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Theories of Legislation and Statutory Interpretation:
Natural Law and the Intention of the Legislature
Patrick J. Kelley*

INTRODUCTION

Lately, legal scholars have explored an area of research that some of them now call “legisprudence,” which includes the study of the relationship between theories of the legislative process, and theories and techniques of statutory interpretation.¹ This relationship is of practical concern to students, lawyers, and judges called on to interpret and apply the law. A significant precondition to thoughtful legisprudence is critical analysis of different theories explaining the legislative process. The agenda in the legal academy for discussing theories of legislation has been set by the brilliant teaching materials put together by William Eskridge and Philip Frickey.² In the first section of this article, I survey a number of modern theories of legislation and test them by considering their adequacy as an explanation of a federal statute, the Family and Medical Leave Act of 1993 (“FMLA”),³ which provides an instructive example of a modern social welfare statute. In explaining and critiquing some of the modern theories, I do not try

* Research Professor, Southern Illinois University School of Law. I appreciate helpful comments on an earlier draft by Brannon Denning, Maria Frankowska and participants at a faculty seminar at the San Diego University School of Law.

¹ See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 587 (4th ed. 2007). Eskridge, Frickey, and Garrett say that “[t]his term describes the systematic analysis of statutes within the framework of jurisprudential philosophies about the role and nature of law.” *Id.* (citing Julius Cohen, *Towards Realism in Legisprudence*, 59 *YALE L. J.* 886 (1950)).

² WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 38-64 (1st ed. 1988); *id.* (2d. ed. 1995) at 43-66; *id.* (4th ed. 2007) at 47-82.

³ 29 U.S.C. § 2601 (1993).

to reinvent the wheel, but follow the explanations and critiques in the teaching materials of Eskridge and Frickey,⁴ and the excellent book by Daniel Farber and Philip Frickey, *Law and Public Choice: A Critical Introduction*.⁵ The contribution here is in adding Marxist theory and modern natural law theory to the mix, and exploring how each of the modern theories would explain the passage of the FMLA. In the second section, I take the most promising of these theories as an explanation of the FMLA—a natural law theory of legislation applying the insights of John Finnis—and examine whether Finnis’s methodology can be used to answer a riddle one faces in elaborating a theory of statutory interpretation: What sense can one give to the recurring explanation by judges that their role in statutory interpretation cases is to discover and implement the legislature’s intent?

I. LEGISLATIVE THEORY AND THE FMLA

A. What are Theories and Why Should We Be Concerned About Them?

A theory of a human institution or practice is an attempt to explain the basic, fundamental facts about that institution or practice.⁶ Theories have been classified as either descriptive or normative.⁷ A descriptive theory attempts to explain how an institution really works. A normative theory attempts to explain how an institution should work. Since human institutions ordinarily are formed to achieve certain purposes, a descriptive theory that includes an analysis of the purpose or purposes of an institution must also be normative to a certain extent. Once one identifies the purpose or purposes of an institution one must, in order to have a complete description, determine whether and to what extent that institution achieves its purposes.⁸ That is, once the theorist identifies the purposes of a human institution he seems obliged to determine how well that institution achieves those purposes.

Descriptive theory about an institution may be important in at

⁴ See ESKRIDGE & FRICKEY, *supra* note 2.

⁵ DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

⁶ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3-4 (1980).

⁷ See, e.g., ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 47.

⁸ See FINNIS, *supra* note 6, at 3-19; see also Lon Fuller, *Human Purpose and Natural Law*, 3 NAT. L. FORUM 68 (1958).

least three ways. First, the theory accepted by those within the institution will affect the way they act as they attempt to fulfill the purposes of the institution as they understand them, in the ways they understand the institution provides for fulfilling those purposes. For instance, a legislator who believes the purpose of the legislature is to achieve a compromise reflecting the relative political influence of competing special interest groups may act one way. A legislator who believes the purpose of the legislature is to promote the general welfare by creating or maintaining the conditions that will allow each individual in the community to flourish may act another way.

Second, the theory of an institution generally accepted by those outside the institution may influence their attitudes toward that institution, which may then, in turn, influence the actions they take that affect the institution. Those who believe that legislators, by and large, simply promote the agendas of special interest groups to whom they are beholden may have a cynical attitude toward the legislature. Those who believe that legislators, by and large, attempt to promote the common good as they see it may have a more positive attitude.

Third, the necessarily normative component of descriptive theory may provide the basis for reforming an institution to better achieve its purposes.

B. The Family and Medical Leave Act of 1993 as a Test Case for Theories of Legislation

In analyzing the different theories of legislation, it is helpful to have a specific piece of legislation in mind, to see how the different theories would explain the legislative process and the final result of that process. I will use the federal Family and Medical Leave Act of 1993 (“FMLA”).⁹ In explaining the extensive legislative history of the FMLA, I will rely throughout on the careful history in Robert E. Dewhirst’s outstanding book, *Rites of Passage: Congress Makes Laws*.¹⁰

The FMLA was enacted as the first statute passed by the 103rd Congress and signed into law by President Bill Clinton.¹¹ The statute required that employers who have fifty employees or

⁹ 29 U.S.C. § 2601 (1993).

¹⁰ ROBERT E. DEWHIRST, *RITES OF PASSAGE: CONGRESS MAKES LAWS* (1997).

¹¹ *See id.* at 12, 41-44.

more must provide twelve weeks of unpaid leave for each employee (except for the highest-paid 10 percent of the employer's workers)¹² in each twelve-month period in order to care for a newborn or newly adopted son or daughter or newly-placed foster child, to care for a spouse, parent, son, or daughter who has a serious health condition, or for themselves to recover from a serious health condition that makes the employee unable to perform the functions of the employee's position.¹³ The rationale for the bill was simple: employees should not be forced to choose between their job and their most fundamental family obligations, nor should they be forced to choose between their job and full recovery from a serious illness or injury.¹⁴

The forerunner of this statute was a bill introduced eight years earlier in 1985 in the 99th Congress. That bill would have required employers of five or more employees to provide a minimum of eighteen weeks of unpaid leave in any two-year period to care for a newborn, newly adopted, or seriously ill child. In addition, the bill would have required those employers to provide a minimum of twenty-six weeks of unpaid leave each year for an employee to recover from serious illness.¹⁵ The opponents of the bill at first used two basic arguments. First, the federal government should not get into the business of mandating specific employee benefits, but should leave that to agreement between employers and employees.¹⁶ Second, the bill would have a boomerang effect: in hiring, employers would discriminate against women because women would make up the vast majority of those making use of these benefits.¹⁷ Later, a third argument surfaced. The guaranteed return provision would be terribly costly to businesses, which would have to cover the job in the meantime with other workers or temporary help.¹⁸ This would be particularly costly to small businesses, which do not have excess staff to cover revolving vacancies.

This first bill did not get far.¹⁹ In the Democrat-controlled House, the sponsor proposed a substitute bill in order to get the

¹² 29 U.S.C. § 2614(b) (1993).

¹³ 29 U.S.C. § 2612(a)(1) (1993).

¹⁴ See DEWHIRST, *supra* note 10, at 13, 18.

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 17-19.

¹⁷ *Id.*

¹⁸ *Id.* at 24, 26.

¹⁹ For the history in this paragraph, see *id.* at 14-20.

bill out of committee. The substitute bill increased the jurisdictional minimum number of employees to fifteen. The substitute bill was reported out of the House committee, but was not voted on before adjournment. The concomitant bill in the Republican-controlled Senate never made it out of committee.

The bill was reintroduced in 1987 in the 100th Congress.²⁰ Based on whip counts of member votes, which predicted defeat of the bill on the floor, the House sponsors introduced a substitute bill with weaker provisions. The new House proposal had a fifty-employee eligibility minimum, which would decline to thirty-five employees after three years. There would be a maximum of ten weeks of family medical leave in a year. Employers could deny employment reinstatement to the highest-paid 10 percent of their employees, and only employees who had worked at least twenty hours per week for the employer for at least a year were covered. This bill passed in the House. Working from an initially more generous bill, the sponsor in the Republican-controlled Senate subsequently introduced a substitute bill that was substantially the same as the House bill, in order to attract enough votes to overturn the threatened veto by President Reagan. Republican senators filibustered the bill, however, and the Senate did not vote before adjournment. At this point, public opinion polls showed consistent high public support of over 70 percent for a parental leave bill.²¹

Similar bills, with different eligibility minimums, were introduced in the Democrat-controlled House and Senate in 1989 in the 101st Congress.²² President Bush threatened to veto the bill, so the sponsors weakened the bill to attract a supermajority to overturn the threatened veto. The sponsor in the Senate adopted the weaker House bill, which allowed up to twelve weeks a year of unpaid medical or parental leave, for one parent at a time, and applied to employers with fifty or more employees. Both the House and the Senate passed this bill, but President Bush vetoed it. By a vote of 232-195, the House failed to override the veto, and the veto override thus was not voted on in the Senate.

Different versions of the bill were reintroduced in the 102d Congress in 1991.²³ President Bush again threatened to veto the

²⁰ For the history in this paragraph, see *id.* at 21-28.

²¹ See DEWHIRST, *supra* note 10, at 28.

²² For the history in this paragraph, see *id.* at 28-32.

²³ For the history in this paragraph, see *id.* at 33-40.

bill; different bills were passed by the House and the Senate, both controlled by the Democrats; and the conference committee reported the final compromise bill out of committee during the Republican National Convention that renominated George Bush for President. That bill was identical to the statute finally enacted in 1993. Both the House and the Senate passed the bill, and President Bush vetoed it in the middle of his campaign for reelection. The Senate voted to override the veto 68-31, but the House failed to override the veto, with 258 votes to override versus 169 to sustain.

Bill Clinton, who made his support of the FMLA a campaign issue, was elected in 1992. For symbolic political reasons, the same bill that died in the 102d Congress was reintroduced in both the House and the Senate in 1993,²⁴ even though a much stronger bill might have passed, since there was no longer the threat of a veto and the need for a weakened bill to attempt to obtain a supermajority. The speedy passage enabled the FMLA to become the first statute to be enacted in the Clinton administration.²⁵

Throughout this lengthy process, it was clear to all concerned that a high percentage of voters supported a bill of this kind.²⁶ It

²⁴ *See id.* at 40-42.

²⁵ *See id.* at 12, 44. President-elect Obama's transition team, following the campaign position of candidate Obama, proposed to expand the Family and Medical Leave Act as follows:

Expand the Family and Medical Leave Act (FMLA): The FMLA covers only certain employees of employers with 50 or more employees. Obama and Biden will expand it to cover businesses with 25 or more employees. They will expand the FMLA to cover more purposes as well, including allowing workers to take leave for elder care needs; allowing parents up to 24 hours of leave each year to participate in their children's academic activities; and expanding FMLA to cover leave for employees to address domestic violence.

Change.gov, The Office of the President-Elect, http://change.gov/agenda/economy_agenda/ (last visited Oct. 29, 2009). The minimum employee requirement could probably have been lowered in 1993 if the proponents of the bill had taken the time to introduce a new, stronger bill.

²⁶ *See* DEWHIRST, *supra* note 10, at 19, 28, 32, 39-41.

took eight years and five Congresses, however, to get it enacted.

The history of the FMLA shows how difficult it is to enact federal legislation, even legislation that has overwhelming public support. Bills may be bottled up in committee. Even if a bill is reported favorably by a committee, it may never reach a floor vote. We have a bicameral legislature, so even if a bill reaches the floor of one house, it may not reach the floor of the other. If the two legislative bodies enact different bills, those differences must be resolved if any bill is to be enacted. If the same bill is not passed by both legislative bodies within the two-year period of each Congress, the process starts all over again. Even if the same bill is passed by both houses, the President may veto it, and the veto will stand unless both houses override his veto by a supermajority. To be enacted, a bill must pass through many gates with many different gatekeepers. Because of the need to overcome the objections of the different gatekeepers, the ultimate legislation, like the FMLA, often turns out to be a compromise, vastly different from what either the proponents or the opponents originally wanted. The whole process seems designed to make enactment of legislation extremely difficult.

Before we use the legislative history of the FMLA to test modern theories of legislation, we must first seek to understand why federal legislation generally seems to be so difficult to enact—why the legislative process at the federal level seems so susceptible to gridlock. The answer may lie in the constitutional structure underlying the federal legislative process, and the theories and attitudes associated with that structure.

C. Constitutional Theory Supporting Gridlock

Enacted legislation almost always changes a prior law. One reason for making it difficult to enact legislation, then, might be a dislike or distrust of change. It was said that in Locris, an ancient Greek city-state, anyone who proposed a new law had to argue for the change with a noose around his neck so that if his proposal were not adopted he could be promptly hanged.²⁷ Those who revere custom, tradition, and the status quo (“conservatives” in

²⁷ See Joseph Ober, *Law and Political Theory*, in *THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW* 408-410 (Michael Gagarin & David Cohen, eds., 2005) (discussing DEMOSTHENES, *Against Timocrates*, in *DEMOSTHENES, AGAINST ANDROTION AND AGAINST TIMOCRATES*, §63 et. seq., (W. Wayte ed., 2d ed. 1893)).

the narrowest sense), might support legislative gridlock because they distrust change, but it is clear that the framers of the United States Constitution were not conservatives in this narrow sense. After all, they drafted and secured adoption of a totally new form of federal government that would allow the federal Congress formed pursuant to the new constitution to enact a broad range of new national laws.

Another theory that might justify legislative gridlock is one of the many theories of limited government, which differ over the reason for limits on the exercise of governmental power, and the nature of those limits.²⁸

The framers of our Constitution were, no doubt, familiar with the principal limited government theorists of their day, Locke²⁹

²⁸ Modern theories of limited government can be traced back to a single one or to a combination of three historically distinct theories. The first theory is that of St. Augustine, elaborated in his great work *The City of God*. Augustine argued that the most important realm of human life was spiritual or religious, which is not the business of earthly government at all. Government in the earthly realm was the business of the city of man, not the city of God. The functions of the city of man, then, were limited to the earthly condition necessary (but not sufficient) for the good life—keeping the peace, protecting against internal predators and external enemies, maintaining the economic welfare of the community. The goal of government was not, as Plato and Aristotle had suggested, to make or perfect human character, but to maintain the material conditions for the good life.

The second significant limited government theory is that of John Stuart Mill in his work *On Liberty* (1859), in 18 COLLECTED WORKS OF JOHN STUART MILL 223 (1977). This theory recognized personal autonomy as the primary good. Since government acts by coercion—forcing people to do things they wouldn't otherwise do—it is a threat to the overriding value of personal autonomy and should be kept to a bare minimum necessary to protect others from harm.

The third significant modern theory of limited government may be traced to the pragmatic, anti-socialist economists of the 1920s and 1930s, epitomized by Friederich Hayek in *The Road to Serfdom*. FRIEDERICH A. HAYEK, THE ROAD TO SERFDOM (1944). These economists observed that when the government in communist or socialist countries interfered with the market economy in ways intended to achieve greater economic equality among citizens, two unfortunate consequences followed. The overall level of economic activity dropped precipitously and the economic well-being of the average person dropped as well. The self-defeating consequences of such government interference with the market economy led these pragmatic economists to conclude that the allocation of resources to non-public goods is better done by a multitude of individual choices by a multitude of individuals, through the market, than by the government.

²⁹ Locke's notion of natural rights seems to underlie the Declaration of

and Montesquieu.³⁰ They saw their specific problem in terms borrowed from limited government theory: How can we give the central government new powers to solve the recurrent problems facing the nation, unsolvable under our current confederation, while limiting that government's ability to abuse its power?³¹ The basic structure of the Federal Constitution reflected the framers' desire to give the federal government needed additional powers, while limiting the exercise of those additional powers and prohibiting the exercise of any other powers. The substantive powers of the legislature, therefore, were limited to those expressly delegated to it in Article I, Section 8. Moreover, the exercises of its delegated powers were limited by specific limiting provisions in Article I, Section 9 and the first eight amendments.

The procedural limitations on the exercise of validly delegated legislative powers also reflect the concern to prevent the abuse of governmental power. To understand more clearly why the procedural limitations took their present forms, it will be helpful to identify the abuse of power that the framers feared most.

The Revolutionary War was fought to free the colonies from "tyranny," understood as the use of governmental power for the benefit of those exercising the power instead of for the common good. The colonists feared that England after the Seven Years War had adopted a colonial system that administered the colonies for the sole benefit of England and its rulers, thus treating the colonists as slaves working solely for the benefit of others.³² In crafting a new federal constitution, then, the framers took great care to prevent tyranny as they understood it. They recognized that any person or group with governmental power could use that

Independence. *See generally* CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* Ch. II (1922).

³⁰ James Madison in *THE FEDERALIST* NOS 47 & 48, showed how Montesquieu's theory of separation of powers was the basis for the separation of powers and checks and balances in the proposed Constitution.

³¹ *See generally* *THE FEDERALIST*, *id.* at 30; *see also* DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984).

³² *See generally* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 94-159 (1967); *see also* John Dickinson, *Letters From a Farmer in Pennsylvania (1767-1768)*, in *COLONIES TO NATION 1763-1789: A DOCUMENTARY HISTORY OF THE AMERICAN RESOLUTION* 122-133 (Jack P. Greene ed., 1967); *The Association and Resolves of the New York Sons of Liberty, December 15, 1773*, in a *DOCUMENTARY HISTORY OF THE AMERICAN RESOLUTION*, *supra*, at 198-201.

power for their own personal benefit, so it was not enough just to free themselves from the tyrannical monarchy of George III. The problem of tyranny became for them the problem of control of governmental power by a faction—a group whose interests were at odds with the public good—that would use governmental power to promote the faction’s interest.³³ They recognized that even the majority of the citizens might constitute a faction so that there could be “a tyranny of the majority.”³⁴

The authors of the Federalist Papers emphasized two features of the proposed constitution that would protect against factional control over legislation. First, the form of government proposed is a representative democracy—a republic—and not a pure democracy. This tends to minimize the danger of factions. Because the representatives are elected, directly or indirectly, by all the people, the representatives do not just represent a narrow, definite class with interests necessarily different from those of the people as a whole. The people as a whole do not directly administer the government, so the danger of tyranny by a majority inflamed by a common passion or interest is lessened. As Madison argued, “[The legislators are] a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”³⁵ Moreover, the senators, elected only indirectly by the people and sitting for six-year terms, are insulated from the violent temporary passions of the people as a whole, and may serve as a cool, rational, deliberative “defense to the people against their own temporary errors and delusions.”³⁶ Second, the danger that a majority of the representatives of the people may represent a single faction is lessened by the size of the United States. As Madison said,

Extend the sphere [in terms of the extent of territory and the number of citizens], and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other

³³ THE FEDERALIST NO. 10 (James Madison).

³⁴ *Id.*

³⁵ *Id.*

³⁶ THE FEDERALIST NO. 63 (James Madison).

citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.³⁷

Finally, even if a faction controls one or both houses of Congress, the system of separation of powers and checks and balances make it more difficult to enact legislation based solely or primarily on factional interest.³⁸

In recognizing that even a majority of citizens might be a faction if their interests are “adverse to the rights of other citizens, or to the permanent and aggregate interests of the community,”³⁹ Madison accepted the position that the objects of government are to promote the common good, and to protect the individual rights of all. This theory of government, and hence of legislation, traces back to the Declaration of Independence, to John Locke, and to the natural law tradition. It depends on the belief that there is an objectively determinable common good that can be discovered by reason, and hence by rational deliberation.

D. Bases for Modern Theories of Legislation

Two influential developments in the nineteenth century, however, undermined the traditional belief in an objectively determinable common good discoverable by reason. The first development was the growing ascendancy of utilitarianism as the prevailing normative moral and political theory.⁴⁰ The second development was the rapid growth of scientism as the source for the methodology of descriptive institutional theory.⁴¹

The Principle of Utility, or The Greatest Happiness Principle, as explained by John Stuart Mill, taught that human actions are

³⁷ THE FEDERALIST NO. 10 (James Madison).

³⁸ THE FEDERALIST NOS 47-48 (James Madison).

³⁹ See *supra* note 33. Madison identified these examples of possible factional interests: “[a] rage for paper money for an abolition of debts, for an equal division of property, or for any other improper or wicked project” *Supra* note 35.

⁴⁰ See G.K. CHESTERTON, *THE VICTORIAN AGE IN LITERATURE*, (1913, reprinted 1947) at 36-40; DAVID WEINSTEIN, *UTILITARIANISM AND THE NEW LIBERALISM* (2007), HENRY PARRIS, *The Nineteenth-Century Revolution in Government: A Reappraisal Reappraised*, 3 THE HIST.J. 17, 28-37; STEVEN CONWAY, *Bentham and the Nineteenth-Century Revolution in Government, in VICTORIAN LIBERALISM* 73-79 (Richard Bellamy ed., 1990).

⁴¹ RICHARD OLSON, *SCIENCE AND SCIENTISM IN NINETEENTH-CENTURY EUROPE* (2008).

“right in proportion as they tend to promote human happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain and the privation of pleasure.”⁴² Originated by Jeremy Bentham in large part as a normative theory of legislation,⁴³ the Principle of Utility supported the conclusion that legislation should be aimed at increasing the sum total of human happiness, where happiness was defined as pleasure and the avoidance of pain.⁴⁴ Utilitarianism thus provided a simple, normative definition of the common good, focused on the consequences of the legislation, often summarized, as the “greatest happiness of the greatest number,” and assumed that there was a single best answer to any choice among legislative alternatives.

At first, this utilitarian understanding of the common good seemed a great improvement over older notions of the common good. It was simple, rather than complex. It focused solely on the consequences of legislation, which presumably could be measured objectively. The consequences it focused on were not themselves defined in normative terms requiring moral judgment, but solely in terms of aggregate human pleasures and pains. The utilitarian definition of the common good thus seemed to be not only intuitively correct but also blissfully easy to apply.

Those who tried to apply the Principle of Utility to decide whether to support specific pieces of legislation, however, soon found that the seeming objectivity of the principle was a mirage.⁴⁵ To apply the Principle of Utility, one had to predict the consequences of the proposed legislation and determine whether those consequences increased the sum total of human happiness more than the available alternatives. Both those judgments, however, are fraught with uncertainty. It is difficult to predict all

⁴² John Stuart Mill, *Utilitarianism* (1861), in 10 COLLECTED WORKS OF JOHN STUART MILL 210 (1969) (1865).

⁴³ See Mary Warnock, *Introduction to JOHN STUART MILL, UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM* 11-19 (Mary Warnock ed., Meridian ed. 1962); Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, in A FRAGMENT OF GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 34, 281-429 (Wilfrid Harrison ed., 1948).

⁴⁴ Warnock, *supra* note 43; see also Bentham, *supra* note 43, at 281-429.

⁴⁵ See, e.g., VICTORIAN LIBERALISM: NINETEENTH-CENTURY POLITICAL THOUGHT AND PRACTICE (Richard Bellamy ed., 1990); see also ROBERT E. GOODIN, UTILITARIANISM AS A PUBLIC PHILOSOPHY (1995); D. WEINSTEIN, UTILITARIANISM AND THE NEW LIBERALISM (2007).

the consequences of legislation. Besides the intended consequences, which often are not achieved fully, there may be unintended and wholly unforeseeable consequences. Even if one could foresee all the consequences, it is difficult to determine exactly how much human pleasure and how much human pain those consequences entail. Pleasures are qualitatively different: is the increased pleasure one person gets from drinking champagne rather than beer equal to the pleasure another person gets from attendance at an opera? Is pleasure from attending an opera equivalent to the pleasure from attending a rock concert? Just as troubling is the problem of applying the Principle of Utility to determine whether one set of consequences is better than another set, when one must subtract the human pain from the human pleasure. But how can we do that? Pleasure and pain are different, and do not seem to be on the same scale at all.

The theory's assumed single best choice among legislative alternatives seemed undeterminable. What seemed to be an easily applicable, totally objective test for identifying the common good turned out to be something that was not objectively determinable by the use of reason at all.

The second development that undermined the traditional belief in an objective common good was the rise of scientism. From the middle to the end of the nineteenth century, most educated, sophisticated people were enamored with one form or another of scientism—the belief that science was the model for all human inquiry and the source of all human progress.⁴⁶ The most sophisticated and influential form of scientism was that of Auguste Comte.⁴⁷ It may help us understand late-nineteenth century scientism in general if we look more closely at two basic Comtean positions—Comte's evolutionary theory of human thought and Comte's views on the limitations of human knowledge.

Comte claimed to have discovered an invariable law of three successive stages in the evolution of human thought about

⁴⁶ See generally Olson, *supra* note 41; see also TOM SORRELL, *SCIENTISM: PHILOSOPHY AND THE INFATUATION WITH SCIENCE* (1991).

⁴⁷ See generally W. M. SIMON, *EUROPEAN POSITIVISM IN THE NINETEENTH CENTURY: AN ESSAY IN INTELLECTUAL HISTORY* (1963).

⁴⁸ For the clearest English exposition of Comte's thought, see John Stuart Mill, *Auguste Comte and Positivism*, in 10 *COLLECTED WORKS OF JOHN STUART MILL*, *supra* note 42, at 263 [hereinafter Mill, *Auguste Comte and Positivism*].

phenomena.⁴⁸ In the Theological mode of thought, phenomena are attributed to the will(s) of living beings, either natural or supernatural.⁴⁹ In the Metaphysical mode of thought, phenomena are explained by abstract metaphysical entities, such as the “nature” or “efficient cause” of a thing.⁵⁰ In the final, Positive mode of thought, the futile search for the essential nature and ultimate cause of an event is abandoned, and phenomena are explained by their relationships to other phenomena. As John Stuart Mill explained Comte’s theory:

We know not the essence, nor the real mode of production, of any fact, but only its relations to other facts in the way of succession or of similitude. These relations are constant; that is, always the same in the same circumstances. The constant resemblances which link phenomena together, and the constant sequences which unite them as antecedent and consequent, are termed their laws. The laws of phenomena are all we know respecting them [These laws of phenomena are all men have ever wanted or needed to know, however, since] the knowledge which mankind, even in the earliest ages, chiefly pursued, being that which they most needed, was *foreknowledge* When they sought for the [metaphysical] cause, it was mainly in order to control the effect, or if it was uncontrollable, to foreknow and adapt their conduct to it. Now, all foresight of phenomena, and power over them, depend on knowledge of their sequences⁵¹

In its application to a theory of legislation, Comte’s positivism would lead to the following conclusions: since ‘the common good’ is neither an observable phenomenon nor a scientific law of resemblance or of antecedence and consequence, “the common good” can have no place in a positivist theory of legislation. The common good, like all normative terms, would be seen as a metaphysical notion that cannot be known, verified, or investigated. Any truly scientific theory of legislation would have

⁴⁹ *Id.* at 269.

⁵⁰ *Id.*

⁵¹ Mill, *Auguste Comte and Positivism*, *supra* note 48, at 265-66.

to focus instead on observable phenomena—the actions of individual legislators, the enactment of legislation, and the consequences of enactments—and scientific laws identifying recurrent relationships between phenomena, particularly laws of antecedence and consequence. This limited scope of a “scientific” theory of legislation is reinforced by other versions of scientism besides Comtean positivism,⁵² as they all, to one extent or another, limited the scope of theories of legislation by what were thought to be the limitations of scientific methodology.

E. Modern “Scientific” Theories of Legislation

Modern scientific theories of legislation developed after the rise of scientism have completely omitted any notion of an objectively determinable common good discoverable by reason. Among these theories are the Marxist theory, the interest group theory, the optimistic pluralism variant of interest group theory, and public choice theory.⁵³

1. Marxist Theory

The Marxist theory of any government action, including legislation tells us to look at facts—the consequences of legislation in a capitalist society—and ask “who benefits?”⁵⁴ Invariably, Marxists say, those who benefit from legislation are members of the ruling class—the capitalist class, who control the means of production. This, of course, is not surprising, because the capitalist class controls the legislature. All legislation in a capitalist society thus will be seen to benefit the capitalist class at the expense of the working class.⁵⁵ The idea that legislation promotes the common good is just one of the ways the capitalist ideology shields the working class from recognizing the bitter

⁵² See *infra* notes 54-74 and accompanying text. (discussing Marxist Theory, Interest Group Theory, and Public Choice Theory).

⁵³ The following discussions of interest group theory, its optimistic pluralism variant, and public choice theory draws heavily from Eskridge, Frickey, and Garret. See *supra* note 2, at 48-65, and earlier editions.

⁵⁴ V.I. Lenin, *The War in China*, 4 LENIN COLLECTED WORKS 372-77 (1964) (first published in 1 *Iska* December 1900) (source: Marxists Internet Archive) (2003).

⁵⁵ See STANLEY W. MOORE, *THE CRITIQUE OF CAPITALIST DEMOCRACY: AN INTRODUCTION TO THE THEORY OF THE STATE IN MAX, ENGELS, AND LENIN* 19-22 (1957).

⁵⁶ KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* (written in 1845-46, first published 1932, reprinted 1970).

truth that all legislation oppresses the working class.⁵⁶

How would a Marxist theorist explain the FMLA? Those benefitted seem to be members of the working class: the employees of employers who employ fifty or more workers. How could this legislation be seen as benefitting the ruling class? The Marxist theorist would explain that such legislation serves the interests of the ruling class by fooling the working class into thinking the government acts for their benefit, thus concealing from workers the reality of the systematic oppression of the working class and the need for revolutionary action. Thus, this kind of legislation contributes to what modern Marxists have labeled the “false consciousness” of the working class.⁵⁷

2. Interest Group Theory

Interest group theorists have a more complex view of society and the legislative process than Marxists. These theorists see that society is composed of not just two classes, but of a number of different, sometimes overlapping “interest groups.” An interest group has been defined by one of these theorists as “any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in the society for the establishment,

⁵⁷ See Ron Eyerman, *False Consciousness and Ideology in Marxist Theory*, 24 ACTA SOCIOLOGICA 43 No. 1/2 (1981). The explanation given by Daniel Little is available on the internet:

“False consciousness” is a concept derived from Marxist theory of social class. The concept refers to the systematic misrepresentation of dominant social relations in the consciousness of subordinate classes. Marx himself did not use the phrase ‘false consciousness,’ but he paid extensive attention to the related concepts of ideology and commodity fetishism. Members of a subordinate class (workers, peasants, serfs) suffer from false consciousness in that their mental representations of the social relations around them systematically conceal or obscure the realities of subordination, exploitation, and domination those relations embody.

Understanding Society gateway. Last visited Nov. 10, 2009. Little identifies Georg Lukács as the first writer to introduce “false consciousness” into Marxist discourse (citing GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* (1920) (reprinted in 1971)).

maintenance, or enhancement of forms of behavior that are implied by the shared attitudes.”⁵⁸ This definition, of course, reminds us of Madison’s notion of faction. But the interest group theorist, elaborating a purportedly scientific theory of legislation, does not share Madison’s fear of faction. Instead, focusing first on the consequences of legislation for different groups, the interest group theorist concludes that legislation reflects the various pressures exerted on the legislature by different interest groups. The resulting legislation reflects the balance of these different group pressures. Or, put a different way, specific legislation reflects the political power of the different interest groups whose members are affected by that legislation.⁵⁹

How would an interest group theorist explain the FMLA? The theorist would probably first list the groups differently affected by the Act: small businesses, larger businesses, unions, upper-income employees, lower-income employees, employees of small businesses, employees of large businesses, employees with children, employees without children, married employees, unmarried employees. Then, looking at the consequences for each group from the FMLA, the theorist might say that the FMLA reflects the balance of pressures from these various groups on the legislature. Or, putting it another way, the theorist might say the FMLA is a vectored compromise of the political forces exerted by each of these different interest groups.

3. Utilitarianism Combined with Interest Group Theory: Optimistic Pluralism Theory

The descriptive interest group theory sketched above provided a potential solution to the problem that stymied any utilitarian theory of legislation: the impossibility of determining which legislation in fact would bring about the greatest increase in human happiness, defined as the total human pleasure in the society minus the total human pain in the society.

The solution sounded like this: group political pressure must reflect the number and intensity of the desires of individuals within that group for or against a particular state of affairs that would be brought about by proposed legislation.⁶⁰ Those desires derive from the expected pleasures and pains of members of that

⁵⁸ DAVID TRUMAN, *THE GOVERNMENTAL PROCESS* 33 (1951).

⁵⁹ See ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 48-50.

⁶⁰ *See id.* at 50.

group in that state of affairs. The balance of different group pressures, then, is most likely that point which maximizes overall human happiness as the Principle of Utility defines it.⁶¹ Thus, although we have no objective way, using reason alone, to determine which legislation will promote the greatest human happiness, the legislative process itself does that for us by identifying the optimum balance among the desires of all those potentially affected by proposed legislation. Theodore Lowi has called this theory the “interest-group liberalism” theory of legislation.⁶² Others call it “optimistic pluralism.”⁶³

How would the optimistic pluralism theory explain the FMLA? To the explanation given by the interest group theory, set out above, it would simply add the conclusion that this compromise of the competing interests probably reflects the optimum point at which human happiness in the society will be maximized by any government regulation of employers’ unpaid leave practices.

4. Public Choice Theory

The optimistic pluralism theory is, in a number of ways, similar to the traditional economic theory celebrating the free market as a mechanism that operates like a “hidden hand” to allocate scarce resources so as to maximize human happiness. Public choice theorists, recognizing those similarities, have analyzed the political process in economic terms. These theorists apply theories of market economics to the study of the election of legislators and their subsequent collective decisionmaking.⁶⁴

Public choice theorists generally agree that the political and legislative processes provide a means for those individuals and groups participating in the processes to maximize their economic well-being. In describing the political and legislative process in this way, public choice theorists, like economists, make certain simplifying assumptions. First, they assume, like economists, that men and women are egoistic, rational utility maximizers.⁶⁵ Second, they assume that the legislative process is a

⁶¹ *Id.*

⁶² ESKRIDGE & FRICKEY, LEGISLATION 50 (2d. ed. 1995) (citing THEODORE LOWI, THE END OF LIBERALISM 51 (2d. ed. 1979)).

⁶³ See ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 50, 54.

⁶⁴ See generally *id.* at 54-60.

⁶⁵ *Id.* at 54.

microeconomic system in which “actual political choices are determined by the efforts of individuals and groups to further their own interests.”⁶⁶ Third, they assume that “taxes, subsidies, regulations, and other political instruments are used to raise the welfare of more influential pressure groups.”⁶⁷ Finally, public choice theorists routinely assume that the primary goal of legislators is to be reelected.⁶⁸

How would a public choice theorist explain the enactment of the FMLA? Perhaps like this: Over a period of time, individuals and interest groups whose economic interests would be enhanced or diminished by the FMLA would support, with campaign money, other political support, and votes, those legislators likely to vote on their side on this issue. Legislators, eager to be reelected, would vote on the bill based on their judgment about which vote would most likely help them get reelected.

Given their implicit normative assumption that the political process, like the market, ideally works to promote the maximum utility in a society (“the greatest happiness of the greatest number”), public choice theorists have identified a number of defects in the political process, analogous to market failures in classical economic theory, which interfere with the achievement of that ideal.⁶⁹ One of the identified defects is that certain individuals and interest groups may have or achieve disproportionately greater political influence so that they can get legislation enacted that promotes their economic well-being at the expense of the vast majority’s well-being. This phenomenon has been labeled “rent-seeking” legislation, and has been explored at great length, with explicit use of a market analogy, by Michael Hayes,⁷⁰ James Q. Wilson⁷¹ and Mancur Olson.⁷² They observe that interest groups are more likely to organize formally and to participate vigorously in the political process when members of a

⁶⁶ Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

⁶⁷ *Id.* at 373-74.

⁶⁸ MORRIS FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

⁶⁹ ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 60.

⁷⁰ MICHAEL HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981).

⁷¹ JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1973).

⁷² MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1973).

relatively small group are faced with the potential for concentrated governmental benefits provided for members of that group, or the potential for concentrated governmental costs imposed just on the members of that group.⁷³ Interest groups are less likely to organize formally and participate vigorously in the political process when the members of a large group are faced with the prospect of widely spread government benefits or widely spread governmental costs.⁷⁴

This transactional, economic model of legislation therefore suggests the gloomy conclusion that because of systematic market failure in the political markets, there will be less than the optimal amount of legislation with broadly distributed benefits and either broadly distributed costs or concentrated costs, while there will be more than the optimal amount of legislation with concentrated benefits and broadly distributed costs. This market failure comes about because organized, politically active interest groups may exercise political power significantly greater than the aggregate number of their members, and hence may have a disproportionate impact on the decisions of legislators whose primary goal, under public choice theory, is to get reelected.

How would the gloomy public choice theorists explain the passage of the FMLA? They might start with the consistent results of public opinion polling over the entire period from 1985 through 1992 showing widespread majority public support for a strong family and medical leave act. The Hayes-Olson theorists might suggest that the reason a bill was not enacted sooner must simply reflect the disproportionate political influence of opposing, organized, special interest groups over the President and Republican Members of Congress, in particular the U.S. Chamber of Commerce, representing business owners and employers. When the political influence of the interest groups in opposition weakened, the bill was enacted.

F. Critiques of Public Choice and Interest Group Theories

Some political scientists have attacked the public choice theorists' basic assumptions underlying their model of the

⁷³ See generally ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 51-60.

⁷⁴ *Id.*

⁷⁵ See, e.g., LARS UDEHN, *THE LIMITS OF PUBLIC CHOICE: A SOCIOLOGICAL CRITIQUE OF THE ECONOMIC THEORY OF POLITICS* (1995); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A*

political process.⁷⁵ Still other political theorists have elaborated a “neo-republican” theory of legislation in deliberate opposition to public choice theory.⁷⁶

1. Critiques of public choice theory

Public choice theorists make a number of simplifying assumptions about the motivation of actors in the political process: most importantly, they assume that legislators are motivated by the desire to be reelected and that voters are motivated by the desire to increase their economic well-being. Others have attacked each of these assumptions. Daniel Farber and Philip P. Frickey have summarized the bases for these attacks in their excellent book *Law and Public Choice: A Critical Introduction*.⁷⁷ First, they point out that in almost every case, a single vote makes no difference in the outcome of an election. If voters are the egoistic, rational utility maximizers that the public choice theorists assume, why do they vote at all? It takes time, energy, and thought to vote: time, energy, and thought that could be devoted to other, more personally beneficial projects.⁷⁸ Second, the econometric studies, using economic factors to predict voting behavior of legislators based on the economic interests of the legislators’ constituencies, are no more accurate than studies that use the ideological commitments of the legislators to predict their voting behavior.⁷⁹ Third, political scientists analyzing legislative voting behavior have concluded that “the behavior of members of Congress is dictated [by not one, but] by three basic goals: achieving reelection, gaining influence within the House, and making good public policy.”⁸⁰ Finally, scholarly examination of the histories of the statutes often used by public choice theorists to illustrate the overriding importance of special interest groups’ influence have tended to refute the public choice theorists’ assumptions.⁸¹ Farber and

CRITICAL INTRODUCTION (1991) at 21-33 (citing a number of critical studies); See also: ABNER MIKVA, *Foreward to Symposium on the Theory of Public Choice*, 74 VA. L. REV., 167 (1988).

⁷⁶ See Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

⁷⁷ FARBER & FRICKEY, *supra* note 5.

⁷⁸ *Id.* at 24-25.

⁷⁹ *Id.* at 29-30.

⁸⁰ *Id.* at 21.

⁸¹ *Id.* at 32-33.

Frickey conclude as follows:

Thus, we have three bodies of evidence that seem to point to the same conclusion: the most careful econometric work, the findings of traditional social scientists, and historical investigations of the public choice accounts of particular legislation. There is no such thing as conclusive evidence in the social sciences, but we can feel some degree of confidence in rejecting the economic model of legislation (at least, without significant modifications). No one would deny the importance of self-interest in the political process, but we can also be reasonably sure that self-interest is not the whole story.⁸²

2. Neo-republicanism

Dissatisfied with the bleak picture of the political process painted by the public choice theorists, a group of theorists in the 1980s and 1990s elaborated an alternative vision.⁸³ They found inspiration in the “republican” tradition that influenced in part the thinking of the founders of the American Republic—particularly

⁸² *Id.* Farber and Frickey go on:

A less grandiose version of the economic theory would simply postulate (1) that reelection is an important motive of legislators, (2) that constituent and contributor interests thereby influence legislators, and (3) that small, easily organized interest groups have an influence disproportionate to the size of their membership. In short, the model could be used to identify tendencies within the political system, rather than claiming to explain all of politics. Based on the empirical evidence, this less ambitious, weaker version of the theory seems far more supportable than the strong version.

Our best picture of the political process, then, is a mixed model in which constituent interest, special interest groups, and ideology all help determine legislative conduct. *Id.*

Id. at 33.

⁸³ See generally *Symposium, The Republican Civic Tradition*, 97 *YALE L. J.* 1493 (1988), (particularly the articles by Frank Michelman and Cass Sunstein, *supra* note 76).

James Madison. This tradition emphasized the importance of collective deliberation by elected representatives, imbued with civic virtue, to identify and subsequently achieve the common good. The neo-republican theorists of the 1980s and 1990s did not accept the whole of this tradition, but just those parts which they concluded were relevant and helpful to our modern situation.⁸⁴

Farber and Frickey contrasted this neo-republican theory with public choice theory as follows:

Modern reconstructions of republicanism stress civic virtue. For modern republicans, political life is more than the use of government to further the ends of private life, as it is in liberalism. Rather, politics is a distinct and in some respects superior sphere. By participating in public life, citizens rise above their merely private concerns to join in a common enterprise. They put aside their own interests and enter a public-spirited dialogue about the common good. Once found, the public interest disciplines their private pursuits. Indeed, one of the most important tasks of government is to make the citizenry more virtuous by changing individual preferences.⁸⁵

Public choice sees politics as a machine, with preferences as the input and decisions as the output. For republicans, however, preferences are shaped by politics; dialogue and reason are the energizing forces behind political decisions.⁸⁶

Farber and Frickey went on to point out possible flaws in this neo-republicanism. First, the neo-republicans “may overestimate . . . the extent to which the public deliberation can break the link between prior preferences and political outcomes.”⁸⁷ This is so for three reasons: (1) “they overplay the contrast between political and personal life,” which are usually closely intertwined;⁸⁸ (2)

⁸⁴ See FARBER & FRICKEY, *supra* note 5, at 44.

⁸⁵ *Id.* at 44.

⁸⁶ *Id.* at 45.

⁸⁷ *Id.* at 46.

⁸⁸ *Id.*

they mistakenly exalt the public sphere over the private: “It is not immediately obvious that attending political meetings is more virtuous than . . . raising a family, viewing or creating art, healing the sick, or advancing human knowledge;”⁸⁹ and (3) they “overestimate the capacity of dialogue [and governmental edict] to transform [individual, personal and political preferences and behaviors.]”⁹⁰ Finally, Farber and Frickey conclude,

Because of its romanticism, uncritical acceptance of republicanism also carries risks. Being confident that the political process yields more valid results than private preferences, republicans may be overly inclined toward government intervention. From believing that public deliberation yields superior answers, it is only a small step to the desire to impose politically correct behavior on the ignorant populace. The dark side of republicanism is its potentially totalitarian tendency to subordinate individuals to the public good, as defined by governmental elites.⁹¹

Perhaps a neo-republican would explain the passage of the FMLA as follows: The publicly-virtuous members of Congress and three different publicly-virtuous presidents, over a period of eight years, deliberated together about what the public good in this particular field of social life would entail. The conclusion, embodied in the statute, is that employers with fifty or more employees must give limited unpaid leave to their employees for certain defined purposes. Before this was determined, neither the legislators, the presidents, nor the electorate knew for sure what the common good in this field entailed. After enactment of the statute they would know, and both their conduct and their preferences would be shaped accordingly.

But this does not seem to adequately describe the history of the FMLA as the legislators seemed to come to the table with preconceived views, and the ultimate Act did not seem to be the consequence of rational persuasion through deliberation. Legislators already had preferences on this matter, ordinarily

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ FARBER & FRICKEY, *supra* note 5, at 47.

related to their political party affiliation and, the ultimate resulting legislation was determined, not by deliberation and persuasion, but by threatened defeat of a currently-proposed bill and the consequent need to reach a compromise bill that would alleviate some of the concerns of those opposed to the original bill and hence gain their vote. Because the ultimate bill is the result of a series of these compromises, it is not clear that any legislator would believe that the ultimate bill is the ideal bill fully promoting their personal view of the public interest, as would seem to be the case for many legislators if the ultimate bill were arrived at by deliberation and persuasion.

Could there be another explanation consistent with neo-republican theory? One might say that, because some legislators and presidents were not sufficiently virtuous, the optimum legislation fully achieving the common good was not enacted. And the reason those legislators and presidents were not sufficiently virtuous is precisely because they listened too much to the special interest groups they were politically indebted to, instead of engaging in an open-minded deliberation over which form of legislation would best promote the common good. This explanation has one big problem. There does not seem to be anything in neo-republican theory that allows us to determine which of the proposed bills would best promote the common good.

The separate problems with each of these explanations point to the basic flaws in neo-republican theory. The problems with the first explanation suggest that, as descriptive theory, neo-republicanism does not seem to describe adequately what happens in the real world. The problems with the second explanation suggest that, as normative theory, neo-republicanism cannot adequately justify the normative judgments made in its name; the normative judgment about consistency of legislation with the common good seems necessarily based on what deliberation actually produces or on what the theorist herself personally believes, prior to deliberation, is the common good.

G. A Modern Natural Law Theory of Legislation

The problems we have identified with neo-republican theory, both as descriptive theory and as normative theory, highlight the modern theoretical predicament: how can we elaborate a scientific theory of legislation that can be accepted as an adequate descriptive theory, which will also provide an acceptable base for judging

whether particular legislation is good or desirable? The social science methodology proposed by John Finnis in his book *Natural Law and Natural Rights*⁹² may help resolve this predicament.

Finnis notes that descriptive social science has as its objects human institutions, which are constituted by human actions, practices, habits, dispositions, and discourse. Objects of this kind cannot be understood without understanding their practical point or basic objective from the standpoint of the people concerned to act within that particular institution. The practical point of an institution is its objective, value, significance, or importance as conceived by those engaged in the actions, practices, and discourse making up that institution. Anyone attempting to formulate an adequate scientific theory of a human institution must therefore adopt the internal point of view of one concerned to act within that institution, and, using that internal point of view, identify the practical point of that institution.⁹³

This methodology may identify a number of different answers to the basic practical point question. How can a social science theorist choose among competing answers to the basic question? Finnis proposes two methodological solutions to this problem of indeterminacy. First, one should identify the focal or central case of the institution—what is most clearly, obviously, or centrally “X.”⁹⁴ Second, one should adopt the internal point of view of a practically reasonable person concerned to act within the institution, and hence use basic principles of practical reasoning to test proposed answers to the basic theoretical questions.⁹⁵ Once one has identified the practical point or basic objective of an institution, the next step in the analysis is necessarily an evaluative question: how well or to what extent does this institution achieve its objective? Thus, any adequate descriptive social science theory will also be normative or evaluative to a certain extent.⁹⁶

How could this methodology be used to develop a theory of legislation and the legislative process?

If we take the internal point of view of one concerned to act

⁹² FINNIS, *supra* note 6.

⁹³ *Id.* at 3-11.

⁹⁴ FARBER & FRICKEY, *supra* note 5, at 9-11.

⁹⁵ *Id.* at 11-18, 46.

⁹⁶ *Id.* at 11-18; *see also* Lon Fuller, *Human Purpose and Natural Law*, 3 NAT. L. FORUM 68 (1958).

within the legislature, and ask what the practical point of the legislature is, the answer seems evident. Legislators are always telling us that they are working to promote the common good, or the general welfare, or good public policy. In justifying their votes on specific pieces of legislation, legislators ordinarily will invoke the common good or the general welfare. Legislators will never announce that they are working to do the bidding of the special interests that help get them reelected. This conclusion is supported by the excellent practical advice contained in Bruce Wolfe and Bertram Levine's 1996 book *Lobbying Congress*:

As a general rule, Congress never justifies legislation on the basis that it may reward a private, special interest. The public benefit is the formal, overriding rationale, no matter who or what the proposal helps or hurts in the end. Every legislative proposition must be rooted in a respectable and defensible public policy argument. Public officials cannot be expected, and must never be asked, to do otherwise. To do so would be to risk compromising the integrity of all involved.⁹⁷

Using this methodology, we can with some confidence say that the practical point or object of the legislative process is to promote or achieve the common good. At this point, however, the problem of indeterminacy arises, for the meaning of "the common good" is a highly-contested question. Some would say it means the greatest happiness of the greatest number, determined by a utilitarian evaluation of the consequences of the legislation. Others would say it has no meaning at all, but is just a fine-sounding yet empty phrase used by legislators to conceal from the public what they are really up to. Still others would say that the common good is whatever the legislature, after careful and rational deliberation, determines it to be.

How can we scientifically develop a single defensible meaning of "the common good," given the welter of overlapping and sometimes mutually exclusive different meanings ascribed to it by theorists and by those concerned to act as legislators? Finnis's methodological injunction in such situations is two-fold:

⁹⁷ BRUCE WOLFE AND BERTRAM LEVINE, *LOBBYING CONGRESS* 27-28 (1996).

adopt the viewpoint of a practically-reasonable person concerned to act within the legislature, and identify and analyze the focal or central case of legislation promoting the common good.

Finnis himself has analyzed the meaning of the common good from the standpoint of the practically-reasonable person. The argument, drastically summarized, is this: If we reflect carefully on our experience and the experience of others, we can identify a number of things that are simply good for human beings, including life, knowledge, play, aesthetic experience, friendship, and practical reasonableness (making rational, coherent choices among possible actions and projects).⁹⁸ We can understand our own and other's actions when we see them as attempts to achieve or participate in one of these goods. Each of these is good in and of itself for human beings; none can be reducible to another good; none can be seen as simply a means to another good. Each of these goods is incommensurable, as there is no common denominator underlying these separate goods.⁹⁹ The utilitarian injunction to maximize human happiness is therefore nonsensical, since there is no scale that can be used to compare total human happiness in one state of affairs with total human happiness in another state of affairs.¹⁰⁰

In their individual pursuit of a good for themselves, two human beings may find that they share a common means to their separate ends. Thus, two travelers may share the same taxi to get from the Boston Airport to Harvard Square for entirely different reasons. Mary may be going to Harvard Square to meet her family for dinner, thus participating in the good of friendship in its manifestation in family relations, while Joe may be going to Harvard Square to attend a lecture by an eminent scientist, thus participating in the good of knowledge. We can call the common means to their separate ends a common good.

Similarly, the common good of a community may be understood as that set of conditions that enables or allows each member of the community to participate in the goods he or she chooses, both in individual actions and over a lifetime.¹⁰¹ Finnis summarizes his analysis as follows:

⁹⁸ See FINNIS, *supra* note 6, at 59-90.

⁹⁹ *Id.* at 92-97.

¹⁰⁰ *Id.* at 111-18.

¹⁰¹ *Id.* at 154-56.

For there is a 'common good' for human beings, inasmuch as life, knowledge, play, aesthetic experience, friendship, religion, and freedom in practical reasonableness are good for any and every person. And each of these human values is itself a 'common good' inasmuch as it can be participated in by an inexhaustible number of persons in an inexhaustible variety of ways or on an inexhaustible variety of occasions. These two senses of 'common good' are to be distinguished from a third, from which, however, they are not radically separate. This third sense of 'common good' is this . . . a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community The common good in this sense is a frequent or at least a justified meaning of the phrases 'the general welfare' or 'the public interest.' Notice that this definition neither asserts nor entails that the members of a community must all have the same values or objectives (or set of values or objectives); it implies only that there be some set (or set of sets) of conditions which needs to obtain if each of the members is to attain his own objectives. And that there is, in human communities, some such set (or set of sets) of conditions is no doubt made possible by the fact that human beings have a 'common good' in the first sense mentioned in the last paragraph.¹⁰²

This analysis helps us identify a central case of legislation promoting the common good. We might all agree that the criminal law prohibiting unjustified homicide is so clearly a case of legislation promoting the common good that we can use it as a focal case of legislation. We can understand why by invoking Finnis's analysis of the common good. First, continued human life is a simple good for each member of the community, and also

¹⁰² *Id.* at 155-56.

a condition for further participation in other human goods. Protection against wanton or unjustified taking of life is, therefore, clearly one of those conditions necessary for individual members of the community to attain their own objectives.

How would a natural law theorist following Finnis explain the FMLA? Clearly it is a good for employees to be able to spend time with newborn or sick members of their family: the good of friendship, specifically, that involved in family relationships. And it is also clearly a good for employees to be able to recover fully and regain their strength before returning to work after a serious illness: the good of human life and health. Employment rules and practices of employers may impair the ability of employees to achieve these goods by forcing an employee to choose between those goods and her job. Since the FMLA removes that impediment, the FMLA can be seen as a condition for members of the community to achieve or participate in certain goods.

This explanation of the FMLA, however, raises a further question: how can one explain, consistent with this explanation of the FMLA as a component of the common good, why it benefits only employees of large entities employing fifty or more workers, excludes employees in the top 10 percent earning category, and provides only for limited leave? The central case of legislation promoting the common good—the law against unjustified homicide—protects everyone in the community, without exception, and that seems consistent with Finnis’s explanation of conditions that protect each member of the community in the pursuit of goods. Here, however, the FMLA only protects a limited number of employees, excluding others. But employees of employers with less than fifty employees, and employees in the top 10 percent of earnings, would also benefit, in just the same way, from the FMLA’s protection of the goods of friendship in family relations, and human life and health. One could argue that these members of the community are not protected for reasons unrelated to the reasons for protecting others. These exclusionary reasons seem, therefore, unrelated to the common good, as they seem in the one case to be based on the political clout of small business, and in the other case to be based on a class-based bias against high-income employees.

Perhaps the answer would proceed as follows. Under Finnis’s social science methodology, a concept may be applied and

¹⁰³ *Id.* at 9-11.

understood even in cases that differ in important ways from the central case.¹⁰³ Keeping those differences in mind, the theorist may see that the new cases are applications of the term in an extended, perhaps partially analogical, sense. In analyzing the relationship between the FMLA and the common good, then, the theorist would have to recognize that gainful employment itself is a condition for full participation in a range of human goods. Extending unlimited leave to employees and extending the leave requirements to small businesses might increase the costs of the leave benefit so greatly as to force employers to reduce the number of employees, or increase employment costs so as to price businesses subject to the FMLA out of markets where they might otherwise be able to compete effectively. Either way, the effect is to reduce opportunities for gainful employment. These costs, attributable primarily to the need to overstaff or hire replacement workers for employees on leave, are arguably substantially less for large employers with the staffing flexibility that comes from having a large number of workers. Similarly, it may be significantly more costly for any employer to replace temporarily its high-income employees, if higher income reflects greater skill or experience. Similarly, the excess staffing costs and uncertainties are arguably reduced by limiting the amount of unpaid leave each employee is entitled to take each year. The compromise embodied in the FMLA can thus be justified in terms of the common good. The Act protects the ability of some workers to participate in the goods identified above without unduly reducing the opportunities for gainful employment by members of the community generally, which is itself a condition for participation in a number of human goods.

The judgments about consequences and costs reflected in the ultimate compromise bill are, of course, contestable, and the FMLA is not the single or unique form of legislation protecting these different ways of participating in human goods. President Obama's campaign proposal to amend the FMLA to lower the minimum employee coverage requirement from fifty to twenty-five employees, therefore, could equally be explained under this analysis of the relationship between the exclusionary provisions and the common good. Nevertheless, all things considered, this theory of the common good makes sense out of the original compromise bill as an attempt to promote the common good. Moreover, this explanation is consistent with the kinds of

arguments made by legislators and lobbyists on both sides of the compromise. Finally, this analysis helps us understand how the legislative process results in legislation that promotes the common good even when no one in the process believes that the resultant legislation is the uniquely desirable or ideal solution to the problems it attempts to resolve.

One might argue that this explanation of the FMLA is fundamentally the same as the interest group theory explanation. Organized women's groups and unions supported maximum protection for workers' rights to leave and return, while organized business groups opposed those rights in order to maintain economic activity and gainful employment. Why then, doesn't this natural law explanation simply reduce to the interest group explanation?

The answer is that certain groups in a society, because of their position in the social order, will be more concerned with one good or set of goods, or with one way or set of ways of achieving a particular good. Thus, in the politics of the FMLA, unions as representatives of employees may be concerned most deeply with maintaining conditions under which employees do not have to choose between their jobs and fulfilling basic family obligations. Employers as a group, on the other hand, may be more immediately concerned with maintaining economic productivity and its concomitant, gainful employment. Thus, insofar as there is a real common good correlated with the interest group's special interest, the support by different interest groups helps promote the common good by making sure there are effective advocates for taking those competing common-good considerations into account. The result is not just a division of legislatively-created benefits among the participating interest groups, but an attempt to protect the various components of the common good identified by the substantive arguments advanced by representatives of different interest groups.

The theory of legislation developed following John Finnis's modern natural law social science methodology seems to be the most coherent explanation of legislation and the legislative process in the United States. It is more consistent with the understanding of the legislative process accepted by most of those concerned to act as legislators. Moreover, it meets the standards of practical reasonableness embodied in Finnis's persuasive analysis of the common good.

This theory of legislation has its limitations. In the first place, it does not identify which of a set of alternative legislative acts would be uniquely best at promoting the common good. Thus, in the debates over whether to enact any Family and Medical Leave Act, and, if so, what precise form that act should take, this theory of legislation would have nothing to say, as each side of the ultimate compromise would, in different ways and to different extents, promote the common good. Thus, the “no act” alternative would promote the common good by maximizing the economic resources available to employers and the resulting economic productivity that would increase or maintain their ability to provide jobs for others. The most stringent proposed act would maximize the good of family togetherness. As long as each proposal would satisfy certain basic, formal criteria that together determine whether a legal system is working well (possibility of compliance, prospective application, consistency and foreseeability of application),¹⁰⁴ each can be seen as promoting the common good within the rule of law. Moreover, because this theory recognizes that legislation has the goal of promoting the common good, it enables us to identify central cases, peripheral cases, and abusive cases of legislation. Under this theory, legislation would be deemed abusive if it failed to take into account at all the good for any one person or any group of persons in the community. Thus, the theory itself would judge as aberrational or abusive a law that would enslave one quarter of the population so that the other three-quarters could better achieve the human goods they seek. In an important sense, then, this analysis repeats the founders’ critique of tyrannical laws imposing burdens exclusively on the colonists for the sole benefit of full-fledged English citizens and their rulers. We seem to have come full circle, with modern natural law theory repeating the very question the founders asked, using an earlier formulation of natural law theory. If all men are created equal, with unalienable rights to life, liberty, and the pursuit of happiness, how is it permissible for the State to impose burdens on some, or give benefits to some, and not to all?

How does the FMLA, with its limitation of benefits, escape the founders’ critique? Three related answers may be suggested. First, the excluded class is not subject to burdens that directly

¹⁰⁴ *Id.* at 270-71 (requirements for Rule of Law).

benefit the included class. Second, the reason for the exclusion is to maintain economic conditions that will promote the common good, including the good of those excluded from the specific benefit. Third, the FMLA is not part of a set of laws, all of which impose burdens on or exclude from benefits the same class of people, as the tyrannical laws of England seemed to the founders to treat the colonists. Thus, although the FMLA may be seen as a peripheral case because it does not protect all members of the community in their pursuit of goods in the same way, it may not be an abusive case.

Although this natural law theory of legislation provides no formula for choosing the uniquely best legislation, there are significant practical benefits from the recognition that this theory is an accurate descriptive theory of the legislative process. First, if members of the community come to see the legislative process in this light, they may be immunized against the prevalent easy cynicism that legislators are tools of the special interests who are only in it to get reelected. Second, this theory would provide a standard independent of political commitments that members of the community could employ to vote out of office those legislators who are not in fact interested in promoting the common good. Finally, this understanding provides an ennobling and factually supportable explanation of what legislators do that would encourage “good” legislators to continue, and would attract to legislative positions more of those who have the common good at heart.

II. NATURAL LAW THEORY AND THE RIDDLE OF LEGISLATIVE INTENT

This natural law theory of legislation, however, seems to complicate further the old riddle of legislative intent.¹⁰⁵ The riddle is this: in cases involving statutory interpretation questions, courts say over and over again that their job is merely to discover and implement the legislative intent. But as Max Radin¹⁰⁶ pointed

¹⁰⁵ See, e.g., *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 859 P. 2d. 1143, 1143-46 (Ore. 1993); *Prewitt v. Warfield*, 156 S.W. 2d 238 at 239 (Ark. 1941) (“The primary rule in the construction of statutes is to ascertain and give effect to the intention of the legislature.”); see generally J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* 309-11 (1891).

¹⁰⁶ Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

out years ago, there can be no single conscious legislative intent, because the legislature is not a single person. Moreover, the aggregate conscious intentions of legislators voting for a bill are undiscoverable, and would not in any event be controlling if that aggregate were inconsistent with the words of the statute, which is all that has the force of law.¹⁰⁷

The natural law theory of legislation complicates this further because it suggests that in cases like the FMLA, no legislator would really have wanted the ultimate statute that finally emerged. How can there be a legislative intent when no one in the legislature really wanted the bedraggled compromise that finally limped into law?

Because Finnis's internal-point-of-view methodology takes seriously the understanding of those concerned to act in a particular institution, it is particularly important for a natural law theorist to understand judges' recurrent explanation of their role in statutory interpretation. This is made even more difficult by another feature of the recurrent judicial explanation: the legislative intent judges say they seek to discover and implement is an intent at two levels: the *intended meaning* of the statutory language, and the *intended application* of that meaning to the case at hand.¹⁰⁸

But the legislature is an aggregate of different people, scholars point out. How can one discover a single intent behind a statute when those voting for it may have had many different purposes or

¹⁰⁷ Radin's arguments have so permeated the legal academy that Jeremy Waldron, a respected professor of law, has stated

[R]eference to legislative intention in one form or another is reasonably common among judges in the United States Philosophically, however, the idea of appealing beyond the statutory text to what legislators are thought to have intended has been subjected to such powerful criticism . . . that one is surprised to find it appearing again in anything other than a trivial form in respectable academic jurisprudence.

Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 329 (Andrei Marmor ed., 1995); *contra*, Larry Alexander, *All or Nothing at All? The Intention of Authorities and the Authority of Intentions*, in *id.*, 356, 360-66.

¹⁰⁸ See, e.g., *Tallios v. Tallios*, 112 N.E. 2d. 723 (Ill. App. Ct. 1953);

no purpose at all as to a particular application? The way this question is formulated embeds the insoluble riddle of legislative intent into the very question itself, for it assumes only a single possible meaning for the term “legislative intent.” But any sensible discussion of the recurrent judicial invocation of “legislative intent” must begin with the question, “what meaning can the judges possibly give to the word ‘intent’ in that phrase?” The critics of “legislative intent” as nonsensical seem to assume that “intent” can have only one meaning. But a glance at a comprehensive dictionary, or a reflection on our ordinary use of a limited number of words to convey a variety of different meanings, suggests that most words have more than one meaning. It seems odd that the principal argument by those making linguistic arguments that “legislative intent” is nonsensical should depend on the naive view that “intent” can have only one meaning.

In exploring the different meanings of “intent” we should start with its central meaning:¹⁰⁹ a human being acts, consciously willing or wanting that act to bring about particular consequences. It is only a small step to a second, analogical meaning: a human being acts when the apparent surrounding circumstances would lead an ordinary person to conclude that particular consequences are virtually certain to follow that action. We might call the central meaning “subjective intent” and the second, analogical meaning “objective intent.” This second, analogical meaning can be extended to a third analogical meaning: a group with legal or conventional capacity to act, acts, under apparent circumstances that would lead an ordinary person to conclude that particular consequences are virtually certain to follow that act. In each of these three cases, we would say the actor intended to achieve particular consequences (whether achieved or not), but the meaning of “intent” in each case is different.

We can sensibly apply the third meaning of intent to the legislature. It is incontestable that a legislature, following the appropriate statutory and constitutional conventions, can legally act. It can enact a statute—an authoritative legal directive consisting of a particular set of words in a particular order. This

Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

¹⁰⁹ Identifying the central or focal meaning of a word is consistent with John Finnis’s focal-case social science methodology (FINNIS, *supra* note 6, at 9-11), as well as the linguistic anthropological studies summarized in GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES*

collective action must be understood as purposive or it makes no sense at all.

A formal argument for legislative intent would rely on objective facts at each of three stages in the argument. First, we know that the legislature acts—it enacts a statute. A statute is, at bottom, a communication to a particular audience. We can describe the legislative action more particularly, then, as the enactment of an authoritative directive communicated to a particular audience through the words of the statute. The question then becomes what intent can be said to accompany that action, using the third meaning of intent with its objective test. Second, in light of our general understanding of communication, we can conclude that the legislature had an intent to convey the general meaning of those words, as understood by the typical member of the legislative audience, in the appropriate context, because that is what that legislative action was virtually certain to bring about.¹¹⁰ Moreover, we know that statutes are a particular kind of communication—directives to others to be applied in particular circumstances. So, third, the objective legislative intent to enact a legal directive with a certain general meaning supports the conclusion that the legislature had an objective intent to bring about the results obtainable by applying that general meaning to particular instances.¹¹¹ This conclusion follows from a simple application of the objective test of intent to the legislature’s action in enacting a directive when those consequences are virtually certain to follow.

It is important here to distinguish the specific, intended results that will result from the application of the general meaning of the specific words from longer-range purposes that might be furthered

REVEAL ABOUT THE MIND 18-57 (1987).

¹¹⁰ For a similar analysis, see REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 69 (1975) (distinguishing actual legislative intent from manifest legislative intent). See also Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 258-59 (Robert George ed., 1996).

¹¹¹ The intent is that the general meaning be applied to specific circumstances, not that specific applications are directly intended. Thus, a legislature in 1890 enacting a statute prohibiting the carrying of a “concealed deadly weapon” could not have intended the specific application to a laser gun invented in 1997; it could and did objectively intend that the general meaning of “deadly weapon” be applied in specific circumstances.

¹¹² This helpful distinction is made by Reed Dickerson. See DICKERSON,

by those specific applications.¹¹² So, in a minimum wage statute, one long-range purpose may be to provide a living wage for the working poor, but the objective “intent” is that certain defined employers pay at least \$7.20 per hour to certain defined employees. Similarly, with the FMLA, one long-range purpose may be to provide unpaid leave for certain purposes to employees when consistent with overall economic productivity, but the objective intent is that those employees be allowed unpaid leave for the purposes and under the conditions defined by the statute. Thus, although a statute may have broader, long-range purposes, the objective intent is to bring about those results mandated by the general meaning of the specific statutory language. Thus, it would be inappropriate for a judge to interpret and apply the FMLA to achieve its long-range purpose in cases beyond the specific language of the Act. This is consistent with our analysis of the way in which the FMLA relates to the common good.

One obvious consequence of the natural law theory of legislation is that the primary object, as well as the limiting considerations are all fully and equally in play in any interpretation question, as together they comprise a unique combination of components of the common good. Thus, it would be inappropriate to allow further leave when the taking of unpaid leave reduces the employee below the working days per year eligibility requirements for taking unpaid leave. The point at which the competing consideration of the public good was balanced by the legislature should be respected meticulously by the administrative and judicial interpreters. Thus, the United States Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.*¹¹³ was justified in striking down Department of Labor regulations implementing the FMLA that could result in employees receiving more than the twelve weeks maximum leave per year, if the employer did not formally designate earlier leave as FMLA leave within a brief time frame. Similarly, of course, it would be inappropriate for a court to interpret a \$7.10 minimum wage act to require payment of an \$8.90 minimum wage on the grounds that \$7.10 an hour, under current economic conditions, cannot achieve the purpose of the minimum wage act to provide a living wage for the working poor.

This analysis reinforces the importance of Reed Dickerson’s

supra note 110, at 87-102.

¹¹³ 535 U.S. 81 (2002).

distinction between the longer-range *purpose* or *purposes* of an Act and the immediate *objectively-intended results* of the Act.¹¹⁴ This distinction between purpose and intent of an act helps us think clearly about the purposive character of statutes. The objective intent is to bring about the consequences that will necessarily result from applying the meaning of the statutory language. Hoped-for longer-range consequences, which may or may not result from those applications, can be fruitfully understood as the purposes of the act. So one legislator may vote for a bill because he believes that achieving the immediate specified consequences will bring about particular longer-term consequences, while another legislator may vote for a bill because she believes that achieving the immediate specified consequences will bring about other particular long-term consequences. To use a dated example: one legislator voting for an automobile guest statute may do so to prevent ungrateful guests from recovering from their generous hosts, while another may vote for the act to cut down on collusive suits by guests against their friends who gave them a free ride.

The above analysis of objective legislative intent seems to leave out any discussion of the individual actions of legislators in voting for or against the bill that ultimately was enacted, as if the legislature were a disembodied entity. But, of course, legislation is enacted only when enough real people—legislators—with real motives and conscious intentions vote for a bill, and a real person—governor or president—approves as well. What about their intentions and their motives? Why shouldn't the aggregate conscious intentions or motives of those voting for the bill be the controlling legislative intent? The problem, as Max Radin pointed out long ago, is that the legislature is not a single person, with a single conscious intent, and the aggregate conscious intentions of the legislators are disparate and unknowable. Moreover, even if knowable, aggregate intent could not be more authoritative than the words of the enacted statute.

But here one can apply the second meaning of intent, with its objective test, to the conduct of the individual legislators. Whatever an individual legislator's accompanying conscious intent or motive in voting in favor of a bill that passes with the aid of that vote, that legislator can be deemed to have the objective intent to enact that bill into law because that is the natural, virtually certain consequence of that action when there are

enough other legislators who take the same action and the governor or president approves. Under ordinary circumstances, then, each yes vote by a legislator on a bill that is enacted can be said to be accompanied by the objective intent to enact that bill into law. And, of course, as a matter of fact, many legislators may have a subjective intent to bring about what that language, in that context, will certainly bring about. It is enough, though, that all those voting for it have that as the objective intent accompanying their vote.

This is a sequential application of the two objective tests of intent accompanying the second and third meanings of intent identified above, first to the individual actions of legislators voting for a bill, next to the enactment by the legislature of a bill with particular words in a particular context, that would then have a determinate meaning to the ordinary member of the intended audience, who would, finally, following that meaning, act in compliance with the legislative directive. This sequential application of objective tests of intent makes sense out of the recurring statements by judges that all they are doing in interpreting statutory language is discovering and applying the legislature's intent in the case before them.

Lately, different approaches to statutory interpretation have been given labels, such as "textualism," associated with Justice Antonin Scalia¹¹⁵ and John F. Manning,¹¹⁶ "intentionalism," associated with Joseph Raz¹¹⁷ and Larry Alexander,¹¹⁸ and "purposivism," associated with Hart and Sacks¹¹⁹ and Justice Steven Breyer.¹²⁰

Under the analysis of objective intent presented above, the text of the statute, in appropriate context, is crucially important. Under this theory, then, there is not any necessary distinction

¹¹⁴ DICKERSON, *supra* note 110, at 87-102.

¹¹⁵ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

¹¹⁶ See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

¹¹⁷ See Raz, *supra* note 110, at 249.

¹¹⁸ See Larry Alexander, *supra* note 107; Larry Alexander and Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).

¹¹⁹ See HENRY M. HART, JR., AND ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374-80 (Eskridge & Frickey, eds, 10th. ed. 1994) (1958).

¹²⁰ See Stephen Breyer, *On the Uses of Legislative History in Interpreting*

between a “textualist” approach to statutory interpretation and an “objective intentionalist” approach. One of the differences between the two camps relates to what counts as part of the appropriate context in determining the meaning the text would convey to the ordinary member of the intended audience. Extreme textualists would preclude reference to anything outside the text if the meaning of the text is clear on its face.¹²¹ This revival of the old plain meaning rule so scorned by Hart and Sacks ignores the fact that we cannot tell what the plain meaning of a statute is without reference to the entire context that the ordinary member of the intended audience would consider—including the answers to the Heydon’s Case questions about the defect in the prior law the statute is to remedy, which the text of the statute alone often does not answer.

Objective intentionalists, textualists, and purposivists often use the same text and the same context to reach the same conclusions about statutory meaning and its application to the facts of the case. The biggest source of controversy among the three self-defined groups seems to be the use of internal legislative history as part of context. Extreme purposivists and subjective intentionalists would presumably use all elements of the internal legislative history to help determine the precise purpose or subjectively intended meaning of the statutory language. Extreme textualists might eschew use of any materials from the internal legislative history because those materials are only relevant to an attempt to discover a non-existent, non-authoritative legislative intent.¹²²

I have argued elsewhere, following Reed Dickerson, that internal legislative history materials are not properly part of the context for interpreting the intended meaning of statutory language because those materials are not likely to be available or apparent to the ordinary member of the intended audience.¹²³

Statutes, 65 S. CAL. L. REV. 845 (1992).

¹²¹ See SCALIA, *supra* note 115, at 16.

¹²² Compare SCALIA, *supra* note 115, at 29-37 (Because intent of legislature not the proper criteria of the law, legislative history not useful in interpreting statutes.) with DICKERSON, *supra* note 110, at 138-68 (Internal legislative history not part of appropriate context audience would use in interpreting statutory language, under Dickerson’s sophisticated analysis of appropriate context).

¹²³ Patrick J. Kelley, *Objective Interpretation and Objective Meaning in Holmes and Dickerson: Interpretive Practice and Interpretive Theory*, 1 NEV.

Unlike Dickerson, however, I argued that internal legislative history may properly be used as evidence of the appropriate context, such as the meaning that a word or phrase may have had in the general community at the time of enactment, or the answers to the Heydon's Case questions identifying the evil or defect in the prior law the statute was aimed at rectifying.¹²⁴ And that seems to have been the principle that American courts in the 19th and early 20th centuries applied in permitting use of internal legislation history for extremely limited purposes.¹²⁵

L. J. 112 (2001) at 133-34.

¹²⁴ *Id.* at 134-36.

¹²⁵ *See Woolcott v. Shubert*, 111 N. E. 829 (N.Y. 1916).