THE INFLUENCE OF JUSTICE TRAYNOR'S APPROACH TO STATUTORY INTERPRETATION ON MODERN AMERICAN LAW

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I. INTRODUCTION

With the recent "statutorification" of American law, a judge's approach to statutory interpretation has become increasingly important. Each judge's approach can determine the outcome of his or her decision, and many judges use differing approaches. Naturally, the approach adopted by an influential judge, like Chief Justice Roger Traynor, whose widely adopted opinions changed the course of law, has the potential to influence the law of the entire nation.

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She wishes to dedicate this paper to her father, Jeffrey L. Marxen, M.D., who died during her first year of law school and always supported her educational endeavors. Additionally, she wishes to thank Professor Michael B. Rappaport of the University of San Diego School of Law for making Legislation and Administrative Law interesting enough to inspire this paper.

II. THE IMPORTANCE OF STATUTORY INTERPRETATION

Statutory interpretation plays an important role in assuring the separation of powers essential to the proper functioning of our government. As James Madison opined, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself."[1] The Founding Fathers obliged the government to control itself by creating a system of government based upon the separation of powers. Article I allows the legislature, consisting of the House of Representatives and the Senate, to make the law; article II vests the executive branch with the power to execute the laws; and article III empowers the judiciary to interpret and apply the laws created by the legislature.[2] Frequently, this interpretation involves interpreting the statutes and laws created by Congress.

Today, statutes, not common law, constitute the main source of modern American law.[3] As a result, the judiciary's interpretive role assumes great importance in "the 'hard cases' not clearly answered by the statutory language" because the court must apply and interpret the statutes enacted by Congress while simultaneously refraining from usurping the legislature's lawmaking power.[4] Thus, "any conflict between the legislative will and the judicial will must be resolved in favor of the former."[5] Accordingly, "statutory interpretation is not 'an opportunity for a judge to use words as empty vessels into which he can pour anything he will.' "[6] Rather, a judge must show deference to the legislature and its lawmaking power when interpreting statutes.

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[1] The Federalist No. 51 (1787) (James Madison).

[2] U.S. Const. Articles I–III.

[3] William N. Eskridge, Jr. & Philip R. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 669 (3rd ed. 2001).

[4] *Id.*

[5] *Id.* (citing Reed Dickerson, The Interpretation and Application of Statutes 8 (1975)).

[6] *Id.* (quoting Frankfurter, J.) (internal citation omitted).

III. THEORIES OF STATUTORY INTERPRETATION

"Three different theoretical approaches have dominated the history of American judicial practice. . . ."[7] Each approach rests upon "different versions of the role of the interpreter and the nature of our constitutional system."[8]

The first approach, *intentionalism*, mandates that the interpreter identify and then follow *the original intent* of the statute's drafters.[9] Intentionalists look first to statutory language but also "attempt to discern the legislature's intent by perusing all available sources, including, principally, legislative history."[10] Supporters of this approach, including Supreme Court Justice Stephen Breyer and former Supreme Court Chief Justice William Rehnquist, "argue that it supports the separation of powers expressed in the Constitution" because "[t]he legislative branch, not the judiciary, has the constitutional power to legislate," and "in order to avoid 'making law,' courts should strive to carry out the legislature's intent."[11] Thus, "[i]ntentionalists view themselves as agents of the legislature that enacted the statute, who must avoid imposing their own preferences rather than furthering the choices of the legislature."[12] Some notable criticisms of intentionalism include arguments that "the intent of a legislative body cannot be ascertained from anything less than the language of the statute approved by that body"; "judges can manipulate legislative history to support their own interpretation"; "in any major piece of legislation, the legislative history is extensive, and there is something for everyone";[13] and finally, because the legislative history is neither approved by a legislature nor the executive, resort to legislative intent undermines the legislative process required by state and federal constitutions: "approval by the legislatures and presentment to the executive for approval or veto."[14]

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[7] *Id.* at 670.

[8] *Id.*

[9] *Id.*

[10] Linda D. Jellum & David Charles Hricik, Modern Statutory Interpretation: Problems, Theories, and Lawyering Strategies 97 (2006).

[11] *Id.*

[12] *Id.* at 97–98.

[13] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 36 (1997) ("As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.").

[14] Jellum & Hricik, *supra* note 10, at 98.