷⁶ Justice Scalia described it as “a litigator’s research tool and expert witness—to say, and to lead you to cases that

72 Paul Edward Lehner and others, ‘Confirmation Bias in Complex Analyses’ (2008) 38 IEEE Transactions on Systems, Man and Cybernetics 584; Clifford R Mynatt, Michael E Doherty and Ryan D Tweney, ‘Confirmation Bias in a Simulated Research Environment: An Experimental Study of Scientific Inference’ (1977) 29 Q J Experimental Psych 85; Raymond S Nickerson, ‘Confirmation Bias: A Ubiquitous Phenomenon in Many Guises’ (1998) 2 Rev General Psych 175.

73 Gordley (n 34) 459.

74 Marshall McLuhan, *Understanding Media: The Extensions of Man* (5th edn, Routledge 2001).

75 Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press 2004) 281–82.

76 Norman J Singer and JD Shambie Singer, *Sutherland on Statutes and Statutory Construction* (7th edn, West 2008).

say, why the statute should be interpreted the way your client wants.”⁷⁷ Yet, a certain amount of curation is required simply to organise the information and present it in a coherent fashion, so an untheorised collection would bear the imprint of an intellectual framework. It might be more accurate to say that such a work contains less theorising than works such as the textualist treatises on statutory interpretation.

However one chooses to regard the issue, the Victorian textualist treatises were works that, through iteration, developed the explicit enunciation of a theory that would eventually be called textualism. As the legacy of this theory demonstrates, the doctrinal theorising that occurred in the nineteenth century treatise can have a long-term impact on the law.

6.7 The Correlation between Textualism and the Treatise

Textualism has exhibited a very striking correlation with the treatise on statutory interpretation. During the era of English textualism, the treatises by Maxwell and Craies persisted through multiple editions without substantial rewrites. The doctrine fell away in England at the same time that the treatises by Craies and Maxwell were discontinued. The last edition of Maxwell, the twelfth edition, was published in 1969. The last textualist edition of Craies, the seventh edition, was published in 1971.

Maxwell’s twelfth edition was republished in 1978 and again in 1982. The seventh edition of Craies was republished 1976 and 1978.⁷⁸ It is rather curious that both works were republished without revision at a time when the legal community was undergoing a shift away from textualism, and the need to revise these works would have been greater than in the past. There was a belief held by some members of the legal community that these works were still relevant without revisions. Whatever forces were at work, whether revised or republished, the canonical treatises persisted in England for as long as the doctrine remained the orthodoxy.

The correlation was not confined to England. The US treatises were no longer published when textualism fell away (with the exception of Sutherland, which morphed into a non-textualist interpreter’s “toolkit”). Meanwhile, when Justice Scalia had elevated textualism to a place of prominence in the US, he also resurrected the textualist treatise on statutory interpretation. Although modified and abridged in comparison to its Victorian-era counterparts, and normative insofar as it

⁷⁷ Scalia (n 55).

⁷⁸ A new edition of Craies was published in 2004, however it had undergone a substantial rewrite. It is no longer a restatement of textualism. William Feilden Craies, Daniel Greenberg and Samuel GG Edgar, *Craies on Legislation* (8th edn, Sweet & Maxwell 2004).

expressed what Scalia believed the law ought to be rather than what the law is, *Reading Law* still fits the mould. It is a restatement of textualism in the form of a treatise.

Textualism and the treatise subsist together. This is perhaps unsurprising given how textualism is regarded by adherents—as a singular, coherent doctrine that is the only approach capable of restraining judges from applying personal values on the law and thus usurping the law-making authority that properly belongs to the legislature. The normative component is sufficiently strong that supporters of the doctrine possess a certain amount of zeal. Proponents of the doctrine will find it highly desirable for a current authoritative textbook to be available to the legal community that explains the doctrine.

The full extent of the relationship between the treatise and the doctrine in England can be gleaned by considering Chapter 4 in its entirety. There is a reflexive interaction between the doctrine, the practices of judges and the perception of those practises within the legal community. There was substantial agreement about the set of rules that were permissible, and there was agreement that the rules could be found in the two canonical treatises by Maxwell and Craies. There was agreement that this was so despite many cases which transgressed or appeared to transgress the rules. Meanwhile, there was significant disagreement about whether the rules amounted to a theory or achieved their purported aim. Despite the disagreement, there was widespread acceptance of the regime, particularly by the judiciary. Exceptions to the exclusionary rule were approached conservatively, for the most part. This was the case even though there were strong precedents such as the *Solio Case*,⁷⁹ in support of the exceptions. It is a complex, sociological process, and to use Duxbury's words, it is a process that is “steered by tradition.”⁸⁰ The doctrine was developed from traditional doctrinal sources using research methods that had become a part of the traditional practices within the Anglo-American legal communities. The doctrine, in turn, became a seamless extension of that tradition by incorporating concepts and the modes of thought and argumentation that were widely accepted within the legal community, and equally part of the tradition.

6.8 English versus American Textualism

There are a number of differences between textualism in England and in America. Some of these issues are directly related to constitutional differences between England and America. Others relate to the fact that textualism was the orthodoxy in England, while it was not in the US. As a

79 *Eastman Photographic Materials Company v Comptroller-General of Patents, Designs and Trademarks* [1898] AC 571.

80 Neil Duxbury, *Elements of Legislation* (CUP 2012) 135.

result of these differences, the doctrine faced a very different set of pressures in each nation.

6.8.1 The Separation of Powers

An obvious issue with respect to the English and American context concerns the separation of powers. The US Constitution requires explicit separation of powers between the executive, the legislative and the judicial branches of government.⁸¹ Because of this, democratic fidelity is the only justification required to argue for the core principles of textualism for judges serving in the federal courts. Furthermore, this justification can be used to conjure the founding myth which arouses strong feelings of national pride in most American citizens.

In England, separation of powers is fraught with complexity. Claims about separation of the judiciary from the legislature must be reconciled with a constitution comprised of a large series of written documents, “unwritten” case law, and historical understandings about which there is disagreement.⁸² From the time of textualism’s emergence until its subsidence in England, the Lord Chancellor was a member of the executive, a member of the House of Lords, a judge and an appointer of judges.⁸³ Law Lords—the judges at the UK’s final court of appeal—were entitled to sit as members of the House of Lords as a legislative body, and many did on occasion during the textualist era.⁸⁴ The overlap had to be overlooked when asserting claims about the separation of powers. Indeed, many of the Victorian treatise writers found the issue to be of little concern. This is one of the many ways that textualism might fail to satisfy the pure theorist.

It is interesting to note that, historically, scholars have cited the founding myth in both nations to justify textualism. The relationship between the founding myth and textualism is obvious with respect to the US Constitution, although it is less so in England. There, the narrative concerns the subjugation of the Crown to the legislative will of Parliament.⁸⁵ It is a long and complex narrative which involves the enactment of certain constitutional statutes including the Magna Carta, the Bill of Rights, and various acts of settlement; it also involves the stories about Coke’s interference with the Crown; and perhaps of most importance, the Glorious Revolution, although it

81 To be fair, the full extent of Federal Court jurisdiction is as contested as any other aspect of the US Constitution. See for example Martin H Redish, ‘Reassessing the Allocation of Judicial Business between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles”’ (1992) 78 Virginia Law Review 1769.

82 Cheryl Saunders, ‘Separation of Powers and the Judicial Branch’ (2006) 11 Jud Rev 337; Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2010) 9–32.

83 Diana Woodhouse, *The Office of Lord Chancellor* (Hart 2001).

84 JAG Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press 1997) 39–42; Louis Blom-Cooper and Gavin Drewry, *Final Appeal: A Study of the House of Lords in Its Judicial Capacity* (Clarendon Press 1972) Ch 10.

85 See Chapter 3, 68.

must be understood within the larger historical context. The narrative establishes the supremacy of Parliament, and it follows that duly enacted legislation is binding on judges and of no less importance with respect to democratic fidelity than in the US.⁸⁶

Many English lawyers are familiar with this founding myth, but for lay English people it is a story that tends to get lost within so many details about the dynasties and related wars over the course of Britain's history, as it is taught in school. The historical narrative about the ascendance of Parliament as a move towards democratic governance is not widely known and understood by the general populace.⁸⁷ It is interesting to note that the concept of Parliamentary supremacy continued to be developed two centuries after the completion of the most important historical events.⁸⁸ With respect to interpretive doctrine, the same result occurs in both jurisdictions; however in England, complexity prevents the doctrine from attaching to popular culture.

6.8.2 Differences in the Structures of the Legislatures

There are important constitutional differences between England and the US. The executive has much more control over the legislative agenda in the Westminster system where the Prime Minister who commands a majority can effectively compel assent in the House of Commons. In Congress there is no equivalent of the party whip, and garnering support for bills requires more political bargaining than in Parliament.⁸⁹ As a result, the nature and potential relevance of various types of preparatory materials as aids to statutory interpretation differ. As Greenberg and others have noted, one must understand the processes within which particular documents were created in order to properly understand their relevance with respect to any particular bill.⁹⁰

An important related difference concerns the approach to legislative drafting taken in each jurisdiction. In England, as of 1868, there has been a designated group of experts at the Office of Parliamentary Counsel who draft legislation for the executive.⁹¹ In the US, legislation is drafted by a

86 See for example Sir Fortunatus Dwaris and William Henry Amyot, *A General Treatise on Statutes* (2nd edn, W Benning 1848) 28–40; and; Sedgwick (n 53) 213–16.

87 N Sheldon, 'A History of School History: From New History to the GCSE 1960s to 1988' (2011) <<http://www.history.ac.uk/history-in-education/project-papers/school-history.html>> accessed 18 September 2018.

88 Consider, Dicey's work, for example. Albert Venn Dicey 1835-1922., *Introduction to the Study of the Law of the Constitution*. (6th edn, 1902).

89 Victoria F Nourse, 'Overrides: The Super-Study Response' (2013) 92 Tex L Rev 205; William S III Jordan, 'Legislative History and Statutory Interpretation: The Relevance of English Practice' (1994) 29 U San Fran L Rev 1, 23.

90 Daniel Greenberg, 'Notes (Hansard, the Whole Hansard and Nothing but the Hansard)' (2008) 124 LQR 181; Daniel Greenberg, 'The Nature of Legislative Intention and Its Implications for Legislative Drafting' (2006) 27 Stat L Rev 15; John Cannan, 'A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History' (2013) 105 L Libr J 131; Nicholas S Zeppos, 'Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation' (1990) 76 Virg L Rev 1295.

91 Geoffrey Bowman, 'Why Is There a Parliamentary Counsel Office?' (2005) 26 Stat L Rev 69.

variety of experts including lobbyists.⁹² As a result, legislation is drafted in a more consistent style in England.

Based on these two differences, it is possible to construct a variety of arguments concerning the acceptance or rejection of legislative history. The consistency in England could be grounds for rejecting legislative history because it is unnecessary.⁹³ In the alternative, statements in Parliament by a minister bearing responsibility for a bill could be regarded as more meaningful given the control that the executive exerts over Parliament.⁹⁴ The inconsistency, and the more extensive use of committees in the US could be grounds for arguing that legislative history is less reliable and therefore less useful;⁹⁵ and in the alternative it can be grounds for arguing that interpretive problems are more likely and therefore there is more need for reliance on these materials.⁹⁶

Despite the differences, there have been complaints on both sides of the Atlantic about the ever-growing quantity and complexity of statutes.⁹⁷ This issue is perennial. Any time such a complaint was made over the past few centuries, it was true.⁹⁸ It is the result of numerous factors, including population growth, the evolving role of governments and moral values that have changed over time. However, it is also cultural. There is a preference for legislation that is rooted in the democratic ideology that is prevalent in common law jurisdictions. Judges in these jurisdictions often profess to be uncomfortable changing the law, even if the law would be improved⁹⁹—a sentiment that is harmonious with textualism. It is widely believed that modification of the law is something that the legislature is better suited to do than judges.

In a legal system where such a belief is prevalent, the growth of statute law and a concomitant reduction in the scope of the common law will be inevitable even without the influence

92 Lisa Schultz Bressman and Abbe R Gluck, 'Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II' (2014) 66 *Stan L Rev* 725.

93 Stephen Breyer, 'On the Uses of Legislative History in Interpreting Statutes' (1991) 65 *S Cal L Rev* 845, 868.

94 While few scholars have taken this proposition, it is an implicit assumption in the rule in *Pepper v Hart*.

95 Zeppos (n 90) 1301–1304; Holger Flesicher, 'Comparative Approaches to the Use of Legislative History in Statutory Interpretation' (2012) 60 *Am J Comp L* 401, 431.

96 See for example Flesicher (n 95) 429–35; Breyer (n 93) 867–68.

97 See for example William Graham-Harrison, 'An Examination of the Main Criticisms of the Statute Book and of the Possibility of Improvement' (1935) 12 *J Soc Pub TL* 9; Guido Calabresi, *A Common Law for the Age of Statutes* (HUP 1982) 1; Johan Steyn, 'Dynamic Interpretation Amidst an Orgy of Statutes' (2003) 35 *Ottawa L Rev* 163, 164–65.

98 The complaint has been made repeatedly over time. See, for example, Steyn (n 97); George Engle, 'Bills Are Made to Pass as Razors Are Made to Sell: Practical Constraints in the Preparation of Legislation' (1983) 1983 *Stat L Rev* 7, 10–11; Geoffrey Marston, 'Review of The Preparation of Legislation. Cmnd. 6053 by David Renton; The Interpretation and Application of Statutes by Reed Dickerson' (1976) 35 *CLJ* 344; Graham-Harrison (n 97).

99 See, for example, Lord Hoffman's address to the University of Cambridge on 29 January 2015. Online <<http://www.privatelaw.law.cam.ac.uk/press/news/2015/01/lord-hoffmann-delivers-cambridge-freshfields-lecture-constitutionalism-and>> accessed 5 Feb 2017; Devlin, 'Judges and Lawmakers' (1976) 39 *The Modern Law Review* 1.

of population growth and technological change. The values which underpin textualism are as likely to be a cause of the expanding role of legislation as they are to be an effect of it.

6.9 Should Judges Read Legislative History?

An issue that the modern American textualist judges have not clearly engaged with concerns the public nature of legislative history. Justices Scalia and Thomas have made comments in *obiter* to the effect that it is reasonable for courts to consider legislative history when a statute suffers from a significant lack of clarity. As discussed in Chapter 1,¹⁰⁰ they did so on a single occasion each, and maintained throughout their judicial careers that legislative history is too unreliable to yield any meaningful insights into the meaning of statutes. Furthermore, recourse to legislative history is dependent upon a conception of legislative intent that is contrary to textualist conception of the separation of powers as a constitutional requirement.

A problem arises because the various records documenting proceedings in the respective legislatures in the US and England, and the various documents produced in the process of governing, are public documents. As scholars such as Vesey-Fitzgerald, Eastwood and Lauterpacht argued, good legal scholarship involves consideration of these sources.¹⁰¹ As Denning's opinions in *Davis v Johnson*, *Hadmore Productions v Hamilton*¹⁰² and *R v Local Commissioner for Administration, ex parte Bradford Metropolitan City Council*¹⁰³ revealed, some judges read the legislative history and find it insightful on occasion.¹⁰⁴ Viscount Dilhorne's response in *Hadmore* points out the problem of procedural fairness that arises.¹⁰⁵ If judges are influenced by these materials, then counsel should have knowledge of it and the ability to respond.

This is a problem that will arise when textualism is imposed upon a judiciary. In the US, where textualism is not enforced as a matter of law, lawyers have the ability to examine legislative history and address the arguments raised by these materials when dealing with a non-textualist judge who finds such arguments to be potentially useful. The textualist judges are free to take the view that such arguments are always unhelpful. In a jurisdiction where legislative history is inadmissible as a matter of law, it is possible that some judges are examining the records, whether directly or via secondary literature, and being influenced by them. There is no way to make it explicit without a judge taking the risk of exposing him- or herself to an appeal; and if it remains

100 Chapter 1, 15–17.

101 Chapter 5, 139–42.

102 [1981] 1 AC 191.

103 [1979] 2 All ER 881.

104 Chapter 5, 162–64.

105 Chapter 5, 165.

unacknowledged, counsel is not being presented with an accurate picture of the judge's views with respect to a particular piece of legislation.

This is a vexing problem for textualism. It is perhaps a problem that can only be dealt with pragmatically in much the same way as the lack of hierarchy within the textualist rules of interpretation. It is something that must be accepted because there is no better alternative.

6.10 The Relationship Between Textualism and Politics

Textualism is intertwined with politics, but the relationship is very different in England than in the United States. Despite this, there are some interesting parallels. In England, textualism became entrenched at a time when the nation was deeply divided politically. As a superficial characterisation, one could claim that the conservative judges were relying on textualism to mask political interference with the legislative objectives of their political foes, whilst Liberal and Labour judges were relying on textualism as a means of forwarding the legislative objectives of their political allies.

The reality is more complex. Around the beginning of the era of high English textualism, the political mandate of the Liberal-Labour coalition was clearly established by the election in 1910,¹⁰⁶ and right-leaning judges had as much reason as left-leaning judges to abide by the will of the people insofar as they respected the democratic legitimacy of Parliament. Throughout the entirety of textualism's tenure in England there were proponents and critics from both ends of the political spectrum. The more important left-leaning critics included Laski and Lord Gardiner. Lord Denning is the most obvious conservative critic. Among Denning's key adversaries with respect to textualism was Lord Simonds, a fellow conservative, who overturned Denning's transgressions in *Magor and St Mellons*.¹⁰⁷ As *Ellerman Lines v Murray* demonstrated, the rules of textualism did not always yield conservative outcomes.¹⁰⁸ The working man could just as easily get a windfall as a corporation could.

The depoliticisation of the judiciary which occurred at the beginning of the high textualist era likely contributed to textualism's success.¹⁰⁹ Even staunch realists could agree that textualism would yield politically neutral outcomes if it was applied by politically neutral judges; and if the claims about the doctrine's neutrality were generally borne out in practice, the doctrine would

¹⁰⁶ See for example Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System* (Heinemann 1967) 115.

¹⁰⁷ Chapter 5, 130.

¹⁰⁸ See the discussion of this case in Chapter 4, 128.

¹⁰⁹ Chapter 5, 148.

acquire more legitimacy within the legal community and beyond than it could if the proponents came from only one end of the political spectrum. Textualism fell out of favour at a time when the notion of the politically neutral judge became subject to doubt,¹¹⁰ and it is reasonable to believe that the claim of political neutrality must be plausible for textualism to be the orthodoxy.

In its modern iteration in America, textualism rose to prominence under very different circumstances. Textualism has been, and continues to be, an explicit tool of right-leaning judges and politicians. It is the strong originalism propounded by Justice Scalia that gives textualism its value to the Republican base because of the constitutional interpretations that this doctrine has been deployed to support. Justice Scalia and his doctrine rose to prominence at a time when conservative values had faced several decades of setbacks in the wake of landmark decisions by the Warren and Burger Courts. Famous cases including *Engel v Vitale*¹¹¹ and *Roe v Wade*¹¹² had greatly extended the reach of constitutional rights in a progressive manner that inspired passionate opposition within conservative communities.¹¹³

Whilst significant constitutional determinations arise in a small percentage of the judgements decided by the Supreme Court, their political impact is significant. These cases are more likely to receive prominent news coverage, particularly cases involving individual rights,¹¹⁴ something that rarely occurs for the more numerous, pedestrian cases that turn on statutory interpretation. As a result of the relative importance placed on such cases, many people in America identify Justice Scalia as an originalist and remain unaware of the larger doctrine of textualism.¹¹⁵

The reactionary component of textualism appears to be relevant to its success as a doctrine. Groups within a particular jurisdiction who feel that activist judges are working against them, for example, evangelicals in America in the late twentieth century, and trade unionists in England in the late nineteenth century, both had good reason to argue that judges should abide by the text that the legislature enacted regardless of personal policy preferences. The fear of activist judging is a key source of motivation for proponents of the doctrine.

110 Chapter 5, 151–52.

111 370 US 421 (1962).

112 410 US 113 (1973).

113 Robert Post and Reva Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash' (2007) 42 Harv CRCL L Rev 373, 415–23.

114 Cases are publicised based on "newsworthiness" and legal significance is not a relevant factor in this determination. Ethan Katsh, 'The Supreme Court Beat: How Television Covers the U.S. Supreme Court' (1983) 67 Judicature 6.

115 See for example Jedediah Purdy "Scalia's Contradictory Originalism" The New Yorker, February 2016, online <<https://www.newyorker.com/news/news-desk/scalias-contradictory-originalism>> accessed 23 March 2018; Ed Pilkington "Originalism: Neil Gorsuch's Constitutional Philosophy Explained" Guardian 2 February 2017, online <<https://www.theguardian.com/law/2017/feb/02/originalism-constitution-supreme-court-neil-gorsuch>> accessed 23 March 2018.

6.11 Textualism and Originalism

Originalism, as it is propounded by American textualist judges, will produce outcomes that are appealing to the political right by its very nature because of the way that these judges determine the “public understanding” at the time of adoption.¹¹⁶ Priority is often given to the legal understanding at the time of adoptions,¹¹⁷ and this will automatically accommodate older moral values and therefore provide constitutional grounds for resisting interpretations of the Constitution that protect more progressive values.

This conservative approach to the Constitution is accomplished by the application of rules and legal arguments that accord well with a doctrinal approach to interpretation that dates back to the Victorian era, and this adds the weight of tradition to textualism. There is one exception, however. The doctrine of *stare decisis* becomes demoted. Interpretations which seem incorrect but have been upheld over time ought to be followed according to traditional common law jurisprudence,¹¹⁸ but not so for the modern American textualists when they are interpreting the Constitution.¹¹⁹

In America, textualism is often conflated with originalism. It should be kept in mind that there is a difference between textualism as a doctrine of statutory interpretation, and some of the variants of originalism that were developed as distinctive approaches to constitutional interpretation. Whilst Justice Scalia’s originalism was influenced by Bork’s ideas, in all likelihood, Bork’s originalism was focused exclusively on the Constitution.¹²⁰ Originalism and textualism are severable. One could take the view, as several of the Victorian-era treatise writers did, that contemporaneous exposition is a method for resolving ambiguity and not a rule of general application.¹²¹ One could also take the view, contrary to that of the modern American textualists, that constitutional texts are fundamentally different from ordinary legislation and should therefore be interpreted using a different set of rules.

Textualism is not the only interpretive doctrine that has been embraced by right-leaning members of the legal community in America. Guido Calabresi, a scholar and former Federal Judge with ties to the Federalist Society, has advocated for a dynamic approach that permits judges to

116 Scalia (n 55) 26.

117 See Chapter 1, 40. Also see Antonin Scalia, ‘God’s Justice and Ours’ (2006) 156 *Christian Law Review* 3, 3–4.

118 See for example the discussion of “void” at chapter 5, 118–20.

119 See for example, *Lawrence v Texas* 539 U.S. 558 (2003), in which case Justice Scalia said, at 587, “I do not myself believe in rigid adherence to *stare decisis* in constitutional cases”

120 See for example Robert H Bork, ‘The Constitution, Original Intent, and Economic Rights’ (1986) 23 *San Diego L Rev* 823; George Kannar, ‘The Constitutional Catechism of Antonin Scalia’ (1990) 99 *Yale LJ* 1297, 1303–08.

121 This issue was examined in Chapter 2 at 76–77.

revise and update the meaning of statutory provisions.¹²² There have been Republican-appointed judges at the Supreme Court such as Justice O'Connor, who do not identify as textualist and who display a more pragmatic, less rule-bound approach to legislation.¹²³ Justice Posner, the archetypal anti-textualist who argues that canons of interpretation do not constrain, and that statutory interpretation inherently involves the application of political and social values in creative process of judicial law-making, was a Republican appointee.¹²⁴ Textualism is one of several approaches that compete for the support of those on the right of the political spectrum in America.

6.12 Textualism and Political Ideology

When considering the relationship between textualism and political ideology, it must be kept in mind that rather shallow connections must be made which border on stereotypes in order to classify large groups of people along the monolithic traditional political spectrum.¹²⁵ There are clear analogies that can be drawn between the political right and left in England and America, based, for example, on groups advocating for laws which benefit workers and groups advocating for laws which benefit employers. It is easy to see how freedom of contract in the US served the same ideological ends as the tort of intimidation in England when dealing with the activities of unions. Whilst drawing such comparisons, it should be kept in mind that there are a variety of divergent and conflicting beliefs among the supporters of any political party.¹²⁶ Furthermore, there are differences between what counts as a left- or right-wing belief in England and America. For example, in the present time there are no evangelicals in the UK, and there are no monarchists in the US.¹²⁷ With these caveats in mind, there are some comments that can be made about the relationship between textualism and ideology.

The strong right-wing affiliation that textualism exhibits in the US is not determined by the theoretical underpinnings of the doctrine. Textualism had no particular party affiliations in England.

122 See, for example, Calabresi (n 97). The Federalist Society is “a group of conservatives and libertarians interested in the current state of the legal order.” <<http://www.fed-soc.org/aboutus/>> Accessed 5 October 2016. Scalia was also a member. Michael Avery and Danielle McLaughlin, *The Federalist Society: How Conservatives Took the Law Back from Liberals* (Vanderbilt UP 2013).

123 Carl R Jr Schenker, ‘Reading Justice Sandra Day O’Connor Symposium: State and Local Government Issues Before the Supreme Court’ (1981) 31 *Cath UL Rev* 487; M David Gelfand and Keith Werhan, ‘Federalism and Separation of Powers on a Conservative Court: Currents and Cross-Currents from Justices O’Connor and Scalia’ (1989) 64 *Tul L Rev* 1443.

124 Richard A Posner, ‘Statutory Interpretation—in the Classroom and in the Courtroom’ (1983) 50 *U Chic L Rev* 800.

125 For a larger treatment of this issue, see Terry Eagleton, *Ideology: An Introduction* (2nd edn, Verso 2007).

126 See for example Alan I Abramowitz and Kyle L Saunders, ‘Ideological Realignment in the U.S. Electorate’ (1998) 60 *J Pol* 634.

127 Also see Ann Shola Orloff and Theda Skocpol, ‘Why Not Equal Protection? Explaining the Politics of Public Social Spending in Britain, 1900-1911, and the United States, 1880s-1920’ (1984) 49 *Am Sociological Rev* 726.

Killebrew, among others, has argued that textualism does not necessarily produce outcomes that accord with right-wing beliefs,¹²⁸ and there are a number of UK cases which prove the point, the most prominent of which is *Ellerman Lines v Murray*.¹²⁹

In the US, a progressive textualist judge could rely on *stare decisis* when adjudicating in order to preserve the impact of progressive constitutional decisions such as *Roe v Wade*.¹³⁰ Furthermore, one could choose to disregard the Federalist Papers and other problematic sources which resemble legislative history. By refusing background information derived from legislative history, interpretation could arguably become freed up rather than being more bounded,¹³¹ particularly with the rights-conferring constitutional clauses that cause the strong divergence between the political left and right.

Because the evidence suggests that the values of textualist judges are reflected in their decisions,¹³² it seems reasonable to conclude that textualism will reflect the political balance of the judges who abide by it. Thus, if textualism is only practised by judges of a particular partisan disposition, the doctrine, on balance, will produce partisan outcomes. If textualism is embraced by judges across party lines, then the doctrine will produce outcomes that are politically ambiguous, on balance. The doctrine is capable of being politically neutral if it is practised by politically balanced panels of judges. This could be regarded as an uninteresting claim given that the same would probably hold true for a non-textualist doctrine of interpretation. However, unlike textualism, competing doctrines are not as well defined and labelled, nor are they propounded as doctrines that facilitate political neutrality. Thus the claim that textualism can be politically neutral is significant. However, if claims about the doctrine's political neutrality must be plausible for the doctrine to become the orthodoxy, the doctrine is unlikely to achieve that status in America.

6.13 Conclusions

To say that textualism became an identifiable doctrine of statutory interpretation about thirty years ago in the US is to simply point out that the doctrine acquired the label “textualism” at that

128 Paul Killebrew, ‘Where Are All the Left-Wing Textualists?’ (2007) 82 NYUL Rev 1895.

129 [1931] AC 126.

130 *Roe v Wade* 410 US 113 (1973). This was an important component of the reasoning in *Planned Parenthood v Casey* 505 US 833 (1992) which affirmed *Roe v Wade*.

131 Research by Schacter, Eskridge, Brudney and Ditslear suggests that the refusal to consider legislative history may provide less constraints on interpretation. Jane S Schacter, ‘The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond’ (1998) 51 Stan L Rev 1, 38–39; William Eskridge Jr, ‘The New Textualism and Normative Canons’ (2013) 113 Col L Rev 531, 557; James J Brudney and Corey Ditslear, ‘Canons of Construction and the Elusive Quest for Neutral Reasoning’ (2005) 58 Vand L Rev 1.

132 See Chapter 1, Section 1.7.4.

time. While it has had a significant impact on American legal communities, this is only a small part of the story of textualism. The doctrine is neither new nor exclusively American. It has existed as a common law doctrine of interpretation for perhaps 150 years or more, and it has had significant impact throughout the entire English-speaking common law realm.

As a theory of statutory interpretation, textualism exhibits very peculiar doctrinal features that make it more attractive to practising judges than to legal theorists. It is a theory that seeks to explain and justify a collection of judicially established rules of interpretation based on a normative, political theory rooted in democratic fidelity. Whether or not one finds the doctrine compelling depends, among other things, on two central issues:

1. The extent to which one believes that the authority of judges to massage the law should be confined to obvious ambiguities within statutory provisions; and,
2. The extent to which one believes that the varied collection of textualist-compliant tools of interpretation are genuinely capable of constraining judicial interpretation.

As a result of the first issue, textualism stands in opposition to dynamic theories of interpretation because of the proclaimed faithful agent theory of the judge's role. By their very nature, dynamic theories are predicated on a theory of judges acting as cooperative partners in the law-making process.

As a result of the second issue, textualism stands in opposition to realist theories about interpretation or, to be more precise, realist critiques of rule-based theories of interpretation. The realist position is essentially that of the rule-sceptic—that the doctrinal rules fail to explain judicial interpretation and fail to constrain judges.

It is ironic that one side-effect of Justice Scalia's legacy as a judge was to provide support to the realist critique. By all appearances, he was sincere in his beliefs. He was forthright about the fact that it is difficult to interpret statutes in a politically neutral manner, and he admitted that he had failed to live up to his ideals on occasion.¹³³ In the same way that scepticism as an epistemological theory can be used to doubt any account of human knowledge, the realist critique can be levelled at any rule-based theory of interpretation. However, it is difficult to accept that judges are entirely biased in the way that some who raise the realist critique allege.

In reality, there are statutory provisions that are clear and raise no genuine questions about meaning in many circumstances. All sentences are not equally fraught with uncertainty. There are degrees of uncertainty and vagueness. As Solan points out, the selection bias of litigation will cause

¹³³ Chapter 1, 3.

cases, and particularly appellate court cases, to focus on problematic texts.¹³⁴ Such a focus can cause one to overlook the many legislative provisions that are subject to widespread agreement about meaning and which do not come before the courts. It is entirely reasonable to assert, as textualists do, that judges should abide by the clear meaning of statutory provisions when there is such clarity. With this in mind, there is room for textualism to achieve its objective and to function as proponents claim, at least some of the time, if it is practised in good faith.

There is also room for some realist critique, particularly for the proverbial hard cases involving texts with significant defects in meaning; and also with politically charged cases such as *Bush v Gore*.¹³⁵ Both kinds of cases are outliers in the larger context of the totality of the law. By focusing on the cases at the top court in any particular jurisdiction, textualism will often appear to undermine the claim that it compels judicial restraint. If one requires perfection—no exceptional cases—then no system of rules will adequately bind a judiciary. Judges are human beings, after all. If a certain amount of “noise” in the form of contrary cases is regarded as inevitable, then textualism can be regarded as one reasonable rule-bounded approach for a judiciary to adopt.

Textualism has proved itself to be viable. It can work reasonably well. It will face criticism, but this too is a perennial issue. Any approach to interpretation that a court may adopt, whether formalistic or pragmatic, will be subject to criticism by some members of the legal community. Arguably, it is more important that drafters, legislators and judges find a way to cooperate with each other so that each performs their respective roles in a manner that is mindful of the roles of the others. If everyone is working with the same basic set of assumptions about the way that legislation will be interpreted, the harmony between the legislature and the courts will be optimised, insofar as this is possible amidst the legal, social, political and linguistic complexities involved.¹³⁶ Although textualism is not the only way of achieving this harmony, it is a way that has proved itself over a long period of time in many different jurisdictions. One can argue about whether or not the doctrine is theoretically robust. However, one cannot deny the doctrine’s success.

134 Lawrence M Solan, *The Language of Statutes* (U Chic Press 2010), chapters 1–2.

135 See Chapter 1, 39.

136 See Eskridge Jr (n 131).

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