

Book Review

Robert Katzmann, *Judging Statutes*, New York: Oxford University Press, 2014, pp. 184, \$26.95 (cloth)

Reviewed by Peter Strauss

Chief Judge Robert Katzmann has written a compelling short book about statutory interpretation. It could set the framework for a two- or three-hour legislation class, supplemented by cases and other readings of the instructor's choosing. Or it might more simply be used as an independent reading assignment as law school begins, to apprise 21st-century law students just how important the interpretation of statutes will prove to be in the profession they are entering, and how unsettled are the judiciary's means of dealing with them. It should be required reading for all who teach in the field.

After establishing the importance of the skill—do our students appreciate that understanding statutes (and other governing texts) concerns the courts far more often than working out the common law?—Judge Katzmann makes clear his preference to be Congress's faithful agent. He much more often invokes "Congress's meaning in the statutes it enacts" (3) than the fictional "intent," "intention," or "intended meaning" one so frequently finds in discussions of interpretation. He knows, as we do, that a body of 535 very different and variably attentive individuals cannot "intend" as that word is best understood. But the words Congress enacts must have meaning if they are to be law. "Our constitutional system charges Congress, the people's branch of representatives, with enacting laws. So, how Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history, should be respected, lest the integrity of legislation be undermined" (4).

I

An introductory chapter mapping the book makes clear that Judge Katzmann understands the continuing tensions between textualists and purposivists, and that he places himself in the purposivist camp. Does the meaning a judge will ascribe to the words of the text as she chooses to understand them dominate, even in cases in which more than one reading is possible? Or is it appropriate to discern Congress's meaning—that is, the legislation's meaning—by drawing on other indicators, such as legislative

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materials? For him, the answer begins with institutional understanding, with “an appreciation of how Congress actually functions, how Congress signals its meaning, and what Congress expects of those interpreting its laws [F]or the judiciary, understanding that process is essential if it is to construe statutes in a manner faithful to legislative meaning” (8-9). And, later discussion will reveal, no federal appellate judge today has had personal experience as a legislator; only a small handful (significantly including Judge Katzmann) have had significant experience working as legislative staff or as academics directly engaged with the legislative enterprise. The obstacles are considerable, then, to the institutional understanding that is so essential to the productive partnership he seeks.

II

In consequence, the book’s first substantive task is to explore “Congress and the Lawmaking Process,” and to do so in a manner that lays bare its institutional characteristics and their implications. Our students are constantly engaged with the characteristics of judges, their courts, and the judicial system. Should they not be invited as well to explore the institutional characteristics of legislators and legislatures, “the engine of statutes” (12)? If I were to single out twelve pages of this book that every law student should read, it would be the pages of Chapter 2, for their detail and realism about the Congress, their capacity to help students grasp the complexity of legislative processes, the significant time constraints and competing demands within which legislators must act, and the elements of institutional functioning that influence the reliability of some of the signals one can find in the history of successful legislation.

The last of these is the most important. Judge Katzmann draws on the remarkable contributions of Victoria Nourse and Jane Schacter,¹ and then Abbe Gluck and Lisa Bressman,² in describing the realities of the congressional drafting process. Students need to understand how little in this process corresponds to the imaginings of textualist judges. Committees differ in their drafting practices; virtually all drafting is in the hands not of Members, but of committee staff apprised of Members’ policy preferences and professional drafting offices responsible for technical issues; even committee Members, and certainly other Members of Congress, rely much more heavily on committee reports that describe a bill’s policy choices—reports whose honesty about what the bill seeks to achieve is enforced by reputational concerns inherent in the continuing nature of the enterprise—than on often incommunicative text. Judge Katzmann underscores this point by quoting elements of the *Hobby Lobby* legislation that simply recite amendments to existing law; only the report

1. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).
2. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons*, 65 STAN. L. REV. 901 (2013) (Part I) and 66 STAN. L. REV. 725 (2014) (Part II).

could help a member with limited time understand what was being proposed. Gluck and Bressman, as he mentions, reveal other considerations: Drafters are unaware of canons and maxims, particularly most of the clear statement rules the Court has recently articulated; they do not use dictionaries; they do not often seek usage consistency with pre-existing elements of statutes; Members vote on the basis of what they read in committee reports, and especially conference committee reports, and so regard them as essential to understanding their work.

The Supreme Court oral argument in one of the cases Judge Katzmann discusses in the fifth chapter of his book, *Arlington Central School District Board of Education v. Murphy*,³ rather dramatically illustrates a lawyer's and two Justices' indifference to, indeed ignorance of, Congress's institutional practices and their practical implications for Members' understanding of the meaning of their action. The question in the case was whether a statutory phrase authorizing courts to award "reasonable attorneys' fees as part of the costs to the parents or guardian of a youth who is the prevailing party" in seeking proper special education treatment included the costs of the experts the parents or guardians would almost necessarily hire to make their case for that treatment. The legislative history of the statute of which these words were a part reveals significant controversy about many issues, but a uniform, uncontroversial, and repeatedly stated understanding that those costs were to be included. The word "costs," it appeared, was consistently understood in its ordinary meaning, "expenses," and not as a reference to court costs in the term of art sense. The House and Senate enacted bills that differed in a number of respects, including in a minor way the wording of this provision, and so they went to conference. The resulting conference report resolving all controversies, submitted to both chambers and accepted by both, reiterated the understanding that had been put before both chambers in committee reports and debate, and enacted in the bills each voted⁴: "The conferees intend

3. 548 U.S. 291 (2006). Having assisted with and signed the Murphys' brief, Brief of Respondents, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (No. 05-18), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1034&context=scb>, I was present at the argument and heard these questions asked and statements made by Justices in apparent sincerity. All may be found in the transcript of argument, Oral Argument, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (No. 05-18), http://www.oyez.org/cases/2000-2009/2005/2005_05_18 [hereinafter *Murphy* Oral Argument]. My teaching materials on legislation and statutory interpretation—PETER L. STRAUSS, *LEGAL METHODS: UNDERSTANDING AND USING CASES AND STATUTES* (3d ed. 2014)—commit about five hours of class in the final weeks to the historical progression of recent decisions and statutes concerning the reimbursement of attorneys' fees and expert witness fees. For the last of these sessions, for which they will have read *Murphy* after reading and discussing preceding judicial and statutory developments, and about 50 pages from the legislative history of the statute, I simply play the recording of this argument.
4. The House version, as enacted, provided for the award of "reasonable attorneys' fees, expenses, and costs." H.R. 1523 § 615(e)(4)(B), 99th Cong. (1986) (enacted). The Senate version, as initially voted in committee contained an elaborate provision that included "reasonable attorney's fee, reasonable witness fees, and other reasonable expenses." S. 415 § 615(f), 99th Cong. (1985), in S. Rep. No. 99-112, at 6 (1985). A streamlined substitute bill

that the term ‘attorneys’ fees as part of the costs’ include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.”⁵ Under the rules of both House and Senate, conferees are obliged to report compromises (which this was not) and precluded from changing matters not in controversy (as, again, this matter was not). And, under those rules, the vote on receiving a conference report is *not* a vote only on the agreed text it reports; it is a vote to accept the report. Here, then, are the excerpts from the oral arguments in the case:

Mr. [Raymond] Kuntz (for the School Board): [The Conference Report language about reimbursement of expert witnesses] emanates solely from the House conference report.

Justice Scalia: Well, that’s only half of the Congress, isn’t it? . . . So we have a committee of one house . . . that thought it meant that or would have liked it to mean that.

Mr. Kuntz: Yes, Your Honor. . . .

Justice Stevens: How do you explain the title, Joint Explanatory Statement of the Committee of the Conference? Doesn’t that speak for both the House and the Senate?

Mr. Kuntz: It . . . yes, Your Honor, it does.

Chief Justice Roberts: Counsel, sometimes these joint statements are actually voted on by the Congress as a whole. Was this one voted on?

Mr. Kuntz: There was no evidence of that, Your Honor, in our review. . . .

Justice Scalia: They are voted on . . . when the conferees make changes, which they sometimes do. Then . . . of course, they have to be voted on. So it’s . . . frequent that they’re voted on, but this one apparently . . . there were no changes made and it wasn’t voted on . . . [sic]

Mr. [David] Vladeck (for the Murphys): . . . So I think that at least in the conference report, Congress is signaling that if there were other costs that were incurred unreasonably as a result of lawyers protracting or delaying a proceeding, they too would be subject to the same reduction.

that was the matter voted into conference by the Senate spoke generally of “a reasonable attorney’s fee in addition to the costs to a parent . . .” but also included a subsection strongly opposed by the Democratic members of the committee and, as they wished, rejected in conference, that would have limited attorneys’ fees paid to publicly funded organizations, provided that for them the “reasonable attorney’s fee” should be computed on the basis of “actual cost,” computed “including the proportion of the compensation of the attorney so related, other reasonable expenses that can be documented, and the proportion of the annual overhead costs . . . attributable to the number of hours reasonably spent on such civil action.” S. 415 § 615(C)(ii), 99th Cong. (1986).

5. H.R. CONF. REP. NO. 99-687 (1986).

Justice Scalia: And that's effective too, as though it were written into the statute, because one committee of Congress said so

Mr. Vladeck: Well, Your Honor, this is not one committee of Congress. This was . . . the conference report [that] was circulated to all Members of Congress before they voted on the final bill.

Justice Scalia: And . . . and they read it.

Mr. Vladeck: Well, Your Honor, this is the final bill they voted on, and if they turned the page—

Justice Scalia: That's the only thing we know for sure that they voted on.

Mr. Vladeck: . . . The vote was a vote to approve the conference report, which contains . . . three pages of text and three pages of explanation.⁶

If, then, judges imagine themselves as Congress's faithful agents, empowered to act only within the framework legislation establishes, it is hard when ascribing meaning to legislative text (and Judge Katzmman earnestly wishes us to realize it is hard) to discard as misleading or at best useless the materials on which the Congress depends when acting. These materials signal its Members' probable understanding of those words, and hence their probable understanding of the meaning their votes have enacted. Declaring independence of these signals repudiates the faithful servant ideal—no *faithful* servant would insist upon ascribing his own meaning to his mistress's words in the face of clear indications of how she understood them.

Focusing as he does on the Congress-court relationship, however, Judge Katzmman omits attention to a different possibility—that the courts serve, in effect, as the agents of the public that reads statutes, not as agents of the legislature that enacts them. Could treating a statute as a reader's text, not a writer's text—a perspective he does not directly consider—lead one to a world in which ordinary meanings should prevail, whatever Members might have understood the words they were enacting to mean? That is a possibility those interested in these questions will want to consider.

Yet taking this road need not bring your students to the Supreme Court's textualists' door. The "public's agent" judge would seem to have a responsibility to consult the public's probable understanding, not her own, and often that is not the pattern one finds. Although the public's understanding may extend to common linguistic usage canons and a few of the maxims—that a penal statute must give fair warning of its application, for example—it hardly reaches "whole act" canons, and certainly not the "whole code" canons and clear statement maxims courts have elaborated for reasons of their own. The affected public—particularly those well-advised by lawyers—may well know the political history of a statute as well as, if not better than, they know its precise text, and may indeed have sought their own understanding of the law (as nonmembers of

6. *Murphy* Oral Argument, *supra* note 3.

legislative committees do) by consulting the committee reports now available online.

Treating statutes from the public reader's perspective also suggests understanding them as of the time they are read, not as of the time they are written—another perspective Judge Katzmman does not explicitly explore. For a statute that has aged, the public reader may be moved by the contemporary meanings of statutory words, not the usages that may have prevailed at the time of enactment. Its readings will occur in the framework of understandings created by law and other factors in the current day—what the statute has come to mean in intervening years as courts and administrators have encountered and applied it. When a statute passed in 1934 has uniformly been taken to have a particular meaning—one readily associated with common legal approaches—a textualist's exploration how its words would have been understood back then cannot be associated with a "public's agent" approach. The public confronts the law as it is and has become today. The textualist move, in such cases, creates unwelcome surprises unseating contemporary understandings of the law, not a vindication of what the contemporary reader would properly understand it to be.⁷

III

In addressing the relation between Congress and the agencies on which it often relies for the implementation of its work, the third chapter of *Judging Statutes* treats a consideration that comes close to the "public reader" perspective. Agencies are bodies that have a profound incentive to act as faithful agents and have, as well, continuous and intense relationships that permit them much more intimate knowledge of the legislative process as it affects their interests. They are often the drafters of legislative proposals; on any matter affecting their particular responsibilities, they are directly engaged with the responsible committees throughout their processes, staying aware of any changes that may occur. Their incentive is not only intimately to know and closely to follow the legislative process, but also thoroughly to understand the expectations that that process engenders. Because future appropriations, future success in securing desired changes, and the temper of future oversight hearings all may depend on Congress's perception of their faithfulness as agents, they have a continuous incentive universally to honor those expectations when implementing a statute after its passage. To be sure, agencies are themselves public bodies, so that their statutory interpretation might seem an imitation of judicial interpretation. Yet in relation to the courts they are public readers. As readers, Judge Katzmman reasons, their understanding properly departs from the textualist model. And the *Chevron* doctrine, as he remarks, demarcates areas

7. Consider in this respect *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), in which the Court, 5-4, addressing a question not presented in the petition for certiorari, disagreed on the basis of its understanding of original textual meaning with eleven circuits and the SEC on the question whether "aiding and abetting" could be the basis for private enforcement under the Securities Exchange Act of 1934. See Peter L. Strauss, *On Resegregating the Worlds of Statute and Law*, 1994 SUP. CT. REV. 429.

of responsibility within which those readings will prevail. “It is . . . striking that agencies . . . view legislative history as essential reading, but within the judiciary there has been considerable debate as to whether legislative history should be used at all” (28).

Of course, to the extent agencies can anticipate that judicial review of a decision’s interpretation will be driven by simple and perhaps timeless textualism, they will have some incentive to read the statutes for which they are responsible in that way. Yet judicial review is episodic and delayed well past the point of agency decision. It occurs in only a tiny fraction of the occasions when agencies will have to decide the meaning of the statutes they are responsible to administer. Congress, on the other hand, is a constant and immediate presence in their consciousness. And, again, an agency’s knowledge of legislative materials will not be acquired just for the infrequent occasions when their interpretations might be judicially reviewed; it pervades the whole of their actions.

IV

It is only after introducing us to Congress and to agencies, encouraging the reader to appreciate their functioning and the elements in it that contribute to their understanding of legislative meaning, that Judge Katzmman turns in Chapter 4 to “Judicial Interpretation of Statutes.” The structure of the book is in itself an argument for his preferred approach to judging statutes, as the chapter’s opening paragraph acknowledges:

Given my arguments that courts should respect Congress’s work product, it will not surprise you that I find authoritative legislative history useful when I interpret statutes. I start with the premise that the role of the courts is to interpret the law in a way that is faithful to its meaning. The role of the court is not to substitute its judgment or to alter the terms of the statute. Judicial respect for Congress and its lawmaking prerogatives in our constitutional scheme requires no less. For a court, that means using the interpretive materials the legislative branch thinks important to understanding its work. Doing so promotes good government as courts applying such methods are more likely to reach results consistent with legislative meaning. Doing so also facilitates healthy interbranch relations as legislators view courts as seeking to hew to the statute’s meaning as passed by Congress (29).

It is hardly that text is irrelevant; Judge Katzmman acknowledges its constraints. But in assessing whether a statute’s words can have only a single meaning that must then control, assessing purpose can be either reassuring or evidence of the alternative means of understanding that are so often present. Two decisions of the Supreme Court in the previous Term can be used to illustrate the power of such inquiries.

A.

In *Yates v. United States*,⁸ decided just before the oral argument in the second of these cases, *King v. Burwell*,⁹ the question was the meaning to be ascribed to the words “tangible object” that appear in Section 802 of the Sarbanes-Oxley Act of 2002, a 66-page law enacted following the collapse of Enron Corporation. Major accounting scandals involving document alteration and destruction had come to light in the wake of Enron’s collapse. The immediate legislative history of that Act reflects Members’ awareness of these recent events and wish to prevent their recurrence, protect investors, and restore trust in financial markets. Section 802, titled “Criminal penalties for altering documents,” contained two provisions that were made part of the criminal code.¹⁰ One was 18 U.S.C. §1520, “Destruction of corporate audit records.”¹¹ The second, at issue in *Yates*, was 18 U.S.C. § 1519, “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy”:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.¹²

There were indications that the phrase “record, document, or tangible object” had been imported from a provision of the American Law Institute’s 1962 Model Penal Code [MPC], which defined as a misdemeanor the act of anyone who, “believing that an official proceeding or investigation is pending or about to be instituted, alters, destroys, mutilates, conceals, or removes a record, document or thing.”¹³ Comments to the provision said that this proscription should be understood to refer to *all* physical evidence.¹⁴

Yates was captain of a commercial fishing boat; a federal agent, while conducting an offshore inspection of his boat at sea, had found that the ship’s catch contained undersized red grouper, in violation of federal conservation regulations.¹⁵ The officer instructed *Yates* to keep the undersized fish segregated from the rest of the catch until his ship returned to port.¹⁶ After the

8. 135 S. Ct. 1075 (2015).

9. 135 S. Ct. 2480 (2015).

10. *Yates*, 135 S. Ct. at 1085.

11. *Id.* at 1081.

12. 18 U.S.C. § 1519 (2012) (emphasis added).

13. MODEL PENAL CODE § 241.7(1) (AM. LAW INST., Proposed Official Draft 1962).

14. *Id.*, at cmt. 3.

15. *Yates*, 135 S. Ct. at 1076, 1078.

16. *Id.* at 1078.

officer departed, Yates instead told a crew member to throw the undersized fish overboard.¹⁷ For this offense, he was convicted of a violation of §1519, for destroying, concealing, and covering up tangible objects—to wit, undersized fish—to impede a federal investigation.¹⁸

Clearly, in ordinary meaning, a fish is a “tangible object.” Justice Ginsberg, writing for herself, Chief Justice Roberts, and Justices Breyer and Sotomayor, invoked the context of the legislation to limit their reach to “objects one can use to record or preserve information, not all objects in the physical world.”¹⁹ Its title, its placement, discussions in the legislative history, canons counseling using the meaning of a series in which interpreted words appear as an indicator of their proper scope, and the principle of lenity as well—all these suggested a necessary limitation on the meaning “tangible object” should be understood to have, and none pointed at fish. Justice Alito concurred (providing the necessary fifth vote for the result), relying on the textual indicators alone. Justice Kagan wrote a strong dissent for herself and Justices Kennedy, Scalia, and Thomas arguing that “conventional tools of statutory construction all lead to a more conventional result: A ‘tangible object’ is an object that’s tangible.”²⁰ Noting how frequently Congress and state legislatures had used the terms, and always with embracive breadth in view, she finds a broad reading reinforced by legislative history that, viewed from a different angle, “for those who care about it, puts extra icing on a cake already frosted.”²¹ Aware that existing laws penalized those who assisted others by destroying evidence, but not those who did it for themselves—as Captain Yates had done—Congress meant embracively to close a loophole in the law punishing obstruction of justice. As Justice Kagan put it:

I agree with the plurality (really, who does not?) that context matters in interpreting statutes. We do not “construe the meaning of statutory terms in a vacuum.” *Tyler v. Cain*, 533 U.S. 656, 662 (2001). Rather, we interpret particular words “in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). And sometimes that means, as the plurality says, that the dictionary definition of a disputed term cannot control. See, e.g., *Bloate v. United States*, 559 U.S. 196, n.9 (2010). But this is not such an occasion, for here the text and its context point the same way. Stepping back from the words “tangible object” provides only further evidence that Congress said what it meant and meant what it said.²²

17. *Id.*

18. *Id.*

19. *Id.*

20. *Yates*, 135 S. Ct. at 1091 (Kagan, J., dissenting).

21. *Id.* at 1093.

22. *Id.* at 1092.

B.

Justices Kagan and Kennedy joined the Justices of the *Yates* plurality, and Justice Alito joined Justices Scalia and Thomas in dissent, in *King v. Burwell*, a case in which a few perhaps inadvertent words in a statute of enormous length, complexity, and economic significance appeared to threaten the viability of its program. The statute was the highly controversial Affordable Care Act.²³ If generally healthy members of the public elect not to buy health insurance because of its cost, the resulting adverse selection bias (*i.e.*, only persons thinking they will have an immediate need will then purchase it) produces rapidly escalating costs for the insurance, further discouraging the healthy from participation. To combat this effect, the Act sought to require purchase of insurance by all who could afford it—and to make purchases more affordable for lower-income people by establishing a tax credit scheme that would reduce their net cost to the relatively small proportion of their annual income that measured their purchase obligation. To create competitive markets for insurance, the Act invited states to create exchanges of a defined character on which health insurance purchases would be made; and it provided that if any state chose not to create an exchange, the Secretary of Health and Human Services would create a federal exchange within that state for its citizens. The provisions for tax credits state that receiving them depends on enrollment in an insurance plan “through an Exchange established by the State,” and the issue was whether those who enrolled in an insurance plan through a *federal* exchange, in one of the 34 states that had not established a state exchange, could receive the tax credit. If they could not receive it, a much higher proportion of that state’s population would be freed of any obligation to purchase health insurance, because it would be deemed unaffordable in relation to their income under the statute. Then the operation of adverse selection on their choice to insure or not would prompt a “death spiral” of yet higher rates and consequent higher exclusions from the purchase obligation, defeating any hope for “affordable care” and expanded insurance coverage of the population.

Reports of the oral argument had Justice Kagan focused much more clearly on context and consequences than she might have appeared to be in *Yates*, issued just days earlier. “We don’t look at four words,” Justice Kagan said.²⁴ “We look at the whole text, the particular context, the more general context, try to make everything harmonious with everything else.”²⁵ Justice Kennedy’s expressed concern was whether Congress credibly—even permissibly—could have put states to the choice between creating a state exchange and having health insurance rates for their citizens driven sky-high by the “death

23. 42 U.S.C. § 18001 (2012).

24. Oral Argument Transcript at 37, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-114_lkhn.pdf.

25. Adam Liptak, *At Least One Justice Is in Play as Supreme Court Hears Health Case*, N.Y. TIMES, March 5, 2015, at A1.

spiral” that could result from denial of the tax credits.²⁶ The opinion for the Court, written by the Chief Justice, was driven by a sense of the overall incompatibility of “Exchange established by the State” with the purposes of the statutory scheme and the possibility of their accomplishment; just a few words, lost in the statute’s complexity and likely not noticed for their possible impact in defeating what appeared to be a clear and coherent design, would be interpreted as if they embraced federal exchanges as well. For the dissenters, much more stridently than in *Yates*, this was judicial legislation; essentially lacking the capacity to ascribe coherence or purpose to what the words of the statute ostensibly said, they rested on Congress’s responsibility, not the Court’s, to enact laws.

C.

One readily imagines Judge Katzmann’s satisfaction with both outcomes, since both privilege discernible purpose over “ordinary meaning” textualism. This chapter presents a clear statement of “the purposive approach” as “[t]he dominant mode of statutory interpretation over the past century,” (31) and the positive uses of legislative history in its service, before turning to “the textualist critique,” a discussion of their impact, and finally his own “critique of textualism.”

Judge Katzmann chooses as the “classic exemplar” of the purposive approach the decision in *Church of the Holy Trinity v. United States*.²⁷ Perhaps in choosing the favorite whipping boy of textualists he is intending to be provocative, as Justice Stevens once was with an unnecessary footnote reference that sent Justice Scalia into dissenting orbit.²⁸ For me, *Holy Trinity* is a poor as well as a provocative choice. Its decision did not require departure from the statutory text, as its caricatures regularly assert—just one reading of the statute as a whole rather than another; and its diction makes clear that the Justices’ personal normativities (“a Christian nation”) were important factors in the decision. As Judge Katzmann remarks in the following text, purposivism has sturdy roots in the work of judges, such as Learned Hand, and scholars (Hart & Sacks) who remain admired today; Justice Brewer, the author of *Holy Trinity*, does not. One can without difficulty find purposive decisions apparently untinged by judges’ strong personal preferences,²⁹ using a persuasive assessment of purpose to support one possible, but perhaps less obvious, reading of statutory text. The alternative, as he remarks, is that “judges will interpret statutes unmoored from the reality of the legislative process and what legislators were seeking to do” (35).

26. *Id.*

27. 143 U.S. 457 (1892).

28. See *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81 (2007), at 107 n.3 (Stevens, J. concurring), 108, 116 ff. (Scalia, J., dissenting).

29. *E.g.*, *Johnson v. Southern Pacific R. Co.*, 196 U.S. 1 (1904); *SEC v. Collier*, 76 F.2d 949 (2d Cir. 1935); *United States v. American Trucking Ass’n, Inc.*, 310 US 534 (1940); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

Hart & Sacks chose as their illustration of this peril of simple textualism and strength of purposivism two decisions reached not long after *Holy Trinity*—Judge Sanborn’s decision for the Eighth Circuit in *Johnson v. Southern Pacific R. Co.*,³⁰ followed by its reversal in the Supreme Court.³¹ At issue was the meaning of a statute requiring railroads to equip their interstate “cars” with automatic couplers, a requirement driven by the extraordinary level of injuries railroad brakemen were suffering in manually coupling cars that either were unequipped for automatic couplers or had couplers incompatible with one another. The statute precluded a railroad from using the “assumption of the risk” defense then common in workplace injury litigation to defend a brakeman’s (or his widow’s) suit to recover for an injury suffered in attempting a manual coupling between two “cars” that were not equipped. Johnson lost his hand while attempting manually to couple a dining car equipped with one kind of coupler with a freight engine equipped with an incompatible kind of coupler.³² For Judge Sanborn, it was obvious that an engine was not a “car,” and in any event that both engine and dining car were equipped with automatic couplers. A strong driver of his opinion appeared to be the statute’s abrogation of the “assumption of the risk” defense, and “statutes in derogation of the common law must be narrowly construed.” His opinion evidences no concern for statutory purpose, and much concern that a central pillar of judge-made common law might be undermined. For the Supreme Court, an understanding of the statute’s purpose to protect brakemen from injury drove the linguistically less obvious conclusions that an engine should be treated as a “car” in relation to the obligation to have automatic couplers, and that compatibility in use, not mere equipment, was required.

Johnson was one of the earlier Supreme Court cases to refer to legislative history (as *Holy Trinity* had also done), and the association between purposive interpretation and use of legislative history is, if not inevitably required, a strong one. In addressing the uses of legislative history, Judge Katzmann refocuses on its institutional importance to Congress—reflected both in the ways Members speak about it and in the Bressman-Gluck finding that it “was emphatically viewed by almost all of our respondents—Republicans and Democrats, majority and minority, alike—as the *most important* drafting and interpretive tool apart from text” (37).³³ As Judge Sanborn’s opinion in *Johnson* could be seen to illustrate, “[d]epriving judges of what appeared to animate legislators risks having courts interpret the legislation in ways that the legislators did not intend, replacing reasoned analysis of what Congress was trying to do with subjective preferences” (38).

30. 117 F. 462 (1902).

31. 196 U.S. 1 (1904).

32. This equipment choice appears to have been common, reflecting a trade-off between sturdiness (freight) and comfort (passenger); couplings between freight and passenger equipment were not frequent.

33. Quoting Abbe R. Gluck & Lisa Schulz Bressman, *Statutory Interpretation, Part I*, at 965, *supra* note 2.

The problem, as Adrian Vermeule noted in one³⁴ of the many sources Judge Katzmann cites, and lists in his extraordinarily rich and helpful appendices—reason in themselves for acquiring this book—is that Members’ awareness that courts had begun to rely on legislative history catalyzed the manipulative abuses that so arm the textualist arguments. One observable phenomenon of the years after the “switch in time that saved nine” during the New Deal was that the judicial use of legislative history became extremely detailed, even on occasion taking precedence over attention to text.³⁵ Perhaps this was an unconscious signal by the courts that they had learned their lesson—that they and the common law were now secondary to Congress’s statutory choices—but whatever the occasion for it, the result was an explosion of “the committee intends,” of colloquies self-evidently structured for judicial, not collegial attention, and of other efforts to influence not present votes but subsequent interpretation—and all on propositions that were not directly put to a vote.

Judge Katzmann is certainly aware of the problems thus created for finding reliable indicators in legislative history of the meanings legislators associated with the words they enacted. He quotes with approval Chief Justice Roberts’s observation at his confirmation hearing that only those elements of it Members themselves institutionally rely upon are worthy of consideration. Granted the risks that Members will abuse these signals, risks of which judges must be aware, nonetheless resolutely ignoring them carries its own risks of “having courts interpret the legislation in ways that the legislators did not intend, replacing reasoned analysis of what Congress was trying to do with subjective preferences.”³⁶

The argument would have been strengthened, in my judgment, by attention to two considerations he does not directly address. One, already mentioned, is that the primary interest in determining the meaning of a statute’s text lies with the affected public—the readers of statutes, agencies and citizens—and not with the courts. Even if courts should regard themselves as the public’s “faithful servant,” not Congress’s, a useful question to ask about the persuasiveness of a statute’s legislative—or more broadly, political—history would be how well it is likely to be known to the affected public, either directly or, as the statute ages in application, indirectly through the law’s consistent, observable applications. One imagines that considerations like these moved the majorities in the recent decisions in *Burwell* and *Yates*. Second, and more important in my judgment, is that for Judge Katzmann and his court, statutory interpretation is most often routine, not a high-stakes political matter—that is, it usually occurs in settings in which the likelihood is higher that Members are informing each other about

34. Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001). Judge Katzmann does not, however, cite the work for the point made here in the text.

35. Judge Katzmann quotes, at 45, Judge Marshall’s remark in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 n.29 (1971) that because “[t]he legislative history . . . is ambiguous . . . we must look primarily to the statutes themselves to find the legislative intent.”

36. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 324 (2006) (Breyer, J., dissenting).

understood meaning, and not attempting to sway the courts on propositions for which they cannot garner votes. This was the point Justice Breyer made while still a First Circuit judge, in an article³⁷ that remains my favorite in the law review literature on interpretation for its practical demonstration of the utility of careful use of legislative materials in the routine cases court of appeals judges cannot escape deciding. The Supreme Court chooses its docket, and if it is choosing well it is choosing cases in which issues are nearly in equipoise, and political stakes can be high.³⁸ Adventitious distortions of the legislative process³⁹ are perhaps more to be feared in that setting than in the run of cases court of appeals judges must decide. Judge Katzmann does not develop the ways in which his situation might differ from that Supreme Court Justices encounter—as, indeed, attention to the impact that a court’s choosing of its docket has on the rationale for the judicial lawmaking inherent in *stare decisis*⁴⁰ is missing from the literature generally.

V

Judging Statutes’ fifth chapter, “Some Cases I Have Decided,” may be the most revealing to students and the most suitable for direct classroom

37. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). Justice Breyer, unlike his colleagues, has had direct personal experience with the legislative process, having once served as Chief Counsel to the Senate Judiciary Committee.
38. See Harry Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WISC. L. REV. 837, 855-57 (1991).
39. Distortions that can affect statutory text as well as legislative history, when the context is a long, complex statute addressing a contentious subject. Did the unexplained words “through an Exchange established by the State” in the 2700-page Affordable Care Act, central to the decision in *Burwell*, enter the statute through careless drafting, or surreptitious mischief? Given their “ordinary meaning,” which would exclude the *federal* exchanges created in states that had not themselves established an exchange, these words would be impossible to square with the understood ends of the statute. Their destructive impact on the statutory plan, if understood in an “ordinary meaning” way, sufficed to persuade the majority to bend them to serve the plan’s unambiguous purpose.
40. The classic support for the discipline of common law precedent and *stare decisis* is that it derives from the necessity of decision of a controversy parties have put before a court, in the absence of established governing principles. Any new principle of the common law that may emerge from the decision is a byproduct of the necessity to decide, and only principles that were *necessary* to that decision (holding, not *dicta*) are entitled to *stare decisis* effect. Courts’ caution about advisory opinions and litigation lacking real controversy (possibly contrived to produce new law) reflects this insistence on the necessity of deciding a real controversy put before the court by parties with opposing stakes in its outcome, in relation to which new law is merely a byproduct. But a court choosing 80 or fewer cases each year from a possible docket of thousands is not in such a position; indeed, it is *supposed* to select those cases for which the settlement of open legal questions is the most important to the public, not those in which the particular parties seeking review have the highest stakes. The New York Court of Appeals, which has a capacity to choose the cases it will decide comparable to the Supreme Court’s, opened one opinion with these words: “We granted leave to appeal in order to take another step toward a complete solution of the problem partially cleared up in [two of its recent decisions].” *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432 (1963). That candid admission is in considerable tension with the premises of *stare decisis*.

discussion. It discusses three controversies in which an opinion of his⁴¹ was one element of a disagreement among the circuits that the Supreme Court then resolved—twice agreeing with his opinion,⁴² and once with the contrary view (but principally on grounds considered in neither circuit’s opinions).⁴³ The controversies, attorneys’ arguments, and the reasoning of all the opinions in the cases, majority and dissent, are fully and fairly described, with brief commentary about their fit with the issues he has developed earlier in the book. The chapter ends with a Coda disclaiming the possibility of

a grand theory of statutory interpretation . . . Statutes differ, contexts differ, and how tools are used may vary from case to case. But the essential framework that guides me remains the same: at all times, I seek to interpret the statute in ways that realize Congress’s meanings and purposes to the best I can discern them. It is for me a practical inquiry, grounded in a process that is respectful of the legislature and its workways. And, in that examination, sticking only to the text may stand in the way of correctly construing legislative meaning. It is for you to judge whether I got it right (91).

Were I using the book as a teaching vehicle, as is tempting, I’d make this chapter central, spending at least a day on each of the cases. Our students get too little in the way of primary materials other than judicial decisions—and in connection with the decisions they get only the (edited) opinions, not the briefs to see how lawyers argued the cases. Although Judge Katzmann’s descriptions reveal a lot, I’d be moved to try to work up a full set of materials—full statutory text, edited legislative history at some length, any preceding caselaw development, and enough of the briefs for students to see the issues as they were put to the courts. As noted above,⁴⁴ in my own teaching materials I have done this for the controversies and statutory developments that eventuated in *Murphy* (and now, this year’s closely divided attorneys’ fee decision in *Baker Botts L.L.P. v. ASARCO LLC*).⁴⁵ It is invaluable for students to experience statutory issues as attorneys do—independent of judicial readings, and in the framework of other statutes and developing understandings of law. If you are going to explore, as Judge Katzmann does not, the possibility that courts act as the public’s agent, not Congress’s, then what the public could and probably did understand when acting is as important to evoke as what the legislators understood when voting. You might even find, as my students have in connection with the *Murphy* statute, statutory considerations beyond those mentioned in arguments or opinions, considerations that might have

41. *Raila v. United States*, 355 F.3d 118 (2d Cir. 2004); *United States v. Gayle*, 342 F.3d 89 (2d Cir.2003); *Murphy v. Arlington Central School Dist. Bd. of Ed.*, 402 F.3d 332 (2d Cir.2004).

42. *Dolan v. U.S. Postal Service*, 546 U.S. 481 (2006) (upholding *Dolan*); *Small v. United States*, 544 U.S. 385 (2005) (upholding *Gayle*).

43. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

44. See text accompanying note 3, *supra*.

45. 135 S. Ct. 2158 (2015).

influenced public expectations, or reflected coherent legislative understandings of meaning.

VI

An underlying premise of this book is that judges do not understand or trust legislative processes, and that if they are to accept their secondary role in law generation to legislatures they need to learn to do so. Legislators and their staffs, as Bressman and Gluck have so well shown,⁴⁶ need also better to understand how judges will approach their work. And so in his final substantive chapter, “Promoting Understanding,” Judge Katzmann addresses his view, reinforced by his own experience on both sides, “that at some basic level, each institution—that is, the courts and the legislature—could benefit from a deeper appreciation of how the other operates” (92).

In imagining “periodic seminars about the legislative process for judges and law clerks” (92), he does not dig deeply. Perhaps Congress’s institutional commitments, on which he so relies in upholding the utility of legislative history, are challenged by the current legislative practices and conditions—enormous statutes, disruptive partisanship inviting efforts at covert statutory subversion such as may have underlain the dispute in *Burwell*. It is not hard to imagine that these would impede those seminars, have them presenting an idealized process quite different from the reality all (including the judges and their clerks) could see. In a brief section entitled “Making Legislative History More Reliable” (102), he acknowledges the omnibus bill problem, but it is not clear that having “legislative leadership . . . more clearly identify legislative history that courts should take into account” (102) is a sufficient response. He appears willing to privilege statements in debate and colloquies that floor managers would signal as definitive; but floor managers are as capable and motivated as any Member—indeed, perhaps more so—to attempt to secure credibility for statements they fear could not survive an up or down vote. He does not address Congress’s recent disarray, heightening these problems.

At least as important, in my judgment, is that here, as in the preceding pages, he suggests no difference between judges and Justices—between decisions in the ordinary cases that lower court judges are obliged to decide and the extraordinary ones Supreme Court Justices choose to decide. It is, to be sure, even more regrettable when the judges of our highest court act as if their lawmaking powers (which the exercise of interpretive authority given *stare decisis* effect most certainly is) act in ways that effectively deny the secondary nature of their lawmaking, by refusing to consult materials that could illuminate the meaning attached to statutes by those who voted upon them, while simultaneously insisting that dictionaries of the age of the enacting Congress, not the likely or effective understanding of the contemporary public, must control. But perhaps that problem at the Supreme Court level could be more readily endured if in ordinary cases the judges and law clerks of lower

46. *Supra*, note 2.

courts—those who might be attending these seminars and disposed to learn from them—would take a different approach.

In discussing possible congressional accommodations, “drafting and statutory revision,” Judge Katzmman *does* address himself below the highest level of actor concerned—perhaps, in consequence, to those most likely to change. Respecting drafting, there is not too much to say—the utility of checklists, guidebooks on drafting, enacting default rules. But he considers at some length the ways in which courts contribute to statutory revision by “housekeeping” measures developed through the Administrative Office of U.S. Courts and the U.S. Judicial Conference. These measures alert relevant congressional officials and drafters to judicial decisions that address statutes that, for one reason or another, could benefit from additional legislative attention. Only the opinions are sent, not commentary, but in the view of their recipients, ““These modest efforts have supplied pertinent and timely information to Congress that it might not otherwise receive,’ including information about ‘possible technical problems in statutes that may be susceptible to technical amendment; and, in any case, how statutes might be drafted to reflect legislative intent more accurately”” (101).

VII

The Justices of the Supreme Court choose their docket, and do so (one would hope) in the most difficult and portentous of cases, those in which the Nation most needs to have the law settled. For this reason, their almost wholly voluntary docket is inevitably created in a highly politicized process. The dockets of the courts of appeal are involuntary and (in general) peopled with less momentous and less difficult cases. For just this reason, there could be much to differentiate judging statutes at the Supreme Court’s level from what would best occur at the court of appeals level. It is perhaps a side benefit of systems that have *separate* constitutional courts that the judges of their ordinary courts are not within their hierarchical control. As noted, the arguable difference between court of appeals’ judging of statutes and the Supreme Court’s is not a subject Judge Katzmman explores. While I wish he had addressed it, as I wish he had given more weight to the arguments for a (public not judicial) reader’s perspective on statutory text, *Judging Statutes*, in its text and in its thorough and helpful appendices, is a remarkable brief introduction to the problems.