

# Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective

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## BOOK REVIEW

### THE HERMENEUTIC TOURIST: STATUTORY INTERPRETATION IN COMPARATIVE PERSPECTIVE

*Daniel A. Farber*†

INTERPRETING STATUTES: A COMPARATIVE STUDY. *Edited by D. Neil MacCormick and Robert S. Summers.* Aldershot: Dartmouth Publishing Co., Ltd. 1991. Pp. xiv, 567.

As with tourism, one of the pleasures of comparative law is the collection of amusing trivia. Consider, for example, the plight of judges in the lower French courts. Their opinions are rarely published, and even then, only at the sufferance of the editors of the law journals.<sup>1</sup> (Imagine if federal court of appeals judges had to submit their work to the third-year students who edit our journals.) But then, French judicial opinions themselves are rather different from those elsewhere. We are told of a comparative study of three judicial opinions on the same subject from courts in France, Germany, and the United States. The French decision had three hundred words, the German two thousand, and the American majority opinion alone had eight thousand.<sup>2</sup> It is little wonder, however, that French opinions are so brief, for the highest civil court in France decides twenty thousand appeals annually.<sup>3</sup>

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<sup>1</sup> INTERPRETING STATUTES: A COMPARATIVE STUDY 198 (D. Neil MacCormick & Robert S. Summers eds., 1991) [hereinafter MACCORMICK & SUMMERS]. THE SAME IS TRUE FOR GERMAN JUDGES. *Id.* at 105. This reflects the salutary principle of the civil law that law professors are more important than judges. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 80-84 (2d ed. 1985) [hereinafter MERRYMAN] (noting that the traditional civil law model "glorifies the scholar" and "demeans the judge"). Under the civil law, as Merryman puts it, the judge is a "kind of expert clerk." *Id.* at 36. "Judicial service is a bureaucratic career; the judge is a functionary, a civil servant; the judicial function is narrow, mechanical and uncreative." *Id.* at 38. In contrast, the "legal scholar is the great man of the civil law." *Id.* at 60.

<sup>2</sup> MACCORMICK & SUMMERS, *supra* note 1, at 172.

<sup>3</sup> *Id.* at 209. This is an impressive number, even taking into account the fact that this court has two hundred judges. *Id.* at 489.

Besides brevity, the French judge has other constraints to worry about. In France, a judge who refuses to decide a case because the law is silent or obscure is subject to criminal prosecution.<sup>4</sup> Stringent constraints on opinion writing are not unknown elsewhere. In Italy, a statute forbids judges to cite law professors.<sup>5</sup> In Scotland, however, it is apparently permissible to cite the work of academics, but only if they are dead—though it is apparently considered good form to plagiarize the work of living scholars.<sup>6</sup> And so on, with each country from Finland to Argentina having some charming quirk of its own.

Another pleasure of travel is the discovery of unexpected familiarities—things that one had thought were distinctively American but turn out to be international. Such, for example, is the “absurdity” rule, which traces its roots in American law to the famous *Holy Trinity* case.<sup>7</sup> This rule allows a court to avoid the literal meaning of a statute in order to avoid a bizarre result. It turns out that this rule is a staple of statutory interpretation everywhere.<sup>8</sup> The leading French case is particularly droll, involving a statute that, if read literally, would have prohibited passengers from getting on or off of a train except when it was moving.<sup>9</sup> Thus, in France as in America, the court must inquire further into the intention of the legislature when a literal meaning would produce a nonsensical result.<sup>10</sup>

Like the serious traveler, however, the comparativist has more in mind than merely collecting anecdotes about the peculiar ways of foreigners, or even about their surprising similarities to the folks at home. The comparative study of law may reveal patterns that transcend any individual legal system. It may also highlight the peculiarities of particular legal systems, reveal intriguing alternatives to familiar legal rules, or present novel approaches to jurisprudential issues. Motivated by these more serious concerns, an international group of

<sup>4</sup> *Id.* at 174.

<sup>5</sup> *Id.* at 229.

<sup>6</sup> *Id.* at 379.

<sup>7</sup> *Rector, Holy Trinity Church v. United States*, 143 U.S. 457 (1892). The issue in *Holy Trinity* was whether a nineteenth-century immigration law, meant to prevent employers from paying manual workers to enter the country, should be applied to an Episcopal church that had hired a minister from England.

<sup>8</sup> MACCORMICK & SUMMERS, *supra* note 1, at 485. The authors note that while the rule is almost universal, its form differs between countries:

[The absurdity] argument is recognized in virtually every system in our study, though not always in the same form. It is sometimes formulated in the UK in terms of a presumption to the effect that the legislature does not intend absurd or manifestly unjust outcomes. In Germany and in Italy such an argument is typically constitutionalized, and thus formulated as an argument that invalidates the absurd or manifestly unjust result.

*Id.*

<sup>9</sup> *Id.* at 192.

<sup>10</sup> *Id.* at 196.

scholars led by Robert Summers worked for nearly a decade on a comparative study of statutory interpretation in nine countries.<sup>11</sup> The result is a five hundred-page study that provides a wealth of information about the legal systems and interpretative methods of those countries.

Like most of American legal scholarship, the rapidly growing literature on statutory interpretation has been quite parochial. This book provides an important and long overdue international perspective on the fervent American debate about methods of statutory interpretation. Part I of this review will provide an overview of the MacCormick and Summers book. Besides examining the general findings of *Interpreting Statutes*, Part I explores the book's treatment of some particularly interesting interpretive methods used by German courts. Part II focuses on the recent revival of formalism by American judges such as Antonin Scalia and Frank Easterbrook. International experience with similar ideas, as recounted in this book and elsewhere, is quite revealing about the potential pitfalls of this approach. In particular, the strenuous efforts of French law to implement a thorough-going formalism have turned out to be remarkably unsuccessful in limiting the creative, policy-making activities of judges.

## I

### STATUTORY INTERPRETATION AROUND THE WORLD

#### A. General Findings

*Interpreting Statutes* begins with a brief discussion of the goals and methods used by the authors. While much comparative work consists of explication and comparison of the substantive rules of various legal systems,<sup>12</sup> the authors opted for a different approach. Rather than laying out whatever rules of interpretation are used in the nine countries studied, they investigated the forms of argument deployed in statutory cases in those countries. They catalogued the interpretative claims that are considered legitimate in various legal systems, those that are not only legitimate but mandatory, and those that are considered illegitimate. In addition, the authors made some effort to consider the ways in which various types of justifications can counter one another, whether by means of some trumping order or a balancing

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<sup>11</sup> This group began life as the Comparative Statutory Interpretation Group and was later called the Bielefelder Kreis. It met for the first time in 1983 and concluded its work in 1990. In addition to the editors, contributors include Aulis Aarnio (Finland), Robert Alexy (Germany), Zenon Bankowski (Britain), Gunnar Bergholz (Sweden), Ralf Dreier (Germany), Christophe Grzegorzczak (France), Massimo La Torre (Italy), Enrico Pattaro (Italy), Aleksander Peczenik (Sweden), Michele Taruffo (Italy), Michel Troper (France), Jerzy Wróblewski (Poland), and Enrique Zuleta-Puceiro (Argentina). *Id.* at xi-xii.

<sup>12</sup> This approach seems less likely to be fruitful in exploring differences in judicial methodology than in exploring different substantive regimes on matters such as torts or contracts or criminal procedure.

test.<sup>13</sup> In order to provide a common basis for comparison, they agreed on a detailed questionnaire to be used by each author as the framework for analyzing individual countries.<sup>14</sup>

The goal of the study, in short, is an understanding of the structure of justificatory arguments used in interpreting statutes. Linguists have used this kind of structural investigation with great success.<sup>15</sup> Literary critics and anthropologists such as Lévi-Strauss have also used this method fruitfully.<sup>16</sup> The effort to apply structural methods to comparative law is certainly worthwhile.

The overall results of the study are illuminating. One such result is that a common core of eleven arguments is used in all of the legal systems under study. For example, every legal system recognizes the importance of ordinary meaning, the significance of precedent, the relevance of evolving understandings of statutory purposes, and the need to put a particular provision into its statutory context.<sup>17</sup> At one level, the universality of these arguments may seem trite: what method of statutory interpretation would view the ordinary meaning of words as completely irrelevant?<sup>18</sup>

The existence of this common core of arguments seems significant, however, for two reasons. First, it is an indication that all of these legal systems are engaged in a common venture—that there really is some similar activity called statutory interpretation that is taking place in all of these systems. It is certainly imaginable that a legal system would have legislative rules and courts, but that the way courts use those rules would differ in some radical way from what we call

<sup>13</sup> MACCORMICK & SUMMERS, *supra* note 1, at 26-27.

<sup>14</sup> The questionnaire is found in the Appendix. *Id.* at 545-51. For example, question six asks about "general and systematic ways" in which conflicts between different types of arguments are resolved:

What patterns, if any, are there here? In choosing between conflicting arguments, do the highest courts commonly give primary emphasis to what they assume to be the *literal or ordinary meaning* of words in the statute? Or to '*contextual meaning*' (if this is different)? Or to fulfilling the *intention* of the legislator? (If so, in what sense?) Or to fulfilling the *reasonable sense* of the statute in light of its *purpose*?

Question six then goes on to inquire about priority and weighing rules used by courts. *Id.* at 546.

<sup>15</sup> See generally STEVEN PINKER, *THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE* (1994).

<sup>16</sup> See, e.g., CLAUDE LÉVI STRAUSS, *STRUCTURAL ANTHROPOLOGY* (Claire Jacobson & Brooke G. Schoepf trans., 1963). For background on structuralism, see TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 94-100 (1983).

<sup>17</sup> MACCORMICK & SUMMERS, *supra* note 1, at 512-25.

<sup>18</sup> See Edward Rubin, *Book Review*, 41 AM. J. COMP. L. 128, 139 (1993) (reviewing D. MacCormick & R. Summers, *Interpreting Statutes*) (noting that this list of similarities is only what one would "naturally expect").

statutory interpretation.<sup>19</sup> At least in the Western legal systems discussed in this book, however, this does not seem to be the case.

Second, at least some of the eleven arguments are less obviously legitimate than the argument from ordinary meaning. For example, the authors call the eighth form of argument "historical." It derives its force "from the fact that, as a matter of historical evolution, the statute has come to stand for something rather different from what its language facially indicates or its original design indicates."<sup>20</sup> It is certainly possible to imagine a legal system that was steadfastly originalist and simply refused to recognize such statutory evolution as legitimate. Indeed, as we will see in Part II, staunch advocates for such an approach can be found in the United States today. It is noteworthy that no Western-type legal system has embraced this pure form of originalism in practice.

Besides cataloguing these "universal" interpretative arguments, the authors also devote some attention to the relationships between these arguments. What happens when different types of arguments conflict? If there were a Restatement of International Statutory Interpretation, the main rule would be that the ordinary meaning of the statutory language (or in appropriate cases, the technical meaning of the word) prevails except under special circumstances.<sup>21</sup> This would, of course, have to be followed by pages of discussion of what constitutes "special circumstances." "In all the systems studied here, the linguistic aspect of interpretative justification has greatest prominence in the sense of nearly always coming first in order of consideration. Linguistic arguments are everywhere regarded as having extremely strong *prima facie* force in justification."<sup>22</sup> Again, this is not a startling result, but it confirms the commonality of the task of interpretation in different legal systems.

Although the authors do not express it in quite the same terms, this commonality of interpretative rules could also be taken as support for Lon Fuller's idea of an inner morality of law. Fuller's view was that the very idea of a legal system implied certain ethical commitments, which are "thin" in the sense of allowing very wide variation in terms of substantive values, but still require judges to adhere to certain moral values.<sup>23</sup> Although they do not link their discussion with Fuller's, the authors are not shy in telling us that the forms of interpretative argument have ethical roots:

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<sup>19</sup> It would not be utterly astonishing if this were true in countries on the periphery of Western Europe, such as Finland and Poland, which might be expected to diverge in some respects from standard European legal culture.

<sup>20</sup> MACCORMICK & SUMMERS, *supra* note 1, at 469.

<sup>21</sup> *Id.* at 481.

<sup>22</sup> *Id.* at 533.

<sup>23</sup> See LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

Statutory interpretation is often treated by lawyers, and all the more by philosophers of law, as a forbiddingly dry and purely formal subject. The error in this view is now plain. Interpretation is through and through a matter implicating fundamental values of the law. It can be well done only by those who study to achieve a reflective and balanced overall conception of the full set of intersubjectively acknowledged values of the law.<sup>24</sup>

It follows, then, that if a solid core of shared rules of interpretation exists, a common core of interpretative values must also exist.

As interesting as the commonalities of different legal systems are, their differences are equally interesting. One of the key disagreements between legal systems regards the possibility of overcoming clear language with legislative history. Jurisdictions seem to be evenly split about whether the "plain" meaning can be overridden by especially strong evidence of actual legislative intent.<sup>25</sup> Surprisingly enough, the fault line does not correspond with the division between the common-law and civil-law traditions.<sup>26</sup> Another noteworthy division relates to deference to administrative agencies in matters of statutory construction. Courts in France and the United States, which in other respects are very different in their approaches to statutory interpretation, both show great deference to an agency's interpretation of its own statute. Britain gives less deference to agencies, and Italy and a number of other countries give them no deference at all.<sup>27</sup>

## B. Particular Approaches to Interpretation: The Case of Germany

All of this is of some interest, but the reader might well be forgiven for wondering whether it is really necessary to wade through the preceding 459 pages of the book before getting to these conclusions. Read consecutively, the individual country studies may tend to blur into a confusing mass. However, they contain a great deal of interesting information about individual countries, which is well deserving of further attention from American scholars. The individual country studies thus provide a wealth of information about the rich array of approaches to statutory interpretation. One considerable virtue of

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<sup>24</sup> MACCORMICK & SUMMERS, *supra* note 1, at 538. The authors make it clear in the preceding paragraph and elsewhere that they are speaking even of relatively noncontroversial methods of interpretation such as ordinary meaning. *Id.* at 533-34.

<sup>25</sup> *Id.* at 484.

<sup>26</sup> *Id.* In general, divisions about statutory interpretation do not seem to fall along the common law/civil law divide. "Thus some largely civil law systems such as Sweden and Argentina appear to be more similar in matters of interpretation to the so-called common law systems than to Continental systems." *Id.* at 508.

<sup>27</sup> *Id.* at 473. One might venture to guess that some of these differences may relate to disparate perceptions of the general level of performance of civil servants (and of their political supervisors) in these countries.

these individual studies is that they provide a taste of different jurisprudential possibilities—approaches to interpretation that differ in intriguing ways from our own.

Perhaps the most interesting of these contrasting approaches is the German. Contemporary German law, like the law of the United States, has a strong constitutional order, vigorously enforced through judicial review. Courts in both countries are explicit about applying societal values in statutory interpretation, but the two legal systems have intriguing differences as well as similarities.

Germany is, of course, a civil-law country. Many American readers will understand this to mean that precedent plays no role in German law, for the doctrine of *stare decisis* is often taken to be the critical distinction between the common law and the civil codes. In reality, however, precedent is quite important in German law (and in other civil law countries, for that matter). A German lawyer who fails to cite governing precedents faces liability for malpractice.<sup>28</sup> There is nevertheless an important difference between the German and American attitudes toward precedent. Protection of reliance interests is central to our idea of *stare decisis*. But while giving weight to precedent, the Germans have made a conscious decision to ignore reliance on prior decisions as a factor in determining whether to overrule prior law:

As we saw, *precedents* . . . do not have the status of a formal source of law. Precedents do, however, play an outstanding role in justifying judicial decisions. This is expressed in that whoever wishes to depart from a precedent carries the burden of argument. This burden of argument does not prevent a line of decisions from being changed only because the citizens trusted in its continuance: "This would result in the courts' being bound to a certain jurisdiction once established, even if it could not really be kept up on account of new insights or a change in social, political or economic conditions."<sup>29</sup>

The openness of German courts toward evolutionary or evolutionary interpretation is also found when the statute invokes a social norm that has changed over time, such as norms about improper sexual behavior. The well-established rule is that the court should apply the contemporary norm, rather than the one in existence at the time the statute was passed.<sup>30</sup>

A critical question is when to depart from the ordinary meaning of the statute. The general idea seems to be that the judge is bound by the law generally rather than by a particular statute, so that the

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<sup>28</sup> *Id.* at 90.

<sup>29</sup> *Id.* at 97 (cross-references and citations omitted).

<sup>30</sup> *Id.* at 84.



general imperatives of the legal system may come into play when interpreting a particular statute:

The judge does not, however, have to stop at the wording of a norm. His being bound by the law does not mean being bound to its letter with the coercion to interpret literally, but being bound to [the] sense and purpose of the law. The interpretation is the method and way by which the judge inquires into the content of a statute, considering its placement within the whole legal order, without being restricted by the formal wording.<sup>31</sup>

It is this holistic method of legal interpretation that seems most distinctively German and most intriguingly different from our own. Particularly interesting is the way that constitutional values enter into statutory interpretation under the German holistic system.

The German Federal Constitutional Court's so called *Soraya* decision illustrates the holistic approach.<sup>32</sup> The case involved the publication of what purported to be an interview with Princess Soraya; actually, the interview was entirely fictional.<sup>33</sup> She recovered damages despite a statute that appeared to exclude damages for non-material injuries (with certain inapplicable exceptions).<sup>34</sup> The court considered privacy to be a value immanent in the constitution,<sup>35</sup> and applied this value to justify an exception from the literal meaning of the Code provision.<sup>36</sup> The court's general thoughts about the jurisprudential aspects of the case are particularly interesting:

The law is not identical with the whole of the written statutes. Over and above the positive enactments of the state power there can be 'ein Mehr an Recht' (a surplus of law) which has its source in the constitutional legal order as a holistic unity of meaning, and which can operate as a corrective to the written law; to find it and to deliver it in decisions is the task of adjudication. . . . The task of adjudication can demand especially that evaluative assumptions which are immanent in the constitutional legal order, but are not, or are only incompletely, expressed in the texts of the written statutes, be elucidated and realized in decisions by an act of evaluative cognition which, admittedly, does not lack volitional elements. In this, the judge must avoid arbitrariness; his decision must be based on rational argumentation. It must be understood that the written statute fails to fulfil its function of providing a just solution for a legal

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<sup>31</sup> *Id.* at 94 (quoting the German Federal Constitutional Court; citations omitted); *see also id.* at 96 on the need for the exercise of judgment in determining the limits of judicial creativity in interpretation.

<sup>32</sup> *Id.* at 80 (citing judgment of February 2, 1973, 34 BVerfG, 269, 287 (F.R.G.) [hereinafter *Soraya*]).

<sup>33</sup> *Id.* at 80.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 98

<sup>36</sup> The Code section at issue in the *Soraya* case was s.253 BGB (Civil Code). *Id.* at 80.

problem. The judicial decision then fills this gap according to the standards of practical reason and the 'community's well-founded general ideas of justice.'<sup>37</sup>

The judiciary's understanding of the "general idea of justice" is in turn shaped by the constitution, as the constitutional court has explained. According to the court, rather than being value neutral, the German constitution establishes "an objective order of values" which is centered on "the human personality freely unfolding itself within the social community, and in human dignity."<sup>38</sup> All provisions of the civil law must be interpreted in the spirit of these norms.

This strong desire for coherence is exemplified by a decision relating to government searches, which construed the word "dwelling" to include a professional office. That interpretation, the court said,

fits sensibly with the principles the Federal Constitutional Court has developed for the interpretation of the basic right of the freedom of profession. If in that case professional work is seen as an essential element of the development of personality, and if it is therefore granted, within the frame of the single human being's individual conduct of life, an especially high rank, it is coherent to guarantee a correspondingly efficient protection of the spatial range in which the work is primarily conducted.<sup>39</sup>

To American eyes, this might seem to be a rather free-wheeling method of interpretation. Yet it apparently thrives in a highly structured and professionalized legal system, and in a society which has, at times, viewed "following orders" as the highest social norm.<sup>40</sup> Of course, the materials presented here do not even begin to make a case for imitating this approach. Perhaps a fuller appreciation of German law would seriously modify this account of the holistic technique, or perhaps the holistic technique works poorly even in Germany, or perhaps it works only because of distinctive features of German society or legal culture. On the other hand, perhaps there is something here of use to Americans. In any event, the materials on German law, like the other studies of individual legal systems in *Interpreting Statutes*, cannot

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<sup>37</sup> *Id.* at 80 (quoting *Soraya*, at 287). This decision is apparently considered controversial, and should not be taken as an indication that German courts freely rewrite statutes. In particular, a much more restrained approach is taken with respect to criminal statutes. *Id.* at 80-81.

<sup>38</sup> *Id.* at 112 (citations omitted).

<sup>39</sup> *Id.* at 88 (citations omitted).

<sup>40</sup> For a discussion of the aspirations of German-influenced civil law to rigorous systemization, see MERRYMAN, *supra* note 1, at 61-62. On the general creativity of the German judiciary, see B.S. Markesinis, *Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court*, 34 AM. J. COMP. L. 349 (1986) (emphasizing tort law and privacy law); John Dawson, *The General Clauses, Viewed from a Distance*, 29 RABELS ZEITSCHRIFT 441 (1987), reprinted in MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 251 (2d ed. 1994).

help but expand the imaginative space open to us when we contemplate our own legal system.

## II

### A COMPARATIVE PERSPECTIVE ON THE NEW FORMALISM

Comparative research may be helpful in more immediate ways to American legal scholars. Presently, a spirited attack is being made on conventional approaches to statutory interpretation by advocates of formalism. These advocates, led by Antonin Scalia and Frank Easterbrook, have called for a purely textualist approach, which would focus on plain meaning rather than legislative intent. Examining the experience of courts in other countries can provide a fresh perspective on the debate over their proposals. After briefly sketching the views of the new formalists and their critics, this Part will consider the insights available from the materials that MacCormick and Summers have assembled.

#### A. An Introduction to the New Formalism

The conventional approach to statutory interpretation has involved an eclectic mix of reliance on text, statutory purpose, public policy, and legislative history.<sup>41</sup> In the 1980s, formalists mounted a challenge to this conventional approach in favor of a much more constrained method of statutory interpretation.<sup>42</sup> As William Eskridge explains, “[f]ormalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened.”<sup>43</sup> Formalists stress that the proper forum for policy making in a legislative society is the legislature. The role of judges is to apply statutes as they are written, without regard to concepts such as statutory purpose or legislative intent, and without attempting to adapt statutes to changing times. “Laws are designed to bind, to perpetuate a solution devised by the enacting legislature, and do not change unless the legislature affirmatively enacts something new. . . . Law does not change in meaning as the political culture changes.”<sup>44</sup> There are several corollaries to this formalist thesis.

First, according to formalists, legislative history should not be consulted. To begin with, the legislative history is irrelevant because “the law” consists of the statutes Congress passed, not the ideas in the

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<sup>41</sup> For a fuller discussion, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

<sup>42</sup> See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994).

<sup>43</sup> William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 646 (1990).

<sup>44</sup> Easterbrook, *supra* note 42, at 69.

minds of the legislators.<sup>45</sup> Moreover, consulting legislative history weakens the separation of powers because the President can veto only the language of the bill, not the unwritten intentions of its supporters.<sup>46</sup> Furthermore, allowing the use of legislative history simply empowers judges to enact their own policy choices at the expense of the statutory language<sup>47</sup> and licenses individual legislators and their staffs to make law without obtaining the full support of their colleagues.<sup>48</sup>

Second, formalists maintain that the ideas of legislative purpose and legislative intent are incoherent. A legislature is a collective body whose members are often in disagreement and have no coherent set of preferences. Legislation is often a compromise between opposing interests, whose only purpose is to strike a deal. "Legislation is compromise. Compromises have no spirit; they just are."<sup>49</sup> Hence, when the legislature has failed to speak clearly to an issue, it is pointless for a court to try to fill the gap. When a court reaches the limits of a statute's clear instructions, the only solution is to put the statute aside and admit that it provides no basis for ruling.<sup>50</sup> As Judge Easterbrook puts it:

*Hard questions have no right answers.* Let us not pretend that texts answer every question. Instead we must admit that there are gaps in statutes, as in the law in general. When the text has no answer, a court should not put one there on the basis of legislative reports or moral philosophy—or economics! Instead the interpreter should go to some other source of rules, including administrative agencies, common law, and private decision.<sup>51</sup>

According to formalists, refusing to stretch statutory language or fill gaps has another major advantage. Knowing that courts will follow only their plain language, legislators will have an incentive to draft carefully and precisely.<sup>52</sup> Thus, by adopting formalism, courts help

<sup>45</sup> *Id.* at 65-66.

<sup>46</sup> See *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment) (noting that legislative history is a poor substitute for bicameralism and presentment); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 404-05 (1992).

<sup>47</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (arguing that courts should not look to legislative history when the language of a statute is clear); Kenneth N. Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 376 (Allowing courts to use legislative history "introduces the voice of the federal courts—the nonpolitical branch—into the political process.").

<sup>48</sup> Slawson, *supra* note 46, at 397-98.

<sup>49</sup> Easterbrook, *supra* note 42, at 68.

<sup>50</sup> Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 944-45 (1983).

<sup>51</sup> Easterbrook, *supra* note 42, at 68.

<sup>52</sup> See Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1022 (1992).

foster the democratic process.<sup>53</sup> If Congress dislikes the results, it is always free to legislate again.

What this adds up to is, as Judge Easterbrook puts it, a "relatively unimaginative, mechanical process of interpretation,"<sup>54</sup> offered in the name of upholding the legislature's monopoly on policy making. Only this mechanical approach "can be reconciled with the premises of democratic governance."<sup>55</sup> This approach is also consistent with the essence of the judicial function, which should be governed by "the lines of logical and analytical categories," operating under clear rules rather than fuzzy principles.<sup>56</sup> For the judge, then, logic and consistency are the very foundation of law.<sup>57</sup>

Not surprisingly, the arguments of these formalists have been subject to a barrage of attacks by defenders of more flexible methods of statutory interpretation.<sup>58</sup> These critics have attacked virtually every premise of the formalist theory. Perhaps more significantly, even critics who sympathize with formalist goals have initiated an attack on the implementation of the formalist program by judges. One critic has charged that courts have "begun to use textualist methods of construction that routinely allow them to attribute 'plain meaning' to statutory language that most observers would characterize as ambiguous or internally inconsistent, and even to attribute 'plain meaning' to language that 'was nearly universally believed to have a contrary meaning for many decades.'"<sup>59</sup> Others describe the new formalism as increasing the tension between democracy and the rule of law and serving "as a cover for the injection of conservative values into statutes."<sup>60</sup> Room for doubt exists, then, whether the new formalism is living up to the promises of its advocates.

Can faithful reliance on statutory language take the courts out of the business of policymaking? Is reliance on legislative intent inconsistent with the proper functioning of a democracy? In short, can formalism hold courts and legislatures in their proper spheres within the

<sup>53</sup> *United States v. Taylor*, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part).

<sup>54</sup> Easterbrook, *Text and History*, *supra* note 42, at 67.

<sup>55</sup> *Id.* at 63.

<sup>56</sup> See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 593 (1989/1990); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

<sup>57</sup> Scalia, *Assorted Canards*, *supra* note 56, at 588, 590.

<sup>58</sup> For some recent examples, see James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 40-66 (1994); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law*, 45 VAND. L. REV. 533, 550-54 (1992); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 825-31 (1994).

<sup>59</sup> Richard J. Pierce, *Hypertextualism*, 95 COLUM. L. REV. 749, 752 (1995).

<sup>60</sup> William N. Eskridge, Jr. & Philip Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994).

separation of powers? As we will see, a comparative perspective on these questions may be illuminating.

## B. A Comparative Perspective on Formalism

Formalism may be a novelty in the late-twentieth century American context, but it has long been known in Europe. Partly in a response to perceived excesses by pre-Revolutionary judges, the French Revolution embraced a highly formalist view of judging:

The first concern of the Revolution was to limit the role of the courts to a judicial function, understood in the strictest manner. Members of the constitutional assembly repeatedly referred to Montesquieu, who had written that judicial power is null and that the judge is no more than the mouth of the law. In effect, the conception of the judicial function during the French Revolution was that it consisted in expressing syllogisms, the major premiss being the statute, the minor the facts and the conclusion the decision itself. Since the statute is the expression of the general will and the facts are objective, the only role for the judge is to draw an automatic conclusion.<sup>61</sup>

This view of the judiciary rested on a strict vision of the separation of powers. Some writers argued that judges should be denied even the power to interpret laws. For "if a judge were allowed to decide what meaning to give to an ambiguous provision or an obscure statement, he would again be making law."<sup>62</sup> Instead, courts should refer any interpretative issues to the legislature for clarification.<sup>63</sup> Accordingly, "French judges thus purport to leave law-making entirely to the legislature, on the ground that the legislature is the democratically elected organ of the people."<sup>64</sup>

Even today, this view of the judicial role shapes the image of the judge in the civil-law tradition. It is not uncommon to find judicial decisions that consist entirely of a recitation that a certain conclusion "emerges from the text itself."<sup>65</sup> Because of the syllogistic form of the opinions, competing considerations are rarely considered. Instead, the courts authoritatively announce the only logically possible conclusion, even in cases that everyone knows are difficult.<sup>66</sup> In contrast to common-law countries, judges in the civil law world are considered glorified bureaucrats, whose function is merely "to find the right legislative provision, couple it with the fact situation, and bless the solution

<sup>61</sup> MACCORMICK & SUMMERS, *supra* note 1, at 203.

<sup>62</sup> MERRYMAN, *supra* note 1, at 29.

<sup>63</sup> *Id.* at 39-40.

<sup>64</sup> MACCORMICK & SUMMERS, *supra* note 1, at 503.

<sup>65</sup> *Id.* at 182 (citation omitted). Commonly, French courts claim not to engage in interpretation at all; rather, the answer "springs obviously from" the text. *Id.* at 190.

<sup>66</sup> *Id.* at 497.

that is more or less automatically produced from the union."<sup>67</sup> Unless the judge is poorly trained and "doesn't know how to follow clear instructions," or the statute is misdrafted, there should be no hard cases.<sup>68</sup>

In reality, of course, things have been far different. The idea that properly drafted legislation contains no gaps or uncertainties has been among the first to go. Following French ideas to their logical conclusion, Frederick the Great promulgated a civil code with 16,000 articles. Judges were forbidden to interpret the code; any doubtful cases were to be referred to a special statutory commission. The whole project was a dismal failure.<sup>69</sup> Despite legislative efforts to provide clear solutions to all possible problems, legislative practice in Code countries "falls far short of this objective,"<sup>70</sup> and as a result, judges continually find themselves confronted with situations in which they must make new law.

As it happened, the French Code was adopted just before the industrial revolution came to France. Courts immediately found themselves confronting a host of problems that had not been anticipated by the drafters. In response, the courts invented much of the modern French law of torts.<sup>71</sup> They were also forced to invent the law of insurance despite a statute that, if read literally, would have made the insurance business illegal.<sup>72</sup> Sometimes acting contrary to the language of statutes, these allegedly formalist French judges have essentially amended statutes to deal with changed circumstances.<sup>73</sup> According to one recent commentator,

[V]irtually all of French tort law is based on judicial decisions and academic writing. Courts also have made significant contributions to the development of private law on unjust enrichment, specific performance of contractual obligations, and many other aspects of the law of contracts. Indeed, "it would be hard to find a single article of the Civil Code to which there have not been added depths of meaning and major restrictions and extensions that could not have been foreseen in 1804."<sup>74</sup>

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<sup>67</sup> MERRYMAN, *supra* note 1, at 36.

<sup>68</sup> *Id.* at 81.

<sup>69</sup> *Id.* at 39.

<sup>70</sup> *Id.* at 83.

<sup>71</sup> *Id.* According to Merryman, the French "code provisions are so rudimentary and so empty of substance that judges have had to create the applicable law on a case-by-case basis." *Id.* at 153.

<sup>72</sup> MACCORMICK & SUMMERS, *supra* note 1, at 173.

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

<sup>74</sup> Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 99-100 (1994) (quoting JOHN P. DAWSON, *THE ORACLES OF THE LAW* 401 (1968)). Because of its origins within the executive branch, the Conseil d'Etat may have felt fewer scruples than an ordinary French court about making new law. By thinking of themselves as administrators

Relations between the citizen and the state, governed in the United States mainly by constitutional and statutory law, are governed in France primarily by subconstitutional administrative law. Most of this law is made by the Conseil d'Etat, a court that evolved out of the bureaucracy in the early nineteenth century. This body of law began as and has largely remained a product of judicial invention, no more based on statute than is English or American common law.<sup>75</sup>

Compensation for governmental takings provides a striking example of this phenomenon. In a well-known case, the French legislature had banned the manufacture of certain dairy products. "Interpreting" this statute, the court held that the manufacturer was entitled to compensation from the government. The basis for this interpretation was that the statute was silent on the issue:

"Nothing, either in the very text of the statute or in the [legislative history] or in the general circumstances of the case, can support the idea that the lawgiver has intended to place on the plaintiff a burden which normally is not incumbent on him; this burden, established for the general interest, ought to be borne by the community."<sup>76</sup>

Thus, the court meekly deferred to this silent legislative mandate, thereby creating out of whole cloth a right American law locates in the text of the Constitution.

If the French experience is any guide, formalism may be an admirable ambition, but its vision of the judicial role is at best quixotic.<sup>77</sup> Despite centuries of indoctrination in formalist ideology, the French courts seem to have been unable to live up to formalist aspirations, and judicial candor has been sacrificed. One price of the formalist ideology is a certain judicial hypocrisy. Everyone knows that French judges rely on policy considerations, but these considerations never make any appearance in published opinions, which instead rely on uninformative syllogisms.<sup>78</sup>

If nothing else, this comparative exercise suggests the need for a certain degree of skepticism about the claims of formalists. Comparative studies also raise questions about the formalist attack on the use of legislative history in statutory interpretation. As *Interpreting Statutes*

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rather than simply judges, the members of the Conseil d'Etat may have reduced the cognitive dissonance caused by their activism.

<sup>75</sup> *Id.*

<sup>76</sup> MACCORMICK & SUMMERS, *supra* note 1, at 192; see also *id.* at 205-06 (providing further discussion of the holding).

<sup>77</sup> As Merryman puts it, the French experience "confirms the folly and futility of attempting to restrict judges to a non-creative role" in the interests of "judicial restraint." John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865, 1873-78 (1988).

<sup>78</sup> Wells, *supra* note 74, at 116-17.



reports, reference to legislative history is practically universal in statutory interpretation among the legal systems surveyed.<sup>79</sup>

At the time of the comparative study conducted for *Interpreting Statutes*, only Britain was an exception to this rule, and even this deviation was illuminating. First, despite the purported rule prohibiting the use of legislative history, reference to legislative history was not in fact unknown. As one noted jurist said:

I always look at Hansard [the official debates], I always look at the Blue Books [committee reports], I always look at everything I can in order to see what is meant . . . The idea that [the Law Lords] do not read these is quite rubbish.<sup>80</sup>

In addition, there were exceptions to rules allowing the use of certain kinds of legislative history in some circumstances.<sup>81</sup>

Second, the British rule against using legislative history was partly based on a separation of powers argument of a kind, but one having no application to the American system. Recall that American formalists partly object to the use of legislative history because the executive cannot exercise the veto power over legislative history; hence, using the legislative history allows the courts to redistribute power from the executive branch to the legislative. The concern in Britain was the opposite: "Since most legislation is promoted by the government, it is a check on excessive executive power to insist that the law be found in Acts as enacted, not as supplemented by ministerial statements in parliament during the passage of a bill."<sup>82</sup>

In any event, Britain has now joined the consensus in favor of consulting legislative history.<sup>83</sup> As a result, it appears that all major democratic legal systems allow consultation of legislative history under certain circumstances. Indeed, some go farther than we do. In Sweden, for example, it has been said that the statutory text serves mostly as a kind of headline summarizing the main points of the legislative history.<sup>84</sup> There are, of course, disputes in the U.S. and elsewhere about when resort to legislative history is appropriate, and how much

<sup>79</sup> MACCORMICK & SUMMERS, *supra* note 1, at 470, 475-76.

<sup>80</sup> *Id.* at 381.

<sup>81</sup> *Id.* at 381; see also F.A.R. BENNION, *STATUTORY INTERPRETATION* 455-59 (2d ed. 1992).

<sup>82</sup> MACCORMICK & SUMMERS, *supra* note 1, at 381. This argument obviously has no application in the American context of non-parliamentary government. For a discussion of the exceptional power the British executive enjoys under the parliamentary system, see Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 723-24 (1993).

<sup>83</sup> *Pepper v. Hart*, [1993] 1 All E.R. 42, [1992] 3 W.L.R. 1032. For a discussion of *Pepper* and its ramifications, see Gordon Bale, *Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process*, 74 CAN. BAR REV. 1 (1995).

<sup>84</sup> MACCORMICK & SUMMERS, *supra* note 1, at 325-26; see also *id.* at 355 (noting that Swedish courts may rely more on legislative history than anyone else in the world).

weight it should be given. But international experience—even in countries whose basic jurisprudential orientation is highly formalistic—seems to provide no support to the new American formalists in their frontal attack on the legitimacy of legislative history. Like American formalists, their counterparts elsewhere have espoused a strict view of the separation of powers, under which courts play no role in creating public policy. In practice, however, this vision of the judicial role has proved quixotic.

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As we have seen, comparative research has the potential to illuminate issues of statutory interpretation. In Part I, we saw that comparativists have discovered intriguing similarities, as well as interesting differences, among contemporary legal systems. Some of these, such as the German system, appear to differ from our own in ways that may challenge us to rethink some of our tacit assumptions. In Part II, we have seen how a study of other legal systems can illuminate the formidable new theories propounded by formalists such as Scalia and Easterbrook. International experience with attempts to limit judicial power to interpret statutes using legislative history raises serious questions about the realistic prospects for the formalist vision of statutory interpretation.

The full implications of comparative research for theories of statutory interpretation are undoubtedly yet to be explored. Unfortunately, there has been little dialogue between serious scholars of interpretation theory and well-grounded experts in comparative law so far. But even the preliminary findings of comparativists are rich with potential for informing our normative debates about statutory interpretation.

The past two decades have seen the emergence of a new and vibrant literature by American legal scholars on statutory interpretation. The horizons of those scholars have been limited, however, to the law as developed by the American courts, and specifically the Supreme Court. *Interpreting Statutes* presents an exciting expansion of those horizons. We can only hope that further comparative research will follow in its wake.