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Legal Process and Judges in the Real World

Peter L. Strauss
Columbia Law School, strauss@law.columbia.edu

COMMENT: LEGAL PROCESS AND JUDGES IN THE REAL WORLD

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It is gratifying, reading through a paper and noting here and there points that you might like to make, to find that by the end the author has anticipated them and made them well. This paper sneaks up on you. If at the outset it seems to be accepting that Justice Scalia has a jurisprudence of statutory interpretation that coheres and restrains, by the end it has shown the self-contradictions and decidedly political and institutional stakes in the textualist position the Justice appears to have been carving out for himself.[1]

I am not going to address Professor Zeppos's account of Justice Scalia's approach to statutory construction and its problems as such. The Justice's general preference for textualism is a striking characteristic of his opinion-writing, and I find Professor Zeppos's analysis of the faults of textualism convincing. At the end, when he moves out from the Justice's relationship to statutes to the larger field of President, Congress, and agency, he points approvingly to a number of suggestions I've made; they are elaborated in two works now in draft that do not need to be repeated here.[2]

Three cautionary propositions about the nature of an enterprise like Professor Zeppos's *do* seem worth stating:

> Judges act in and against the real world, not the world of academic theory.
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> Public choice theory and other academic theories are grounded in premises about human behavior that do not depend on the job held by the individual they describe; that is, a public choice theorist would have ways of talking about judging and being an executive as well as legislating.
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> If we are constructing a theory about government and

* Betts Professor of Law, Columbia University. These remarks were made in response to the version of Professor Zeppos's paper delivered to the conference, and—under the pressure of other undertakings and with his encouragement—have not been much altered to reflect the changes he made to his paper following those proceedings.

[1] See also, to the same effect, Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

[2] Strauss, *Relational Readers of Intransitive Statutes: Agency Interpretation and the Problem of Legislative History* (forthcoming in CHI.[-]KENT L. REV.); Strauss, *Review Essay: Sunstein, Statutes and the Common Law—Reconciling Markets, the Communal Impulse and the Mammoth State*, 89 Mich. L. Rev. 801 (1991).

> judges' place in it, then that theory has to pay as much attention to the judges and what will support and/or constrain their work as it pays to the rest of the government of which they are a part.

I want to stress at the outset that this is largely a rhetorical critique. Professor Zeppos's earlier writings and this one all contain passages that seem to reflect acceptance of these propositions. Yet he has chosen to make the literature central rather than the facts—a choice some see as rather characteristic of much of today's legal scholarship,[3] and a choice that seems to me to risk wrestling with shadows. I do not think my three propositions change the bottom line, but they might alter the manner in which Professor Zeppos presents his analysis, and in doing so bring him closer to the judicial problem he means to address.

First, then: *Judges act in and against the real world, not the world of academic theory.* In my judgment, it is inappropriate to make Professors Hart and Sacks the stalking horse for analysis, even of a fallen academic like Justice Scalia.

> Justice Scalia is, after all, also a former executive official—he held three executive branch posts that gave him unusual opportunities for insight into the operation of executive and congressional government;[4]
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> He is a practitioner of high-level politics—for several years, he edited *Regulation Magazine*, the principal commentary on governmental matters of the American Enterprise Institute;
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> He has been very active in the bar on matters of administrative law practice and reform;[5]
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> And he heard and decided administrative and statutory cases as a member of the D.C. Circuit, the court of appeals most responsible for governmental law matters, for a number of years before his elevation to the Supreme Court.

Even if Justice Scalia was aware of the influence of The Legal Process

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[3] Carrington, Aftermath (draft 1990) (to be published by Oxford Univ. Press in a *Festschrift* for Patrick Atiyah).

[4] Justice Scalia was General Counsel in the White House Office of Telecommunications Policy, 1971-72, Administrator of the Administrative Conference of the United States, 1972-74, and Assistant Attorney General for the Office of Legal Counsel—the President's lawyer in the Department of Justice—1974-77.

[5] Chair, Section of Administrative Law, 1981-82; consultant, ABA Coordinating Group on Regulatory Reform, 1979-81.

in some circles, especially academic circles, these direct experiences of government are more likely to form the ground for his behavior and provide the targets for his own analyses than are someone else's theoretical constructs for reconciling law and politics in government.

Indeed, we can readily point to four important institutional changes that set the context for Justice Scalia's positions:

First is the growing congressional self-consciousness about the uses to which legislative history are put. When courts began to refer to legislative history, that use was unexpected, and the quality of intracongressional dialogue was relatively high; members of Congress regularly debated one another, dealt face to face, expected to resolve issues directly. From the resulting documentary traces, an impartial observer might expect to learn a good deal about the political impulses that had given rise to legislation. Now, judicial use is routine and expected, and can be consciously planned for; this expectation of the observer has obvious implications not only for Congress's behavior but also for the caution with which the observer must then proceed.[6]

Second, and related, is the tremendous growth of congressional bureaucracy, a growth that has sharply altered the internal dialogues of Congress. Members of Congress now deal through their staffs, spend relatively little time themselves on legislative issues, enact "intransitive" legislation whose tendency is to create problem solvers rather than to resolve problems. This could compound the legislative history problem, if congressional staff, acting with or without the help of the tremendous number of interested lobbyists now to be found in Washington, create legislative history precisely in the hope it will influence the courts, with little or no direct supervision by their principals and with little or no attention to its impact on the congressional debates. In my own judgment, that story is oversimple, but it is being told with some frequency these days.[7]

In one respect the story is oversimple because legislative behavior is response as well as potential stimulus. To say that "legislative history is an effort to make law . . . by an end run around article I"[8]

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[6] Thus, the Justice's often-quoted concurrences in Hirschey v. FERC, 777 F.2d 1, 6-8 (D.C.Cir. 1985) and Blanchard v. Bergeron, 489 U.S. 87, 97-100 (1989). *See, e.g.*, Wald, *The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277, 281 (1990); Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39 *passim*.

[7] *See supra* note 6.

[8] Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1617 n.124 (1991).

captures only the second part; it hides from view the extent to which the very fact of legislative history, as well as any specific content, captures current political disputes that set the context within which legislative action occurs and within which all the political actors, from members of Congress to the President, as well as private citizens subject to the measure understand what is going on. As Professor Zeppos remarked in an earlier work,[9] a judge who abjures that context years later is asserting strong law-making prerogatives for herself.

What also makes the story oversimple is a third change in our institutional context, one I have elsewhere suggested may point in the opposite direction but in any event needs to be taken into account.[10] This is the fact of congressional reliance on administrative agencies for so much of the work of giving meaning to law. Agencies have a different relationship to Congress, staff, and legislative history than do the nonpolitical, only occasionally engaged courts; they are constant players, concededly creatures of politics as well as law. The attention paid to their initiative in resolving issues of statutory meaning[11] suggests that one ought to—although Justice Scalia does not—think about the problem of using legislative history from their perspective.

Legitimating agency reference to legislative history would tend to tie agencies somewhat more closely to legislative politics, and that suggests the fourth institutional change—one Professor Zeppos recognizes, and one that both puts a political coloration on the Scalia position and suggests significant separation-of-power consequences for it. In recent decades we have fallen into the habit of electing Republican Presidents and Democrat Congresses. Judges appointed by Republican Presidents then may have some political reasons for hostility to Congress relative to the President; it is unsurprising, from this perspective, that the move to textualism is being orchestrated by recent Republican appointees.[12] Combining the enhancement of Presidential authority suggested by decisions like *Chevron*[13] with the alteration in congressional politics likely to result from a devaluation of legislative history works a significant shift in power to the President. The more troublesome element in this is that it also works a shift, in my judg-

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[9] *See supra* note 1.

[10] *See supra* note 2.

[11] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511.

[12] *Cf.* Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160; for a well-developed argument that Justice Scalia's position is better placed in personal history than political preference, see Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

[13] *Chevron*, 467 U.S. 837.

ment, away from law. If the agencies may devalue legislative history, they are that much freer to treat a statute just as they want to in the current day; the President is that much freer to tell them how to treat it; Congress is reduced to using contemporary oversight controls—real politics but not legislative politics; and the courts are that much farther from a capacity to enforce the standards of reasoned judgment that, in the administrative state, are a major element of the world of law.

These changes, then—growing congressional self-consciousness about the uses of legislative history; the bureaucraticization of Congress; reliance on intransitive statutes and, relatedly, agency judgment; and our recent habit of splitting power between a Republican White House and a Democrat Capitol—these seem to me to provide more the context for understanding Justice Scalia's statutory jurisprudence than any possible reaction to the work of Hart and Sacks.

A second and perhaps the more important problem with treating Justice Scalia's work in terms of textualism is that he is not a theorist but a judge. In prefatory remarks to a recent series of talks on constitutional interpretation of which Justice Scalia was a part, Dean Gerety of the University of Cincinnati's Law School remarked that "what strikes me most in these essays . . . is the sense of resistance they show to what I will call the simplifying force of theory."[14] And Justice Scalia's work, as I think Professor Zeppos would agree, is generally exacting and sophisticated in its attention to the small grain—whether or not we would agree with all its outcomes.[15] If Justice Scalia prefers constitutional originalism but abjures legislative history, as it appears he does, perhaps that is because *constitutional* history, on the whole, is ancient enough not to have been dominated by the drafters' awareness of its possible influence on later interpretive communities, as he believes to have occurred for contemporary statutes.[16] "Originalism," he writes, "does not aggravate the principal weakness of the system,

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[14] Gerety, *The Justice, The Senator and the Judge: Essays in Constitutional Interpretation*, 57 U. CIN. L. REV. 847, 847 (1989).

[15] See, for example, his lengthy concurrence to Crandon v. United States, 110 S. Ct. 997 (1990), the case Professor Zeppos discusses at length in his analysis, see Zeppos, *supra* note 8, at 1606-14, and Pittston Coal Group v. Sebben, 488 U.S. 105 (1988), in which the Justice wrote for a bare majority of the Court, the Chief Justice and Justices O'Connor, Stevens, and White dissenting. In the latter case, despite his usual preference for deferring to agency interpretation, Justice Scalia upheld potential government liability under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 239, 92 Stat. 95 (codified in scattered sections of 26, 29, and 30 U.S.C), that had been denied by a regulation he found statutorily unsupported.

[16] Of course, the drafters deliberately kept the journals of their meetings confidential, even as they provided that the new Congress would keep journals that were largely public, U.S. CONST. art. I, § 5, cl. 3—arguably a recognition of the problem, but therefore also some assurance that those journals were not manipulated for external effect.

for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[17] When he can see the use of legislative history in the same terms—not as an exercise in deriving particular meaning fraught with the hazards of lobbyist traps, but as setting a historical criterion of *general* purpose and understanding that is conceptually quite separate from the preferences of the judge himself—he seems open to its use.[18]

My second and third propositions are about the world of theory, and I shall have rather less to say about them.

The second proposition, then: *Public choice theory and other academic theories are grounded in premises about human behavior that do not depend on the job held by the individual they describe; that is, a public choice theorist would have ways of talking about judging and being an executive as well as legislating.* One easily falls into a kind of intellectual trap in theorizing about human behavior, which is to assume that the theorist, observer, or perhaps some other human actor than the one under scrutiny is not subject to the same premises. If I premise analysis on a general proposition about human behavior, for example that people are rational self-interest maximizers, then that is a proposition I must be willing to apply to the whole group—to academics as well as to judges as well as to executives as well as to legislators. If such premises suggest that the imperfections in electoral control over legislators combine with the practical incentives they have to secure reelection to produce legislation inevitably reflective of private deals rather than the pursuit of some public interest, then I want also to know what those premises suggest about the behavior of a panel of three judges appointed to life tenure in a political process, and who may reasonably believe that not one in two hundred of their decisions will be reviewed by higher authority, when that panel decides a contestable proposition of law.[19] It is quite impermissible to treat judges—or academics for that matter—as upstanding types who may act in the public interest (including when they opt for ostensibly self-denying approaches) unless we are willing so to treat legislators and the President. These last are people we can throw out when they act in a rascally way (at least in theory we can throw them out) and history teaches me that the risk of judges acting to block the public's

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17 Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

18 *See, e.g.*, Green v. Boch Laundry Mach. Co., 109 S. Ct. 1981, 1994 (1989) (concurrence grounded in Congress's probable general understanding at the time the Rule of Evidence at issue was adopted).

19 Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Administrative Action*, 87 COLUM. L. REV. 1093 (1987).

wishes is endemic—sometimes desirable, as in the case of civil liberties, but always endemic.

For me, I should add, the premises about human conduct associated with the Chicago school—and their current influence leads me to hope I do not understand them—deny human altruism (along with our emotionality); that altruism is a good part of the experienced reality of human behavior, and denying it encourages its atrophying. Collective action becomes all the more difficult if one has been persuaded in a theoretical way that unselfish action will never occur, that all must be reasoned from the base of individual self-interest. But if we are to act in the public sphere on the basis of what these premises teach us, we cannot afford to be partial about it. We must look unblinkingly at what they say about judges and about the academics who produce analyses like this one, as well as at their implications for legislating and executing the law. Again, the implications for judging appear to me to be no prettier than the implications for legislating. The impoverishment of Justice Scalia's view of proper judicial role, to which I shall return to in a moment, suggests that he might accept this point; but then what we see is that these premises lead to a public realm that on the whole, not just in legislative respects, lacks principled restraint.

Finally, my third proposition: *If we are constructing a theory about government and judges' place in it, then that theory has to pay as much attention to the judges and what will support and/or constrain their work as it pays to the rest of the government of which they are a part.* Here, in my view, is where the rehabilitation, or at least the recasting, of Hart and Sacks might begin. Once one understands, as Professor Zeppos agrees,[20] that Professors Hart and Sacks, too, were reacting to phenomena in the real world—an actual Congress as well as actual courts and other actors—it becomes quite impossible to ascribe any *descriptive* purpose to their oft-quoted remark that legislators are to be taken as reasonable persons acting reasonably in the pursuit of rational purposes.[21] Congress's process has changed, but it hasn't changed *that* much; it was in the late nineteenth century that Bismarck is said to have remarked that persons favoring legislation and sausage should never watch either being made.[22]

Hart and Sacks were not naive enough to think they were

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20 Zeppos, *supra* note 8, at 1598.

21 This seems to me an error made in the commentaries Professor Zeppos refers to in his extended discussion of the "purposivism" of Hart and Sachs. Zeppos, *supra* note 8, at 1600 nn.18-22.

22 *See* Community Nutrition Institute v. Block, 749 F.2d 50 (D.C. Cir. 1984) (Scalia, J.).

describing an actual legislature; they were *prescribing* an attitude toward legislation that would be appropriate for a judge, despite the contrary reality such sophisticated observers knew even a half-hearted observer would quickly discover. The normative basis for that prescription lay in ideas about the appropriate role of judges and of law in relation to political government and, particularly, the Congress. One might say that in telling judges what attitudes they ought to take to legislative work product—that that product must, *normatively* must, be regarded as the result of reasonable persons reasonably seeking rational purposes—those instructions comprised their theory of separation of powers; it told judges what was their place in the universe of government, where statutory law stood in relation to common law, where legislative initiative stood in relation to judicial initiative, in framing the legal order within which we live.

The consequences for Professor Zeppos: Professor Zeppos is surely right in asserting that Professors Hart and Sacks, on the one hand, and Justice Scalia, on the other, have a good deal in common, although I might put the proposition a bit differently than he does. For both, the realm of law is idealized as a coherent, integrated unity; for both, the judge is the ultimate voicer of that unity; for both, the judicial voice must be the voice of reason, of judgment and not will in Hamilton's terms.[23] The result, for both, is to produce a powerful tension, one that can perhaps be mediated but that can never be resolved. On the one hand is a robust view of judging—with, as Chief Justice Stone once put it, judges creating "a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication."[24] And on the other is the proposition that judges are not entitled to seek the fulfillment of personal political goals, that they must restrain themselves to the artificial reason of the law, within the premises that the larger political system creates.

Hart and Sacks, as I understand them, respond to the resulting tension by insisting that judges treat statutes as the product of reason—not because they *are* the products of reason, but because doing so will serve the twin ends of reminding judges of their inferior place in the world of policy formation and permitting judges to act on them in the characteristic judicial way, restrained by the requirement of reasoning toward coherence. If judges cannot treat statutes as the product of reason, they cannot coherently reason with them; to admit

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[23] THE FEDERALIST NO. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961), *quoted in*, Public Citizen v. United States Dept. of Justice, 109 S. Ct. 2558, 2575 (1989) (Kennedy, J., concurring).

[24] Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12 (1936).

the irrationality of statutes both threatens to reawaken judicial claims of superiority to legislatures—such disdain for legislative effort by smugly rational courts was the basis of the ancient canon that statutes in derogation of the common law were to be narrowly construed—and makes the court's treatment of the statute an act of will rather than judgment, whatever the court chooses.

From this perspective, the examination of legislative history is supplementary in just the sense that Justice Scalia admits when it comes to the context of constitutional provisions: it reaffirms the judge's political subordination by requiring her to read the statute in the context of the political history experienced by others than herself in producing it. It doesn't pretend precise meanings will be found; yet it asserts judicial judgment will be informed by information the political actors had. It treats the judge, as it treats the legislator, as a person capable of acting in a public interest way although having to be watched, in some sense, in doing so.

Justice Scalia also seeks coherence in his way, as Professor Zeppos illustrates by showing us his attention to the United States Code as a whole,[25] and he also means to keep the courts out of politics. Yet his route is to an impoverished, and yet threatening, view of the judiciary. In important ways, Justice Scalia's judge appears to be the judge, not of the common law, but of the civilians—a judge freed of responsibility for developing coherence although she is to assume it, a judge notably subordinate as well as formalistic in her address to legal issues.[26] To take an example Professor Zeppos does not develop but that certainly supports this picture, consider the problem of implying private remedies from public statutes. Justice Scalia has been emphatic that federal judges ought not find such remedies there unless explicit direction to create them can be found, and he grounds that position in virtual denial of the common-law, integrationist, coherence-building function of the federal judge.[27]

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[25] *See* Zeppos, *supra* note 8, at 1620-23 (n.147).

[26] Justice Scalia states his difficulties with the common-law tradition in Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); *cf.* Kannar, *supra* note 12. In fairness to the Justice, it is appropriate to note that he ties his difficulties quite explicitly to the current nature of Supreme Court jurisdiction, in which (a) the Court has virtually complete control over its docket; and (b) lower courts hardly ever encounter discipline of Supreme Court review. *Cf.* Strauss, *supra* note 19. It is useful to recall that our comfort with the virtues of case-by-case, factually oriented, and rule-limited adjudication developed in the context of appellate jurisdiction that was mandatory, and judicial encounters with issues that were frequent.

[27] *See* Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring). *Compare* United States v. Stanley, 483 U.S. 669 (1987) (Justice Scalia declined to employ common-law reasoning to find tort liability, in the face of commanding facts suggesting that the armed services had deliberately made a serviceman the unwitting subject of an experiment with LSD) *with* Boyle v. United Technologies Corp., 487 U.S. 500 (1987) (Justice Scalia found a federal

Writing in 1908, Roscoe Pound conceived four ways in which "courts in such a legal system as ours might deal with a legislative innovation";[28] putting them in the order that would suggest the line of progress for which he hoped, they were:

> First, to treat it as limited to the circumstances to which it expressly applied, refusing to reason from it by analogy;
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> Second, to interpret it sympathetically to apparent purpose, but not as a source for analogical reasoning;
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> Third, to accept it as embodying a policy from which judges might reason as at common law, but having no greater dignity than the policies reflected in the judge-made rules of the common law;
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> Fourth, to accept the statute as embodying a policy from which judges are to reason analogically as at common law, and which "as a later and more direct expression of the general will [is] of superior authority to judge-made rules on the same general subject."[29]

Hart and Sachs point at this last approach, the highest development in Pound's pantheon. Distrusting Congress and fearing judges, Justice Scalia not only opts for the first and narrowest of these formulations vis à vis statutes, but also denies the strong common law that was its alternative "in such a legal system as ours."[30] The result, as Professor Zeppos shows us, emphasizes the authority of the President and undercuts the claims of law. And therein lies the threat.[31]

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common-law immunity for military contractors against state tort actions). Both cases are discussed in Zeppos, *supra* note 1, at 1351-54, 1367-68. *See also supra* note 26.

28 Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908).

29 *Id.*

30 *Id.*

31 For a strong signal of judicial retreat, closing off the judiciary even as a point of access and stressing the limitations of the judicial role, see Justice Scalia's opinion for the Court, five to four, in Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3190 (1990); to similar effect, in the politically less important context of "pendant party jurisdiction," see Finley v. United States, 490 U.S. 545 (1989).