

The Role of Purposivism in the Delegation of Rulemaking Power to the Courts

Abstract

The courts are often used by Congress as a “political lightning rod,” when Congress cannot decide how to resolve an issue. Congress relies on administrative agencies for their expertise, and it also makes sense for Congress to delegate some rulemaking authority to the courts, relying on a court’s expertise in developing caselaw in an incremental basis. However, this authority should not be lightly implied. A court can tell that Congress has delegated rulemaking authority to it when the purpose of the statute is clear and the text is broadly worded. It thus makes sense in these cases that purposivism should be used to interpret the statute. Forgotten because of the current focus on the debate between textualism and intentionalism, purposivism is the most probative tool when Congress has delegated rulemaking power to the courts. The major critiques of purposivism lose much of their force when only considered in this light. However, purposivism can be a very unreliable, and while it should be used in some narrow cases, other methods of interpretation should predominate when the statute is detailed or the purpose is unclear. With a resurgence of purposivism, judges can play a helpful role in the development of legislation.

The Role of Purposivism in the Delegation of Rulemaking Power to the Courts

I. Introduction

Gay marriage, abortion, the 2000 presidential election, the national do-not-call list – these are only a few of the many controversial issues that the courts have tackled and will continue to face in the coming years. Judge Richard A. Posner blames this on Congress, noting that the courts are often used as a “political lightning rod” when Congress cannot agree on how to rectify a politically charged problem, thus “dump[ing] the problem in the lap of the courts”¹ According to Judge Posner, the courts then have “a mandate [to solve the problem], though no specific directions.”² While step-by-step instructions may not be provided for the courts in these instances, they are not at a total loss of what to do as general blueprints to guide the court may be available. After all, it is because Congress recognized some problem that it tried to craft a statute in the first place. The goal of Congress was to rectify such a problem and it makes sense that the courts should interpret the legislation to that end.

Once Congress has delegated the problem to the courts, it makes sense that purposivism should assume a prominent role in the interpretation of the statute being that the purpose of the statute may be all that the legislators could agree on. Felix Frankfurter explained the logic behind purposivism: “Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy . . . ; it is evidenced in the language of the statute, as read in the light of other external manifestations of purpose.”³ Henry Hart and Albert Sacks, early proponents of

¹ RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 290 (1985).

² *Id.*

³ Felix Frankfurter, *Some Reflections on the Readings of Statutes*, 47 COLUM. L. REV. 527, 539 (1947). Ironically, it

purposivism, explained how to apply it quite succinctly:

In interpreting a statute a court should:

- 1) Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
- 2) Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either -- (a) a meaning they will not bear, or (b) a meaning which would violate any established policy of clear statement.⁴

Thus, purposivism looks at the aim of the statute first and only then applies it to the words that were enacted. Whether or not it is a valid way to interpret all statutes, purposivism makes particular sense when Congress has delegated to the courts the task of solving a particular problem -- that is, effectively delegated rulemaking authority just as it does with administrative agencies. It certainly doesn't make sense to look only at the text of the statute in these cases since Congress never agreed on a specific plan.⁵ Likewise, it is useless to look at the intent of Congress given that its only intent was to let the courts solve the problem.

Furthermore, the common criticisms of purposivism lose force when the statute is an effective delegation of rulemaking power to the courts. Purposivism has come a long way since it was the "the touchstone of statutory interpretation."⁶ Understandably, this tool of statutory

is the legislation itself that is also supplying the inadequacy.

⁴ William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 333 n.43 (1990) (quoting 2 HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1200 (1958)). Hart & Sacks have argued that "every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible." HART & SACKS, *supra*, at 35 (1958). Judge Hand was also a proponent of using the purpose of a statute to construe its meaning and argued:

It is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.).

⁵ Cass Sunstein notes that, in fact, the "incompleteness of textualism is most conspicuous when Congress has explicitly or implicitly delegated lawmaking power to the courts" Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421 (1989).

⁶ See REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 87 (1975) ("Whereas the concept of 'legislative intent' is in disfavor with many legal writers, that of 'legislative purpose' enjoys not only favor but

interpretation has been highly criticized by textualists who argue that “the only object of statutory interpretation is to determine the meaning of the text and that the only legitimate sources for this inquiry are text-based . . . sources.”⁷ Purposivism has also been heavily criticized by public choice theorists by noting that the quest to find a single purpose in a statute does not make sense when legislation is viewed as “the vector sum of political forces.”⁸ However, this paper will argue that these common critiques of purposivism are almost wholly inapplicable when applied specifically to statutes delegating rulemaking power to the courts.

Purposivism should play a dominant role in statutory interpretation when Congress has effectively given its problem to the courts to solve. Part II of this paper discusses the delegation of such power to the courts. Many times Congress does not explicitly state that it is delegating power to the courts, and so Part III will explain how a court can tell when Congress has implicitly delegated such power: namely when the text of the statute is broad and the purpose of the statute is clear. Part IV will discuss generally what purposivism is and specifically how to find the purpose in a statute. Part V will address some of the common critiques of purposivism and analyze how those critiques fare when looked at in the light of delegating rulemaking power to the courts as well as discuss any problems with allowing Congress to duck political issues in this manner. Finally, Part VI will argue that although purposivism should play a major role

preeminence. For most, it is the touchstone of statutory interpretation.”). *See also* William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 868 (1993) (“The dominant view throughout much of the twentieth century has been that statutes embody the legislative writer’s public purpose.”).

⁷ WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 228 (2000). Justice Scalia has been particularly critical of using purposivism. *See, e.g.*, *Babbitt v. Sweet Home Ch. of Cmty. for a Great Or.*, 515 U.S. 687, 756 (1995) (“I thought we had renounced the vice of ‘simplistically . . . assum[ing] that *whatever* furthers the statute’s primary objective must be the law.’”) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis in original)). *See generally* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); William Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

⁸ *See* Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI. KENT L. REV. 123 (1989); *see also* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227-33 (1986) (arguing that the multiple purposes held by interest groups cannot be aggregated into one public purpose); Eskridge, *supra* note 4, at 335 (“Judicial attempts to fancy up those deals [amongst interest groups] with public-regarding rhetoric either are naïve or simply substitute the judge’s

when the statute is broad and the purpose is clear, it is dangerous to apply it in all situations and should take a back seat to other forms of statutory interpretation either when the statute is detailed or the purpose is vague.

II. Delegation of Rulemaking Power to the Courts

There is little debate that Congress specifically leaves some statutes without detail so as to allow courts room to solve a problem that Congress identifies. Congress may feel that it is more efficient to leave the details of a statute to the courts. Congress does the exact same thing when it gives rulemaking authority to administrative agencies. The court has its own type of expertise that can be useful to Congress just like an administrative agency's skills. Justice Jackson, speaking for the Court in *Skidmore v. Swift & Co.*, noted that with regard to the Fair Labor Standards Act, "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act, [but] put this responsibility on the courts."⁹ In that case, the Court also cited several times the case of *Kirschbaum v. Walling*, which likewise noted that the FLSA "puts upon the courts the independent responsibility of applying . . . the statute to an infinite varieties of complicated industrial situations."¹⁰ Congress is obviously extremely busy, and just as it is efficient for it to delegate some rulemaking authority to administrative agencies, it also stands to reason that it would be efficient for it to delegate rulemaking authority to the courts.

Congress might choose to use the federal courts, rather than an administrative agency, because of the federal court's expertise in developing law on a case by case basis. As Judge Posner has noted: "[A] statute necessarily is drafted in advance of, and therefore with imperfect

conception of public policy for that of the legislature. . . . [T]his is judicial lawmaking . . .").

⁹ 323 U.S. 134, 137 (1944).

¹⁰ 316 U.S. 517, 523 (1942).

appreciation for, the problems that will be encountered in its application.”¹¹ Congress may have some general idea on how to solve a problem -- or may only know that it *wishes* to solve a problem -- but may be unsure what a practical solution should look like that can work in a variety of cases. It makes sense for Congress to want to leave the courts with room to adjust the statute as necessary so that the courts can work out some of the details of the statute. Indeed, our entire judicial system’s use of precedent is based on building law incrementally so that the law can develop in response to the specific cases that arise.¹² Justice O’Connor notes in her recent book how fortuitous it was that criminal law developed in this fashion, allowing a continuing reexamination and tweaking of the law.¹³

As mentioned previously, a parallel can be made between Congress’ delegation of rulemaking authority to the courts and the delegation of rulemaking authority to administrative agencies. In *Chevron U.S.A. v. Natural Resources Defense Council*, the Court held that agencies should get broad deference in interpreting statutes because of their expertise in the area.¹⁴ Specifically, in interpreting the Environmental Protection Act, the Court in *Chevron* gave deference to the Environmental Protection Agency because Congress “consciously desired the Administrator to strike the balance at [that] level”¹⁵ Just as administrative agencies have

¹¹ POSNER, *supra* note 1, at 280.

¹² See 19 U.S. (6 Wheat.) 264, 399-400 (1821); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) (“The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are . . . seldom completely investigated.”). See also EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 30-31 (1949):

For a legislature perhaps the pressures are such that a bill has to be passed dealing with a certain subject. But the precise effect of the bill is not something upon which the members have to reach agreement. If the legislature were a court, it would not decide the precise effect until a specific fact situation arose demanding an answer. . . . It will not be required to make the determination in any event, but can wait for the court to do so.

¹³ Sandra Day O’Connor, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 11 (2003) (noting that a continuing reexamination of criminal law is healthy because it “remind[s] us all that important issues are at stake,” “allows the law to be developed gradually,” and “enables the Court to correct or redefine rules that prove ineffective or counterproductive”).

¹⁴ 467 U.S. 837 (1984).

¹⁵ *Id.* at 865.

expertise in particular fields, courts have expertise both in resolving disputes under specific factual situations and in formulating a sensible common law to account for multiple circumstances. Therefore, it makes sense for Congress to treat the courts like administrative agencies – at times, relying on their proven ability to develop caselaw in an incremental basis.

It also may be the case, though, that Congress just cannot agree how to solve the problem due to competing interests. Public choice theory posits that for a statute to pass Congress, it “must be acceptable to a range of interest groups, each of which will have their own reasons for supporting, or at least not opposing, the statute.”¹⁶ Considering the delicate balancing act which legislators must carry out, often times it is very likely that they cannot agree on a specific solution to the problem. Their only agreement, then, is to leave the statute purposely ambiguous, thereby giving the problem to the courts.¹⁷ In these cases, the language of the statute may be deliberately ambiguous so that it “can be interpreted to include [all] their positions.”¹⁸ Here again, Congress agrees that a problem needs to be fixed, but leaves the solution of the problem to the courts.

Whether it is for efficiency or an inability to formulate a plan due to competing interests, it is clear that Congress often delegates rulemaking power to the courts to solve an identified problem. The wisdom of allowing Congress to pass off the problem to the courts will be discussed in Part VI, but if a court is to treat such statutes differently, it must be able to recognize when a statute is such a delegation.

¹⁶ Eskridge, *supra* note 4, at 335.

¹⁷ See Frank H. Easterbrook, *The Supreme Court, 1983 Term, Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) (“[S]ometimes the compromise may be to toss an issue to the courts for resolution.”).

¹⁸ Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislation Compromise*, 44 EMORY L.J. 117, 117-18 (1995).

III. How a Court Knows When Congress Has Delegated Rulemaking Power to the Courts

A. When The Statute is Broad and the Purpose is Clear

One sign of when Congress has effectively delegated rulemaking power to the courts is when the statute is written broadly. When Congress delegates such power to the courts, it is because the legislators agree that a problem exists, but cannot agree on the specific way in which to solve the problem. It follows then that the statute they pass will not be detailed, but will only broadly give some semblance of what it is trying to achieve. Justice O'Connor has suggested that the earliest example of broad delegation may be the Bill of Rights, where "our ancestors recognized the importance of framing our most basic rights in broad terms."¹⁹ Two definitions should first be explained in full. It is important to note that when the term "detailed" is used, it does not necessarily refer only to the number of words or parts in a statute. Congress could pass a very long statute filled with ambiguities and gaps, and likewise could pass a very short statute which gives exact instructions to the courts. Thus, the term "detailed" refers to the specificity of directions given to the courts in applying the statute. One example of a detailed statute which is discussed more fully below is the Tax Code.²⁰ In the Tax Code, Congress has painstakingly crafted an extremely detailed scheme, and it is apparent that by doing so it did not "pass the buck" to the judicial branch, but tried to cover a wide array of particular situations. Second, it should be noted that when the term "statute" is used, it does not necessarily refer to what Congress calls the statute. It is possible that Congress passes a very detailed statute in its entirety, but wants to delegate one subpart of that statute to the courts. Later in this section, the Civil Rights Act of 1991 will be discussed as just such an example.

¹⁹ O'Connor, *supra* note 13, at 63.

²⁰ See I.R.C. (2003).

Even if the wording of the statute is broad, though, a court should not assume that Congress delegated rulemaking power to it unless the purpose of the statute is clear. If Congress can agree that some problem exists, but yet is unable to agree how to fix it, Congress would make the purpose of the statute apparent. The purpose in these instances is specifically to fix the problem that Congress has identified. It often might be the case that Congress agrees on the purpose of a statute, but that purpose is not explicit in the statute itself. For these cases, a complete discussion of how to find the purpose in a statute can be found in Part III, but suffice to say that Congress has no incentive to hide the purpose of the statute if indeed the legislators all agree that they want to rectify a particular problem. In addition, trying to use purposivism without a clear purpose is akin to using textualism without a text.

B. The Sherman Act

A prime example of a case where Congress has delegated rulemaking authority to the courts is the Sherman Act,²¹ a statute that has formed the basis of modern antitrust law. Section one of the Act simply reads: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal”²² The term “restraint of trade” was specifically inserted into the act to reference common law, but the Act was more than just an authorization for the courts to continue using common law.²³ As Professors Ernest Gellhorn and William E. Kovacic

²¹ 15 U.S.C. §§ 1-7 (1890). As Cass Sunstein noted, “courts have inevitably taken the Act as a delegation of policymaking power pursuant to quite open-ended criteria.” Sunstein, *supra* note 5, at 421.

²² *Id.* § 1.

²³ Judge Posner explained:

Since ‘monopoly’ and ‘restraint of trade’ were terms that had a common-law history in both England and America, it would be natural to view the act as the culmination of a tradition of legal concern with the monopoly problem; but it would be incorrect. The law of monopolies and restraints of trade had a miscellany of objectives mostly unrelated and sometimes antipathetic to competition and efficiency.

explained: “To define and apply critical concepts such as ‘restraint of trade’ and ‘monopolize’ in specific cases, courts would be required to consider the goals that Congress intended to achieve.”²⁴ The section on restraint of trade gives no specific instructions to the courts on how to prevent restraints on trade -- or really even what that term means. When the Court first had to construe the Act in *United States v. E.C. Knight Co.*, it had to resort to common law and explanations from the prominent scholar Lord Coke to try to figure out how to apply the terms “restraint of trade” and “monopoly.”²⁵ The Sherman Act is clearly a broad statute that is not detailed in the instructions it gives to courts.

The overall purpose of the Sherman Act was clear. However, there were arguably many sub-purposes of the Sherman Act for the different types of situations which would come under it.²⁶ Commentators have suggested that the Act was meant: to preserve opportunities for firms and individuals to compete;²⁷ to prevent unfair redistributions of wealth from consumers to producers;²⁸ to sustain the vitality of democratic institutions;²⁹ or, to specifically shift wealth from large manufacturers to small merchants.³⁰ More generally, Robert Bork has argued that the Sherman Act “displays the clear and exclusive policy intent of promoting consumer welfare . . .

RICHARD A. POSNER, *ANTITRUST LAW* 33 (2d ed. 2001). Although the Sherman Act had perhaps a more directed focus than the common law, the previous common law did form the foundation and starting point for modern antitrust law. See ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS* 22 (4th ed. 1994) (“Congress gave federal courts a new jurisdiction: federal judges were to create a common law of federal antitrust within the general aim of -- but apparently not confined by -- the prior common law.”). See also 21 Cong. Rec. 2,456 (1890) (statement of Senator Sherman) (assuring that the Sherman Act “does not announce a new principle of law, but applies old and well recognized principles of the common law”).

²⁴ GELLHORN, *supra* note 23, at 21.

²⁵ 156 U.S. 1 (1895). Lord Coke’s writings were especially helpful as they noted: “quod est cum unus solus aliquod genus mercaturae universum vendit, ut solus vendet, pretium ad suum libitum statutens.” *Id.* at 10. Perhaps by focusing on the purpose of the Act rather than other commentators, the Court could have spared itself relying on definitions of the word monopoly in Latin.

²⁶ See generally GELLHORN, *supra* note 23 at 22.

²⁷ Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981).

²⁸ See Robert H. Lande, *Wealth Transfers as the Original and Primacy Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

²⁹ See David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988).

³⁰ See Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest Group Perspective*, 5 INT’L REV. L. & ECON. 73 (1985); Thomas W. Hazlett, *The Legislative History of the Sherman Act Reexamined*, 30 ECON. INQUIRY 263

.”³¹ Many of these purposes could conflict, but in most cases, they are in harmony with one another, and it is fairly clear in certain circumstances which purpose should prevail. James May has argued that at the time Congress passed the Sherman Act, it thought all of these aims were consistent and mutually reinforcing.³² More on the problem of multiple purposes will be discussed later in Part IV. If a case arises where the purposes do conflict, courts will obviously have to turn to other methods of interpretation – just as they would if words in a statute conflict. Therefore, since the text of the Sherman Act is broad and the purpose is clear, a court should consider the Act a delegation of rulemaking power to the courts, and decide cases under the Act in a way that promotes the purposes that Congress has put forth.

When the Court first construed the Sherman Act, it did not look at the statute in this manner and instead erroneously used a literalist interpretation. In *United States v. Trans-Missouri Freight Ass’n*, the Court focused on the beginning words in the Act, “every contract,” and held that even if antitrust concerns were not present, every contract that restrained trade would be held to be illegal.³³ Thus, unlike under common law, if two businesses agreed on a reasonable restraint of trade that was not predatory at all but helpful to the market, it would nevertheless be held against the law under the Act. It was a ridiculous result. The purpose of the Act and the clearly established common law made clear that the antitrust laws did not cover “reasonable” contracts that restrained trade, a view that Justice White urged in dissent.³⁴ Ultimately, a more purposive methodology won out in *Standard Oil Co. v. United States*, in which Justice White’s reasoning swayed the court to adopt the “rule of reason.”³⁵ The Court

(1992).

³¹ Robert Bork, *The Antitrust Paradox*, 9 CARDOZO L. REV. 115, 161 (1987).

³² James May, *Antitrust in the Formative Era*, 50 OHIO ST. L.J. 257, 391-94.

³³ 166 U.S. 290 (1897).

³⁴ *Id.* at 343-74.

³⁵ 221 U.S. 1 (1911).

read the statute with a focus on its purpose -- to protect property rights, not destroy markets.³⁶

The court went from a simplistic literal reading of the Act that did not work and had the “vice of overinclusiveness” to the current “full blown rule of reason” that governs current modern antitrust law.³⁷ The Court changed its view of the Sherman Act, and by focusing on the purpose of the broad Act, has created a workable piece of legislation. In short, the Court played a *helpful* role in the development of the antitrust legislation, a role that the Court should have originally played, and would have played if it had construed the Act using purposivism.³⁸

C. The Civil Rights Act of 1991

An example of a case where the entire statute is not necessarily broad, but one subpart is such that a court should assume power has been delegated to it, is the Civil Rights Act of 1991.³⁹ There was agreement that the purpose of the Act was generally to make it easier for plaintiffs to sue in employment discrimination cases and specifically overrule many of the court precedents that had made it more difficult.⁴⁰ The purpose was clearly defined in the Act itself, which stated that it was passed “to respond to recent decisions of the Supreme Court by expanding the scope

³⁶ The Court described the purpose, at least for this narrow instance, as an effort “to protect, not to destroy, rights of property.” 166 U.S. at 78. Thus, the Court held that its original reading of the Act was overinclusive.

³⁷ ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 81-83 (2002).

³⁸ As discussed later, Judge Posner has argued that courts should play a helpful role in the development of legislation, and statutory interpretive theories adverse to this notion should not be used. POSNER, *supra* note 1, at 292.

³⁹ Pub. L. No. 102-166, 105 Stat. 107 (1991). The same could be said about the Civil Rights Act of 1964. Cass Sunstein notes that the “basic prohibition of ‘discrimination’ provid[ed] no guidance on the role of discriminatory effects, the appropriate burdens of proof and production, and the mechanisms for filtering out discriminatory treatment.” Sunstein, *supra* note 5, at 422.

⁴⁰ The actual text of the Act stated that it was “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.” *Id.* § 3(4). See also Thomas W. Lee, *Deducting Unemployment Compensation and Ending Employment Discrimination: Continuing Conflict*, 43 EMORY L.J. 325, 351 (1994) (noting that the Act was meant to “enhance the effects of title VIII in ending employment discrimination”); Henry P. Ting, *Who’s the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J. L. & PUB. POL’Y, 515, 542 n.191 (stating the amendments were specifically passed to reverse five Supreme Court decisions that were undermining the employment discrimination laws).

of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”⁴¹ However, there are clearly parts of the Act that are detailed. For example, Congress specifically shifted the burden in employment discrimination actions⁴² and specifically added punitive damages.⁴³ Congress was not able to decide, though, whether it should be applied retroactively. As mentioned before, it is not the entire statute which must be broad -- Congress can very well delegate only parts of a statute, and this is just such a case. It is, of course, a weaker sign of delegation when only a part of the statute was ambiguous, but there was also other evidence that Congress specifically wished the courts to resolve this issue. The issue of retroactivity was a politically contentious issue, and at the time the law was passed it was opposed by the first Bush administration, but supported by the Democratic leadership in Congress.⁴⁴ As the Court noted in *Landgraf v. USI Film Products*, it was “highly probable” that “because it was unable to resolve the retroactivity issue . . . , Congress viewed the matter as an open issue to be resolved by the courts.”⁴⁵ Since the purpose was clear and the “statute” was broad, the Court should turn to purposivism as a guide in adjudicating cases that fall under the Act.

The Court did just that. It saw parts of the Act as a delegation of rulemaking power from the legislators and used common legal standards of fairness and notice to find that the Act should

⁴¹ 42 U.S.C. §1981a(a)(3)(4) (1998).

⁴² *Id.* §§ 1981a(a)(3), (4).

⁴³ *Id.* at 1981a(a)(1).

⁴⁴ See Linda Greenhouse, *Ginsburg at Fore in Court's Give-and-Take*, N.Y. TIMES, Oct. 14, 1993, at A1, B8 (noting that the omission of any language having to do with retroactivity was the result of “an impasse between the Democratic leadership in Congress, which favored retroactivity, and the Bush Administration, which adamantly opposed it”).

⁴⁵ 511 U.S. 244, 261 (1994). Some courts criticized Congress for not resolving this issue. See, e.g., *King v. Shelby Medical Ctr.*, 779 F. Supp. 157, 158 (N.D. Ala. 1991) (“The ultimate answer on the retroactivity or non-retroactivity of the Civil Rights Act of 1991 will be long in coming, and only after thousands of judicial hours, which Congress could easily have saved, are spent.”). Apparently, the North Dakota Judge felt that this delegation was not an efficient one.

not be retroactively applied.⁴⁶ The Court looked at the broad purpose of the Act as a restraint in their interpretation.⁴⁷ True, allowing the statute to be retroactive would further promote its remedial purposes, but Congress' aim in passing the Act was not to create a voluminous number of possible claims. Rather, Congress wanted to make it easier to bring an employment discrimination suit without being impeded by procedural restraints that the Court had previously added. Retroactivity was never a part of the Civil Rights Act, never a part of the Court's jurisprudence on the Act, and opposed to common notions of fairness found throughout the Court's cases. The broad purpose of any statute will always have to be restrained in some way. Here, it was restrained by the history of civil rights jurisprudence, a body of law that had never been applied retroactively. The text was not helpful, nor was the intent of Congress -- the intent was specifically to give the courts the problem. By looking at the specific purpose of the Act, the Court was able to play a helpful role in the development of the legislation and a fair outcome was reached.

IV. How to Find The Purpose in a Statute

Finding the purpose of a statute is no different when looking at the statute as a delegation of rulemaking power than when invoking traditional notions of purposivism. It may be that some of the critiques of these methods lose their force, later discussed in Part V, but the same methods remain. Seven of these methods are discussed shortly below: the language of the statute; purpose sections in the statute; looking at the statute as a whole; looking at similar statutes; considering interest groups and legislative compromises; the legislative history; and finally, in some instances, case law. Each of these methods has been critiqued and this paper

⁴⁶ 511 U.S. at 261.

does not fully discuss the merits of each. However, as noted previously, it is probably true that when Congress wishes to delegate rulemaking power to the courts, the nature of the problem Congress delegated will be ascertainable through a variety of these sources.

A. Language of the Statute

The Court often remarks that any reading of the statute must start with the text itself.⁴⁸ This seems adverse to the concept of purposivism which says that one should first start with the purpose and then read the text in light of that purpose.⁴⁹ However, as we are dealing with situations where Congress has not come up with a plan to combat the problem it seeks to rectify, the language of the statute itself will not be able to give specific instructions to the court. Still, through the language, courts can be guided by the general purpose of the legislation. Looking at the text of the statute to discern its purpose is a practice that most textualists would accept. In fact, some commentators have remarked that finding the purpose from the text is the only way to validly consider purpose. As noted by Professor Eskridge, “[b]ecause text is the only thing actually enacted into law, it is formally the most legitimate expression of legislative intent or purpose. Moreover, it is argued, citizens ought to be able to rely on clear statutory text to determine their rights and duties.”⁵⁰

⁴⁷ *Id.*

⁴⁸ *See, e.g.,* *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) (“[O]ur starting point must be the language employed by Congress.”).

⁴⁹ *See* HART & SACKS, *supra* note 5.

⁵⁰ Eskridge, *supra* note 4, at 337. Justice Scalia said that looking at other sources to find the purpose is ridiculous because “the ordinary meaning of [the statutory] language accurately expresses the legislative purpose.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380 (1992) (emphasis omitted)). *See generally* Sunstein, *supra* note 5, at 415-18 (discussing the textualist approach).

B. Purpose Sections in Statutes

An obvious place to look for the purpose in a statute is in the purpose section, if one exists. It would make the most legislative sense, that when Congress wishes to delegate rulemaking power to the courts because it cannot decide on a specific solution to their problem, that it would carefully construct the purpose section so as to give the courts some guidance in applying the statute. However, courts should keep in mind that purpose sections in statutes are not always the most carefully crafted entities. In fact, Professor Reed Dickerson cautioned any legislators who were considering putting in a purpose section to “be careful not to create, by the omission of other legislative purposes, the misleading impression that they were not also relevant,” and concluded that “the draftsman who doubts his own draftsmanship would do better to omit any such statement, because the deficiencies of draftsmanship that infect the working provisions of the bill are likely also to infect its statement of purpose.”⁵¹ It may often times be the case that the purpose section does not list all the purposes sought to be achieved by the legislation, and a court should not solely consider such sections when trying to find the purpose of a statute.

C. Looking at the Entire Statute

A general purpose of a statute can also be gleaned from looking at the statute as a whole and identifying what it is trying to achieve. Looking at a single section to try to find the purpose of a statute may be successful in some cases, but in others, it is only when one looks at how all the sections of the statute work together that a general purpose can be found.⁵² Justice Cardozo

⁵¹ DICKERSON, *supra* note 6, at 97-98 (1975).

⁵² This idea follows from contract law. *See* *W. Lumber Co. v. Willis*, 160 F. 27, 30 (9th Cir. 1908) (“In construing a

recognized this in *Panama Refining Co. v. Ryan* when the Court had to decide the constitutionality of a section of the National Industrial Recovery Act that delegated power to the President.⁵³ On its face, Section Nine of the Act delegated broad powers to the President, but Justice Cardozo argued that the Act must be read as a whole.⁵⁴ He reasoned that the first ten sections taken as a whole expressed a clear purpose to restrain that delegation of power, thus making the delegation specific and constitutional.⁵⁵ In another opinion, Justice Cardozo reiterated this idea writing that “the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.”⁵⁶ It may seem that this method of finding the purpose might be inapplicable because purposivism is only advocated when the purpose is clear, but, as noted earlier, even when the entire statute is detailed, Congress can specifically delegate only a part of the statute to the courts. It would be especially true in these cases where looking at the entire statute may shed some light on the purpose.

D. Looking at Similar Statutes

Looking at similarly worded statutes that have a clear purpose to try to figure out the purpose of a statute is a perilous method, but one that may be appropriate in some cases. This follows the often used canon that sections of a statute are to be construed *in pari materia*, and likewise, similar statutes can also be construed the same way. Such logic was applied in *United States v. Stewart*, where the Court used the Farm Loan Act to illuminate the Revenue Act of 1916, noting that they addressed similar concerns and were enacted by the same Congress in the

contract, the intention is to be collected, not from detailed parts of the contract, but from the whole of it.”).

⁵³ 293 U.S. 388 (1935).

⁵⁴ *Id.* at 433-74.

⁵⁵ *Id.*

⁵⁶ *United States v. Constantine*, 296 U.S. 287, 298-99 (1936) (Cardozo, J., dissenting).

same session.⁵⁷ Judge Posner rightly notes, though, that this is a dangerous process, because “[t]here is no assurance that the particular constellation of political forces that produced the first statute was also in play when the second was adopted.”⁵⁸ Thus, finding purpose in this manner would be most valid when statutes were passed at the same time, dealt with the same matters, and passed amidst similar political forces.

E. Considering Interest Groups and Compromises

Public choice theorists have argued that courts should consider the presence of interest groups and the reality of compromise when construing a statute,⁵⁹ and the same could also be said for finding the purpose of a statute. These compromises occur not only between competing interest groups, but also between the House and the Senate, Congress and the President, and/or competing factions within each body.⁶⁰ In fact, the purpose of a statute could very well be to specifically advance the interest of a particular interest group, and Judge Posner has even suggested that it might be helpful to classify statutes according to whether it advances the public interest or was passed to help a specific interest group.⁶¹ Traditional notions of purposivism have focused only on public purposes, but in light of recent public choice research, I agree with Judge Posner that there are not always such purposes in statutes. Sometimes Congress’ purpose

⁵⁷ 311 U.S. 60, 64 (1940). *See also, e.g.,* *Morales v. Trans World Airlines*, 504 U.S. 374 (1992) (using identical language in ERISA to interpret language in the ADA). However, courts should always consider the different purposes for the Acts before applying the exact same rule of law. *See Miller v. United States*, 597 F.2d 614, 616 (7th Cir. 1979) (construing the Recreational Use Act and Licensing Act *in pari material*, but noting that because their purposes were limited to certain geographical areas, the language must also reflect this difference).

⁵⁸ POSNER, *supra* note 1, at 268-69.

⁵⁹ *See, e.g.,* POSNER, *supra* note 1, at 289 (“[W]here the lines of compromise are discernible, the judge’s duty is to follow them, to implement not the purpose of one group of legislators, but the compromise itself.”).

⁶⁰ *See Simmons, supra* note 18, at 118 (generally explaining different compromises that go into passing a bill).

⁶¹ POSNER, *supra* note 1, at 265 (noting, however, that many statutes would both serve a public interest and further a specific interest group’s agenda).

may be to favor certain interest groups.⁶² If a court is to use purposivism to elucidate a statute that delegates rulemaking power, the court must also allow for the possibility that the purpose is to appease certain interest groups. The current Court usually agrees that looking at these competing interests is a valid way to construe a statute, or, in our case, find the purpose of the statute.⁶³

F. Legislative History

Looking at the legislative history of a statute is another way to find the purpose. Legislative history has lately been severely attacked specifically by textualists who have pointed out many of the drawbacks of using this source. Justice Scalia, in fact, claims that he regularly flips past any section of briefs submitted to him that concerns legislative history.⁶⁴ One of the reasons for this is the inherent unreliability of legislative history.⁶⁵ Justice O'Connor has noted that reliance on legislative history is "hazardous at best," noting that sometimes even the sponsor of the bill may not know what the bill really means.⁶⁶ Also, Professor John F. Manning has argued that it is constitutionally invalid for courts to use legislative history as legislative history

⁶² Professor Michael Livingston calls Judge Posner's approach "a sort of updated intentionalism . . . which has much in common with the Hart and Sacks approach but is more willing to enforce narrow legislative 'deals' and less likely to seek broad public purposes." Michael Livingston, *Practical Reason, 'Purposivism' and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 682 (1996).

⁶³ See, e.g. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (noting that the Court should "preserve[] the delicate legislative compromise that had been struck"); *Cnty. for Creative Non-Violence v. Reed*, 490 U.S. 340, 347 (1989) (holding that the Court should respect the specific terms of the Copyright Act because it was "the product of two decades of negotiation by representatives of creators and copyright using industries . . . and, to a lesser extent, by Congress"). Not everyone agrees with this notion, though. See, e.g., *Bowen v. Owens*, 476 U.S. 340, 347 (1986) (Marshall, J., dissenting) (arguing that legislation cannot be "a way station on the road to a sensible destination [as] legislative classifications that result from compromise must bear at least a rational relationship to a legitimate governmental purpose"). By this, Marshall undoubtedly meant a legitimate public purpose.

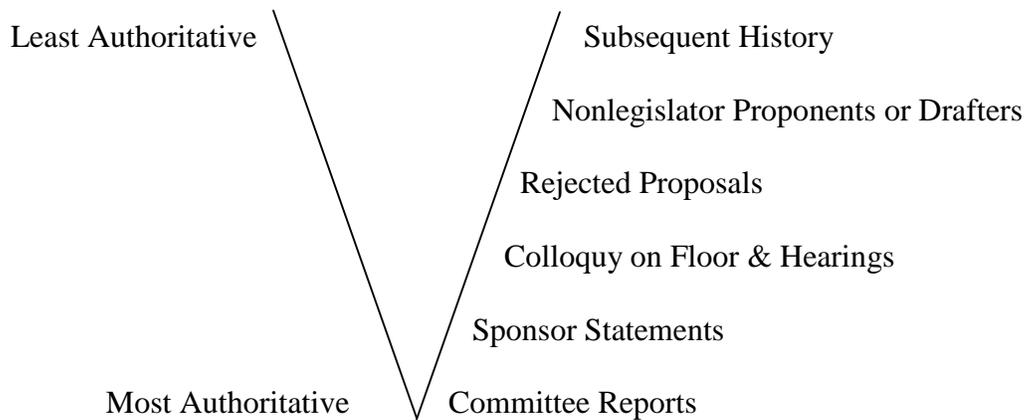
⁶⁴ Justice Antonin Scalia, *Constitutional Interpretation*, The Owen J. Roberts Lecture, The University of Pennsylvania (Feb. 13, 2003). See generally SCALIA, *supra* note 7, at 22 (criticizing the use of legislative history). Justice Scalia also argues that legislative history is not written by legislators at all, but by "well organized private groups." Sunstein, *supra* note 5, at 429.

⁶⁵ See generally ESKRIDGE, *supra* note 7, at 295-312.

⁶⁶ *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 242-43 (1990).

does not go through bicameralism and presentment, “authoriz[ing] committees and sponsors to speak for Congress as a whole . . . [and] permitting them to ‘say what the law is.’”⁶⁷ However, this has been countered by academics suggesting that legislative history is a valid part of any statute.⁶⁸ Judge Posner has even argued that “when [legislators] vote for a bill they are assenting, in a sense, to at least some of what is in that history,” noting that many times members of Congress don’t even read the bills they vote on, but rely solely on statements by the bill’s sponsors.⁶⁹ Even Justice Rehnquist, a staunch conservative, has stated: “It [is] well settled that the legislative history of a statute is a useful guide to the intents of Congress.”⁷⁰

The debate on the use of legislative history will continue, but those judges who do use it, seem to agree that there is some sort of hierarchy to sources of legislative history that indicates their relative probative value. William Eskridge and Philip Frickey have suggested that the different types of legislative history are best seen along a funnel and present the following diagram:⁷¹



⁶⁷ John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 676 (1997).

⁶⁸ See Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000) (arguing that legislative history is incorporated by reference to the statutory text).

⁶⁹ POSNER, *supra* note 1, at 69.

⁷⁰ *Co. of Wash. v. Gunther*, 452 U.S. 161, 182 (1981).

⁷¹ ESKRIDGE, *supra* note 7, at 307 (2000).

As can be seen from above, committee reports and sponsor statements are accorded the most weight while subsequent history and drafters' comments are given the least amount of weight. This hierarchy is based on how available these types of legislative history are to the legislators and, perhaps to some extent, to the courts and the public.⁷² It is likely that most legislators will have at least skimmed, if not read, the committee report before they vote for the bill, but whether they are even aware that nonsponsoring legislators made a comment about the bill during a floor hearing (which are notoriously empty)⁷³ is anybody's guess.⁷⁴ To the extent that the current Court uses legislative history, it seems to agree with this hierarchy, giving each type of document a corresponding weight.⁷⁵

G. Current Case Law

Finally, in many cases Congress may just be explicitly delegating an area of law to the

⁷² See DICKERSON, *supra* note 6, at 147. There was a time when critics charged courts who used legislative history as rummaging among the "ashcans of litigation." *Id.* at 149 (quoting C. CURTIS, *IT'S YOUR LAW* 52 (154)). By this, they meant that the courts were wading through things thrown out by the legislators and probably not read by any of them. However, the increased availability of Congressional materials and the cognizance of Congress of the importance of these materials make these statements less applicable. See *id.* at 149 (arguing that even in 1975, "the materials of federal legislative history are more widely available than many lawyers have heretofore suspected"); POSNER, *supra* note 1, at 269 (arguing that when legislators vote for a bill, they are voting, at least in part, for some of the legislative history). Justice Stevens has argued that even if the legislators haven't read the committee reports, that a court should still consider them as the legislators no doubt relied on the committees and their party leaders to make their vote. See *Bank One Chicago, N.A., v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276 (1996) ("Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities . . . Representatives and Senators may appropriately rely on the views of the committee members when casting their votes.").

⁷³ POSNER, *supra* note 1, at 270. See also DICKERSON, *supra* note 6, at 155 ("Materials in hearings and floor debates are so heterogeneous and fragmentary and so influenced by the tactics of promoting enactment that they have almost no credibility for the purpose of later interpretation.").

⁷⁴ POSNER, *supra* note 1, at 270 ("But it is one thing to assume that legislators who vote for a bill defer to the understanding of the bill expressed by its sponsors, and another to assume that they adopt the statements of the witnesses, or nonsponsoring legislators . . . who want to impart some twist to the statute when it is applied by the courts.").

⁷⁵ See, e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (noting that post enactment statements by legislators should be given little weight); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (Rehnquist, J.) ("In surveying legislative history, we have repeatedly stated that the authoritative source for finding the legislature's

courts that already has a rich common law history. Looking at how Congress has responded to what the court has already done may shed some light on the purpose of a particular statute. A case in point is the Sherman Act.⁷⁶ The Sherman Act’s language was based on the then existing common law and incorporated the general purposes of antitrust law already stated by different courts.⁷⁷ Thus, by adopting the Sherman Act, Congress was showing approval of the existing common law, and only modified it marginally in some places.⁷⁸ The words of the Sherman Act itself were basically irrelevant,⁷⁹ and the purposes that were identified in the common law became the guide posts in all future interpretations of the Act.⁸⁰

V. Problems with Using Purposivism In These Instances

As noted above, purposivism has been heavily criticized in the past ten years mainly by textualists⁸¹ and public choice theorists.⁸² Each of the main criticisms of purposivism is addressed in the following sections. However, many of these critiques are wholly inapplicable when purposivism is used only when dealing with statutes that are delegating rulemaking power to the courts. Additionally, the remaining critiques lose much of their force because of the narrow instances in which purposivism is advocated. Finally, this section will address the

intent lies in the committee reports on the bill, . . . eschew[ing] reliance on the passing comments of one member, and casual statements from floor debates.”) (citations omitted).

⁷⁶ Sherman Act, 15 U.S.C. §§ 1-7 (1890).

⁷⁷ See 21 Cong. Rec. 2,456 (1890) (statement of Senator Sherman) (assuring that the Sherman Act “does not announce a new principle of law, but applies old and well recognized principles of the common law”).

⁷⁸ See POSNER, *supra* note 1, at 288 (noting that when Congress codifies common law, that “this is a clue that the courts are to interpret the statute with the freedom with which they would construe and apply a common law principle—in which event the legislators’ values may not be controlling after all”).

⁷⁹ Judge Posner noted:

Lawyers and judges do not begin their analyses of a challenged competitive practice by comparing the practice with the language of the [Sherman] act and then, only if they have satisfied themselves that there is some relationship, proceed to analyze the case law. They start with the case law and may never return to the statutory language

POSNER, *supra* note 1, at 278.

⁸⁰ See note 23 & accompanying text.

⁸¹ See *supra* note 7 & accompanying text.

wisdom of allowing Congress to delegate such power to the courts, effectively allowing them to duck political issues.

A. Multiple Purposes

When a statute is passed, it may gain passage for a variety of reasons. Public choice theorists have argued that it is impossible to draw one overriding public purpose from legislation because there are always so many interest groups that Congress is trying to appease.⁸³ The Court has also recognized that many statutes are compromises between different interest groups, and that consequently, there may sometimes exist opposing purposes in one piece of legislation.⁸⁴ However, in looking at a statute as a delegation of rulemaking power, these critiques are inapplicable.

When statutes are the product of compromise between different interest groups and have different conflicting purposes, they are not the kinds of statutes that would delegate rulemaking power to the courts. I have argued that courts should only assume that Congress meant to delegate rulemaking power to them when the purpose of the statute is clear. When there are many conflicting purposes, purposivism is not a probative tool of statutory construction. In fact, Courtney Simmons has noted that the Supreme Court relies more heavily on textualism when it is apparent that the legislation is a product of an ironed out compromise.⁸⁵ Accordingly, we will not usually have the problem of multiple purposes when Congress is delegating authority to the

⁸² See *supra* note 8 & accompanying text.

⁸³ Macey, *supra* note 8, at 227-33. See also Geier, *supra* note 120, at 494-95 (noting that “public choice theory . . . denies that any single purpose, or any combination of public-spirited purposes, prompts particular legislation”). Similarly, Cass Sunstein notes that just finding the purpose of a statute is problematic, but “[i]n the face of multimember institutions, the problem because even more troublesome.” Sunstein, *supra* note 5, at 427.

⁸⁴ See, e.g., *Stewart v. Abend*, 495 U.S. 207, 225 (1989) (“The process of compromise between competing special interests leading to the enactment of the 1976 Act undermines any such attempt to draw an over-arching policy [as it was a] compromise package involving controversial and intertwined issues.”).

⁸⁵ Simmons, *supra* note 18, at 134.

courts. Using purposivism and assuming a delegation of rulemaking authority in this circumstance is dangerous, as will be discussed more in Part VI.

Sometimes, though, Congress will identify multiple problems and try to solve them all in one statute – leaving the statute with multiple purposes. Congress may be trying to delegate power to the courts to solve a wide variety of goals. Just as with a single purpose, it makes sense that if Congress is delegating power to the courts that it clearly states the multiple goals of that legislation. Still, Congress may not think of possible conflicts between multiple purposes, but there are still ways to use purposivism to elucidate a statute. First, most statutes will only have one overriding purpose.⁸⁶ Obviously, in these cases, using purposivism is relatively easy. If there are minor goals that Congress is trying to achieve, a court would be justified in allowing the overriding purposes to trump these minor goals. Also, it may be that the entire statute has many purposes, but with regard to the interpretation of a specific section, only one of the purposes really is relevant. Thus, the only case where a problem would exist would be when the statute has multiple purposes, the purposes would lead to opposite results in the interpretation of the text, the conflicting purposes are equally relevant to the language, and it is not evident that one of the purposes is more important than the others. In these limited cases, purposivism obviously could not be used. Even though Congress meant to delegate power to the courts, using purposivism would just not be probative and other tools would have to be considered.

⁸⁶ Just as one of many examples that exist, when Congress passed the Clayton Act, there were multiple purposes including promoting trade and bettering the economy. However, courts have always considered the overriding purpose of the act to stop anti-competitive behavior. *See* *United States v. Von's Grocery Co.*, 384 U.S. 270, 275 (1966) (noting the similarities in the purposes of the 1950 Celler-Kefauver Act and the Clayton Act to “prevent economic concentration in the American economy by keeping a large number of small competitors in business”); *United States v. E.I. du Pont Nemours & Co.*, 353 U.S. 586, 592 (1957) (“For it is the purpose of the Clayton Act to nip monopoly in the Bud.”).

B. Reasonable Legislators

Another major critique given by public choice theorists is that purposivism assumes that legislators are rational and reasonable when they are often times neither. One of the two branches of public choice theory, interest group theory, advocates that “‘rational’ legislators responding to rational interest groups will not, in fact, produce purposive statutes.”⁸⁷ In fact, William Eskridge skeptically notes, “[t]o speak of a statute’s ‘purpose’ is incoherent unless one means the deal between rent-seeking groups and reelection minded legislators.”⁸⁸ The interest group theorists complain that the purpose of a statute is often times just to appease certain groups -- that crafting a statute is a balancing act between competing factions as opposed to legislators trying to do good for the public with an overarching purpose.

There are two responses to this criticism when dealing with the delegation of rulemaking authority. First, there is no reason why a court cannot conclude that the purpose of a statute is to appease a certain interest group and further that particular group’s interests.⁸⁹ The public choice theorists’ complaint is that trying to find a public purpose is a useless endeavor in most cases because many laws aren’t passed with a public purpose. However, there doesn’t need to be a *public* purpose -- just some reason why the statute was passed. If the statute was passed to appease a particular interest group, the purpose of the statute can be read to that end. Second, in looking only at statutes with clear purposes, this entire complaint becomes inapplicable. If a statute is not purposive, the purpose will obviously not be clear and purposivism will not be helpful to the courts.

⁸⁷ Simmons, *supra* note 18, at 131 (quoting Eskridge, *supra* note 4, at 334).

⁸⁸ Eskridge, *supra* note 4, at 334.

⁸⁹ Judge Posner argues the same in his book on the federal courts. POSNER, *supra* note 1, at 288. Hart & Sacks also acknowledged this as a valid purpose. See HENRY M. HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC

C. No Purpose Exists

A third complaint of the public choice camp is more specifically that there is never an overriding purpose which prompts legislation. Decision theorists have analyzed voting structures, agenda setting, and decision proofs to conclude that “statutes are the vector sum of political forces expressed through some institutional matrix which had profound [effect], but probably unpredictable and non-traceable, on the policies actually expressed.”⁹⁰ First, as just noted, this article does not advocate trying to find a *public* purpose for a statute, but only attempt to determine what purpose prompted Congress to pass the legislation.⁹¹ In addition, when only looking at statutes where the purpose is clear, this complaint again becomes inapplicable. The purpose does not have to be to solve a problem for the public good, but could be to address the problem of a specific interest group. It is obvious that when using purposivism only when the purpose of the statute is clear, the tightrope walking compromises envisioned by decision theorists, where multiple purposes barrage the legislator on all sides, simply don’t arise.

D. How Far a Court Should Go In Furthering the Purpose

Public choice theorists also argue that even if the statute has a clear purpose, it may be unclear how far the legislature meant to go in serving its purpose. The Supreme Court addressed this problem in the Civil Rights Act of 1991 as discussed above. In that case, the Court was able to determine how far to go by looking at the history of civil rights jurisprudence and using that as a limit. There will be other cases that will not be as clear, but it is a court’s specific expertise at

PROBLEMS IN MAKING AND APPLICATION OF LAW 1415 (4th ed. 1962).

⁹⁰ Mashaw, *supra* note 9, at 123; *see also* Macey, *supra* note 8, at 224 (noting that because “laws are passed for a wide variety of reasons,” it is difficult, if not “impossible for judges to reconstruct the complex array of motives that prompted the passage of a particular statute”). Cass Sunstein notes: “The characterization of legislative purpose is an act of creation rather than discovery.” Sunstein, *supra* note 5, at 427.

⁹¹ Judge Posner has argued that the courts need not find why Congress passed certain legislation, only that they be able to tell what Congress hoped the legislation would accomplish. *See* POSNER, *supra* note 1, at 267.

developing caselaw that is the reason Congress delegated power to the courts in the first place. A court's specialty is drawing lines and determining how far to go. If Congress knew how far it wanted to go in the first place, it would have written a detailed statute and not left it up to the courts. In most cases, how far to go will be unclear, but this is exactly as Congress intended when it delegated power to the courts.

E. Usurpation of Power

Purposivism has been seen as a blank check that judges can use to usurp power from the legislature.⁹² In fact, this balance of power problem has been put forth as a point of divergence in each of the “grand theories” of statutory interpretation (namely, purposivism, intentionalism, and textualism).⁹³ However, this critique does not apply when Congress is specifically giving away its power to the judicial branch. Of course, even under the very narrow circumstances where this article has proposed purposivism should play a role, it could be argued that Congress did not intend to delegate rulemaking power and the courts got it wrong. There also could easily be some judges who will use purposivism to settle cases as they see fit and not as the law necessarily demands. However, given the narrow application of purposivism advocated by this article, this is unlikely. Furthermore, as Judge Posner notes, Congress can always take the power back “with the stroke of a pen.”⁹⁴ One only need look at the recent legislation concerning the Do-Not-Call registry to support this notion.⁹⁵ Within twenty-four hours of an Oklahoma judge

⁹² See, e.g., POSNER, *supra* note 1, at 291; Simmons, *supra* note 18, at 132 (arguing that using purposivism the court has the danger of crossing over into “judicial lawmaking”); Amy E. Fahey, Note, *United States v. O’Hagan: The Supreme Court Abandons Textualism to Adopt the Misappropriation Theory*, 25 FORDHAM URB. L.J. 507, 534 (1998).

⁹³ See Eskridge, *supra* note 4, at 325.

⁹⁴ POSNER, *supra* note 1, at 273 (noting that if the courts have misconstrued what the Sherman Act was supposed to accomplish, Congress could easily fix everything).

⁹⁵ The Do-Not-Call list is a registry, which allows people to put their names on the list, stopping many types of telemarketers from calling them. See Federal Trade Commission, *National Do Not Call Registry*,

invalidating the Do-Not-Call list, Congress rewrote the statute to specifically fix the problem the judge identified.⁹⁶

F. Allowing Congress to Duck Political Issues

It could be argued that looking at any statute as delegating power to the courts allows Congress to duck political issues and ditch their constitutional responsibilities. However, there are legitimate reasons that would support a decision by Congress to pass its problem to the courts. Congress may recognize some problem exists, but without seeing it on a case-by-case basis, it may not have an appreciation of what it will take to fix this problem. Thus, just as Congress does with administrative agencies, it may be delegating power to the courts because of the courts expertise in resolving case-by case disputes. However, this is not always the case, and the courts should have a role in promoting legislative responsibility. As noted in *Girouard v. United States*, it should not be “lightly implied that Congress has failed to perform . . . and has delegated to this Court the responsibility of giving new content to language” because this would “discourage, if not to deny, legislative responsibility.”⁹⁷ Refusing the delegation of the authority to punish Congress for ducking the issue will not create, as Judge Posner has noted, a “helpful” judiciary in its duty to the process of legislation, the litigants, or society.⁹⁸ Furthermore, under the narrow conditions argued for above, namely when the statute is broad and the purpose is clear, courts are not “lightly implying” that power is being delegated to them, but only assuming

www.ftc.gov/donotcall (Oct. 24, 2003).

⁹⁶ On September 24th, an Oklahoma judge ruled that the FTC did not have the power to enforce the Do-Not-Call list because that power was specifically given to the FCC. *U.S. Security v. FTC*, 282 F. Supp. 2d 1285 (W.D. Okla. 2003); Caroline E. Mayer, *Do-Not-Call List Blocked by Court; FTC Overstepped Role, Judge Says*, WASH. POST, Sept. 25, 2003, at A01. A little more than twenty-four hours later, the House approved a bill giving this power to the FTC by a 412 to 8 vote, followed by a 95 to 0 vote in the Senate five hours later. Caroline E. Mayer, *Call List Is Again Blocked in Court; Order Comes after Congress Votes to Protect Registry*, WASH. POST, Sept. 26, 2003, at A01.

⁹⁷ 328 U.S. 61, 76 (1946).

this in the most obvious of situations.

Although this article will not explore the constitutionality of such delegation of rulemaking power to the courts,⁹⁹ from a judicial standpoint it makes sense to accept such delegation. A judge has the important responsibility of deciding every case or controversy which might come before her.¹⁰⁰ As noted above, there are political reasons and efficiency reasons why Congress might choose to pass along a problem to the courts, but regardless of the reason, once this duty is given to the courts, a judge would be violating her mandate from Congress if she did not accept that delegation.¹⁰¹ As discussed previously in Part II, when Congress gave a mandate to the courts to apply the general terms of the Fair Labor Standards Act, the Court in *Kirschbaum* referred to it as a *responsibility* that it had to fulfill.¹⁰² Responsibilities cannot just be ignored. Current and potential litigants rely on the courts to carry out that responsibility. Judge Posner elucidates this point with the following example:

If someone was short-changed on the purchase of a bag of oranges and brought suit against the seller under the federal securities laws . . . he would receive short shrift. The securities laws do not authorize the courts to deal with a sale of oranges. But if the case involves something that is or may be a security, and the judge is simply very uncertain whether the statute was meant to apply, he cannot

⁹⁸ See POSNER, *supra* note 1, at 292.

⁹⁹ Judge Posner has noted that an explicit delegation would probably not pose any constitutional problems, but there is a question whether delegating rulemaking power to federal courts specifically “would really be ‘judicial’ [power] within the meaning of Article III . . .” POSNER, *supra* note 1, at 290.

¹⁰⁰ U.S. CONST., art. III, § 2. Of course, the Constitution itself does not say that a judge *must* hear all cases before her, but only that her jurisdiction extends to certain cases and controversies.

¹⁰¹ In fact, one prevalent view of the federal courts is that they are merely agents of Congress. See Sunstein, *supra* note 5, at 415 (“According to the most prominent conception of the role of the courts in statutory construction, judges are agents or servants of the legislature.”). See also, Easterbrook, *supra* note 17, at 60 (“Judges must be honest agents of the political branches. They carry out decisions they do not make.”). Justice Holmes starkly presented this view when he had to apply what he considered to be a “foolish” statute, and said, “if my fellow citizens want to go to Hell I will help them. It’s my job.” Sunstein, *supra* note 5, at 415 (quoting HOLMES-KASKI LETTERS 249 (M. Howe ed. 1953)). However, not everyone is in agreement, and Cass Sunstein argues that this view of the federal courts is erroneous. See *id.* at 415-41 (1989) (arguing that Courts should be “more aggressive in statutory interpretation”). Professor Sunstein would have the courts take a more active role when there would be a “gross injustice”, when changed circumstances call for “creativity”, or “when constitutional considerations counsel courts to interpret statutes in one direction.” *Id.* at 440-41.

¹⁰² *Kirschbaum v. Walling*, 316 U.S. 517, 523 (1942).

just dismiss the case out of hand; it is within the scope of the legislation delegated to him.¹⁰³

A Judge cannot just dismiss a case because there is not an explicit section in the statute that deals with the particular circumstances of the case. If the law arguably covers the case, it is no answer that Congress wasn't explicit enough in their instructions. It is the judge's duty to decide the case or controversy – not to punish Congress for poorly written legislation.

Of course, this puts a heavy burden on a court's shoulder, and it may very well be that the federal courts have reached a crisis with regard to the amount of cases that they have to handle.¹⁰⁴ Whether the courts should use different judicial tools on account of this heavy administrative burden is a question I will leave to other commentators.¹⁰⁵ However, I have no doubt that judges are up to the task and agree with Felix Frankfurter when he noted: "Perfection of draftsmanship is as unattainable as demonstrable correctness of judicial reading of legislation. Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the proper fulfillment of both these august functions is to entrust them only to those who are equal to their demands."¹⁰⁶

VI. When Congress Has Not Delegated Power and the Role of Purposivism

Given the above guidelines about when courts can assume that a statute is delegated (when the statute is broad and the purpose is clear), one could go even farther and argue that anytime Congress leaves an ambiguity in a statute, it is delegating rulemaking power to the

¹⁰³ POSNER, *supra* note 1, at 289.

¹⁰⁴ See POSNER, *supra* note 1 (arguing that the increase in caseload of the federal court system has led to a crisis which demands a new set of interpretive tools).

¹⁰⁵ Compare POSNER, *supra* note 1 (arguing that the increased caseload should make courts eager to practice judicial restraint among other things) with Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation"*, 6 U. PA. J. OF CONST. L. 377 (2003) (countering that the fear of increased litigation should not be a valid judicial consideration in deciding cases).

¹⁰⁶ Frankfurter, *supra* note 3, at 546.

courts. However, the criticisms of purposivism, although stifled when the statute is broad and the purpose is clear, become louder as the legislative scheme moves farther away from these two positions. When a statute is detailed and/or the purpose is not clear, it is an indication that Congress did not mean to delegate any rulemaking power to the courts. In these cases, Congress has a specific way in which it wants to achieve its goals and has gone to great lengths to make sure the words of the statute express that method. In addition, in cases where the statute is detailed, there may not even be an agreed upon purpose, but only an agreed upon implementation, and trying to apply purposivism would contort the purposeless statute.

The subsequent sections will discuss how a court should analyze a statute when the text of the statute is detailed or the purpose is not clear. In considering how much rulemaking power Congress has delegated to the courts, the following table lists which method of statutory interpretation should ideally predominate:

PURPOSE	STATUTE	
	Detailed	Broad
Ambiguous	Textualism	Dynamic Interpretation or No Statute Exists!?
Clear	Textualism	Purposivism

A. The Statute is Broad and the Purpose is Ambiguous

When the statute is broad and the purpose of the statute is ambiguous, courts are faced with a very serious problem. Because the statute is broad, the text apparently does not speak to the question at hand with any specificity. Also, there is not a clear purpose in the statute. The entire statute itself is broad, but without any hint as to the goal Congress was trying to achieve. It could be that many purposes were put forth by different members of Congress, but, looking at the legislative history and evidenced by the words of the statute, there was never a meeting of the minds as to what problem Congress was trying to fix or how it was going to do it.

The easiest answer to such a problem is to simply say that Congress never agreed to anything specifically, and thus, just as in contract law,¹⁰⁷ there is no statute. Karl Llewellyn, an early proponent of purposivism, stated simply that “[i]f a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.”¹⁰⁸ While Professor Llewellyn used that statement to generally support purposivism, in the category of statutes that we are talking about in this section, there is much more than no purpose – there is no clear rule as well. Perhaps Professor Llewellyn would call this something even worse than nonsense. Judge Easterbrook has said as much when he proposed “declaring legislation inapplicable unless it either expressly addresses the matter or commits the matter to common law.”¹⁰⁹ This line of reasoning is plain: if Congress does not articulate its intentions either by giving a clear purpose or a clear rule, then it is as if no statute were passed.

Although attractive from a logical view, declaring a statute void due to a lack of clear purpose or rule of law is incredibly harsh both on litigants and Congress. Congress may well have meant to fix something in society, but only had a general idea of what the problem was and thus did not articulate a clear purpose. Judge Posner has criticized Judge Easterbrook’s approach because it “denies the courts a *helpful* role in relation to legislation.”¹¹⁰ Congress certainly meant to do *something* by passing legislation. At the very least, it could be said that Congress recognized that there was a problem with an area of law (whether or not it recognized specifically what the problem was), and wanted to fix it.

¹⁰⁷ Public choice theorists have proposed analyzing the bargains reached to make legislation just as they would construe a contract. See Easterbrook, *supra* note 17 at 18 (“If statutes are bargains among special interests, they should be enforced like contracts.”); but see Mark C. Mousesian, *Are Statutes Really ‘Legislative Bargains’? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C.L. REV. 1145 (1998).

¹⁰⁸ Karl Llewellyn, *Remarks on the Theory of Appellate Division and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950).

¹⁰⁹ Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 552 (1983).

An alternative, then, is to say that when the purpose is unclear and the statute is broad that Congress meant to actually delegate to the courts the ability to craft common law in the area. This would fit in well, albeit in a limited manner, with Judge Calabresi's idea of dynamic interpretation.¹¹¹ Judge Calabresi suggested that courts be able to treat statutes just like common law.¹¹² He argued that when Congress passes statutes due to certain circumstances and these circumstances then change, it is the duty of the courts to change the statutes accordingly.¹¹³ Commentators have criticized this as an "usurpation" of legislative power.¹¹⁴ However, if Congress has implicitly delegated this power to the courts, the court cannot be usurping legislative power (or, at least not without the consent of Congress). In fact, by passing broad statutes with unclear purposes, Congress could have meant to effectively authorize the courts to make common law in that area, such as they explicitly have done with collective bargaining agreements.¹¹⁵ As Cass Sunstein notes, when a judge fills in gaps of a statute that were left by Congress for the court to solve, "this approach is hardly an usurpation, but instead an inevitable part of interpretation."¹¹⁶

Whether one takes Judge Easterbrook's draconian approach to these sorts of statutes or considers them a particular instance that is ripe for a dose of Judge Calabresi's dynamic interpretation, it is clear that purposivism should not play a major role. Most obviously, without a clearly articulated purpose, trying to use purposivism would not do much good. However, at a

¹¹⁰ POSNER, *supra* note 1, at 292 ("Judges have to play a constructive, helpful role if legislation is to work.").

¹¹¹ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Building on Judge Calabresi's article, William Eskridge coined the term "Dynamic Statutory Interpretation." See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

¹¹² CALABRESI, *supra* note 111, at 166 (explaining that "the judicial common law would attach to statutory rules that are out of phase just as much as to common law precedents or doctrines").

¹¹³ *Id.* at 165 ("[T]he courts would not be bound to declare or promulgate the new in order to find that the old fails to fit.").

¹¹⁴ See, e.g., POSNER, *supra* note 1, at 291.

¹¹⁵ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957) (holding that the Labor Management Relations Act of 1947 "authorizes federal courts to fashion a body of federal law for the enforcement of . . .

more structural level, in these instances Congress either did not mean to delegate rulemaking power to the courts or, alternatively, did not mean to put any restraints on such delegated power.

B. The Statute is Detailed and the Purpose is Ambiguous

When the purpose of a statute is ambiguous, it is fairly plain to see that purposivism will not be very helpful as a statutory interpretation tool. One cannot start with the purpose of the statute if no articulated purpose exists. Given all the problems with purposivism listed above in Part V, the courts would be doing nothing more than guesswork if the courts relied on an ambiguous and unclear purpose to govern a statute. This is mostly just common sense -- when the text is all a court has to go on, it will be the predominant tool of statutory construction. One might ask why intentionalism may not play a bigger role. This will be addressed more specifically in the next section, but when a statute is detailed, a court can assume that Congress did not mean to delegate any rulemaking power to the courts, and trying to go past the text by using purposivism or intentionalism is a dangerous enterprise.

C. The Statute is Detailed and the Purpose Is Clear

When the statute is detailed and the purpose of the statute is clear, this paper parts with traditional notions of purposivism. When the statute is detailed, it means that Congress spent an inordinate amount of time crafting the exact wording of the law. As such, we can assume that Congress took the time to painstakingly consider the intricacies of the law passed and tried to fit it to specific situations. Congress did not mean to delegate any authority to the courts, but tried to make a detailed enough statute so that the legislation itself would control in all instances.

collective bargaining agreements”).

¹¹⁶ Sunstein, *supra* note 5, at 422.

Because we can assume that Congress did not mean to delegate any power, trying to fill in apparent holes in the statute with the general purpose of the statute is a dangerous use of judicial power.

First, the apparent holes that a court finds in the detailed statute are likely to be there for a reason. It is often the case that a broad purpose is articulated in the statute, and yet when it gets down to the implementation of that purpose, Congress chooses only to take small steps towards that goal.¹¹⁷ The more specific the steps Congress takes, the greater likelihood that Congress wanted to stop short of fulfilling a purpose for whatever reason. When considering the Tax Code, the Court noted in *Iselin v. United States*, that “[t]he particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax” all go to “preclude an extension of any provision by implication to any other subject.”¹¹⁸ The Court noted that to disregard the detail in the statute that was enacted by Congress would be an “enlargement of it by the court.”¹¹⁹ There are supporters of using a purposivism approach in the Tax Code,¹²⁰ but Professor Michael Livingston has pointed out that these proponents, “tend to exaggerate the logic and consistency of the Code, and to overstate the authority of tax scholars as interpreters of basic tax principles.”¹²¹ The example of the Tax Code as a detailed statute will be explored more fully below. It remains, though, that the court’s role in the legislative process is not to enlarge statutes, but to interpret them and apply them. When a statute is detailed, it is likely that Congress meant to leave a gap, and if a court fills that gap in, it is taking the chance

¹¹⁷ See *DICKERSON*, *supra* note 6, at 99 (“Indeed, it is the essence of a broader legislative purpose that it will not be wholly fulfilled by the statute in question even if its working provisions are fully complied with.”); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) (“[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone.”).

¹¹⁸ 270 U.S. 245, 251 (1926).

¹¹⁹ *Id.*

¹²⁰ Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 Fla. Tax Rev. 492 (1995); Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C.L. REV. 623 (1986).

¹²¹ Livingston, *supra* note 62, at 679.

that it is enlarging the statute.

Second, the probative value of the general purpose is very small when a statute is painstakingly detailed. Professor Reed Dickerson, an early proponent of purposivism,¹²² conceded that “the disciplines of the legislative process are directed more to attaining agreement on the specific action to be taken in a bill than to attaining agreement on its legislative purpose, even when these purposes have been memorialized in the bill itself.”¹²³ We can assume with a detailed statute that Congress spent most of their time, not crafting the purpose section, but in deliberately choosing the wording of the actual statute. It is for this reason that the wording of the statute must take predominance over any articulated purpose -- even if it is very clear what the purpose was meant to achieve. Considering all of the problems of purposivism which were discussed in the previous Part, when a statute is detailed and Congress has therefore not delegated power to the courts, the probative value of finding the purpose of a statute to resolve ambiguities is very small.

Finally, it might be argued that in a detailed statute, Congress could very well have just forgotten about something. One could ask if the courts really should not use purpose to fill that gap in. The quickest answer is that if Congress did not legislate for that specific instance, then the court cannot write law for it. Weighing the probative value of finding a purpose of the statute with the likelihood that Congress specifically left a gap on purpose, the safer course would be to leave the statute alone. Even Justice Frankfurter, who participated in the Supreme Court’s trend toward using purposivism as a dominant method of statutory construction in the mid twentieth century,¹²⁴ said that, “[a]n omission at the time of enactment, whether careless or

¹²² See generally DICKERSON, *supra* note 6.

¹²³ *Id.* at 90-91.

¹²⁴ See Frankfurter, *supra* note 3; *Md. Casualty Co. v. Cushing*, 347 U.S. 409, 415 (1954) (Frankfurter, J.) (“[W]e must read the statute in light of its expressed purpose.”); *62 Cases of Jam v. United States*, 340 U.S. 593, 596

calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion.”¹²⁵ Justice Frankfurter was specifically speaking to the fact that the courts are not there to legislate and should be careful not to overstep their authority. If the statute is detailed and Congress has spent so much time crafting all the intricacies of that legislation, the courts take a big risk in trying to close apparent gaps by using purposivism given all the problems with purposivism and the likelihood that the gaps themselves are purposeful.

As mentioned above, one example of an area of law where Congress has specifically not delegated legislative power is in tax law. In 1995, the Tax Code contained 1,339,000 words.¹²⁶ While I argued above that the number of words alone aren’t determinative of whether a statute is detailed,¹²⁷ the voluminous amount of specific instructions given to the courts on how to interpret every element of the tax law¹²⁸ indicates that it is a very detailed statute indeed. It has likewise been argued by commentators that tax law has clear purposes.¹²⁹ For example, Deborah Geier suggests that the Tax Code’s purposes include taxing dollars only once, not taxing income until it is realized, and that only net wealth should be taxed.¹³⁰ Professor Geier argues that a textualist approach to tax interpretation frustrates the purposes of the Tax Code and just requires Congress to enact more legislation -- adding more to the already voluminous material that

(1951) (“Regard for [the] purposes [of the statute] should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words.”).

¹²⁵ Frankfurter, *supra* note 3, at 534.

¹²⁶ Geier, *supra* note 120, at 511.

¹²⁷ *See supra* Part III.

¹²⁸ *See, e.g.*, 28 U.S.C. § 280F(a)(1)(A) (setting specific depreciation amounts specifically for luxury automobiles year by year); § 220 (b)(5) (disallowing deductions for payments made to medical savings accounts if the person’s spouse is covered under a high deductible health plan); § 141(e) (defining a “qualified bond” as one of either eight different categories of bonds and meeting the detailed requirements set forth in §§ 146 and 147).

¹²⁹ *See* Livingston, *supra* note 62, at 683 (noting that commentators have said the tax code is a special case of statutory interpretation due in part to the existence of broad structural principles).

¹³⁰ Geier, *supra* note 120, at 497. Geier has also noted that usually in the case law, it is the taxpayer who wants a more textualist approach to tax law and the government who wants a more purposivist approach. *Id.* at 495 (noting, though, that on average each approach probably does not benefit either group more than the other).

exists.¹³¹

While Professor Geier's approach to tax law, emphasizing the broad purpose and goals of the Tax Statute instead of the text, would no doubt produce a nice cohesive code that perhaps didn't need to be as voluminous as it is currently. However, its cohesiveness says nothing about the validity of such an approach. As noted previously, public interest theories posit that legislation is the vector sum of forces from numerous interest groups. This seems especially true in tax law. Trying to pass a new tax law elicits responses from each of the major party's leadership and most interest groups, and usually catches the attention of many of the voters.¹³² The Tax Code has been painstakingly hammered out by Congress with extraordinarily specific detail and input from all sides. To upset this balance would not respect the compromises that Congress has reached with respect to every element, and changing the law to achieve some general tax purpose would not be carrying out congressional intent at all -- for their intent was not to delegate this area of law to the courts, but to enact a piece of carefully balanced legislation, taking into account interests from every direction. Although the current concept of tax lawyers who try to find loopholes in the legislation is not appetizing to many people,¹³³ the creation of these loopholes is often times purposeful. Upsetting this delicate balance in the name of an overriding purpose is a very dangerous business and often times will result in destroying the compromises that Congress has reached between competing interest groups.

¹³¹ *Id.* at 511 ("The Code can only become inexorably longer and more complicated as Congress must overturn decision after decision by statutory amendment, a cumbersome device intentionally made difficult by the framers.").

¹³² *See, e.g.,* Virginia Gannon, *Stores to Closely Track Congress*, DAILY NEWS RECORD, at 9, Jan. 11, 1991 (noting the pressure on Congress to create more revenue while store owners are pressuring Congress to cut taxes); Dan Walters, *A Tax Hike with No Fingerprints on It*, THE SAN DIEGO UNION-TRIBUNE, at B15, Mar. 13, 2003 (explaining that in considering new tax legislation on cars, Governor Gray Davis had differing pressure from the police, the firemen, motorists, republicans who would supply the key votes, and, most of all, voters).

¹³³ For instance, Deborah Geier notes with distaste that William S. McKee, a prominent tax attorney at King & Spalding, was quoted as saying that "taxpayers are entitled to take the benefit of unintentional . . . glitches in the law that tax advisers find by applying a literal reading of the law until the government somehow stops them." *Id.* at 510-11 (quoting Lee A. Shepherd, *Partnership Antiabuse Rule: Dirty Minds Meet Mrs. Gregory*, 64 TAX NOTES 295,

The question of whether purposivism or textualism should control in the Tax Code was faced by the Ninth Circuit in the case of *Albertson's Inc. v. Commissioner*¹³⁴ The Ninth Circuit first used textualism to interpret the statute,¹³⁵ but then, it agreed to rehear the case and overturned its original opinion, replacing it with a purposivism analysis.¹³⁶ At issue was the interaction between the deduction for business interest in section 163, and the deduction only for “qualified” employee benefit programs in section 404.¹³⁷ *Albertson's* had a non-qualified employee plan, and thus under section 404, it could not take a deduction for the plan until it was paid out. It nevertheless got around this hurdle by taking the deduction as a general business deduction under section 163, which was technically allowed by the statute.¹³⁸ As explained by Professor Livingston, “[t]he literal language of the statute thus permitted an interest deduction under 163, although the implicit general policy of 404 -- denying employer deductions until [a certain time] -- seemed to oppose it.”¹³⁹ It was a direct clash between the clear text of the statute and the seeming overall purpose of the employee benefit section (namely, to encourage employers to establish qualified plans).

Looking at the statute in terms of the amount of rulemaking authority delegated to the courts, the outcome would be clear. There is a clear purpose, but because the statute is detailed, the text of the statute should control. In fact, it is very likely that Congress recognized this discrepancy between the two sections when it wrote the statute. The first *Albertson's* opinion quoted legislative history and noted that “Congress was fully aware of the [163] business exceptions If Congress had intended section 404 to govern the timing of interest

296 (July 18, 1994)).

¹³⁴ 42 F.3d 537 (9th Cir. 1994), vacating in part 12 F.3d 1529 (9th Cir. 1993).

¹³⁵ *Albertson's*, 12 F.3d 1529.

¹³⁶ *Albertson's*, 42 F.3d 537.

¹³⁷ See generally Livingston, *supra* note 62, at 712-16.

¹³⁸ *Id.*

¹³⁹ *Id.* at 713.

deductions, it could have made specific reference [in section 163]”¹⁴⁰ The statute was detailed and purposefully deliberate. The Ninth Circuit made the right decision in the first instance.

However, the Circuit Court reversed its decision in part after a rehearing of the case, and decided that purposivism should control.¹⁴¹ Upon reconsidering the issue in the face of much academic criticism,¹⁴² the court felt that “despite the literal wording of the statute, Congress could not have intended to exclude interest payments”¹⁴³ It may be that Congress was not aware of the gap in the statute and would have closed it when it was brought to their attention,¹⁴⁴ but that does not mean the Ninth Circuit was correct in its analysis. As Professor Livingston notes, “the court’s opinion is troubling on several levels. The suggestion that a court may ignore even clear statutory language in order to effect a broader legislative purpose violates Professor Hart and Sacks’ injunction against giving the words of a statute ‘a meaning they will not bear.’”¹⁴⁵ There was legislative history suggesting that Congress knew of this hole when it passed the relevant sections, and the scheme describing deductions both for interest payments and employee benefits plans was incredibly detailed. It is likely that Congress meant to leave that gap. The Ninth Circuit’s second decision, although perhaps good for the promotion of qualified employee benefit plans, did not focus on what it should have: the painstakingly detailed plan that Congress passed with its 1.4 million words.

¹⁴⁰ *Albertson’s*, 12 F.3d at 1553 (citing H.R. Rep. No. 1337, 83rd Cong., 2d Sess., reprinted in 1954 U.S.C.C.A.N. 4017, 4181).

¹⁴¹ *Albertson’s*, 42 F.3d 537.

¹⁴² See, e.g., Daniel Halperin, *Ninth Circuit’s Decision in Albertson’s Is Outrageous*, 62 TAX NOTES 1083 (Feb. 21, 1994); Lee A. Sheppard, *News Analysis: The Ninth Circuit Creates a New Interest Deduction*, 62 TAX NOTES 405 (Jan. 24, 1994). However, some commentators supported the original decision. See Steven J. Willis, *Albertson’s: Less Emotion and More Reason Would Be Helpful*, 64 TAX NOTES 961 (Aug. 15, 1994); Edward A. Zelinsky, *The Ninth Circuit’s Albertson’s Decision: Right for 1983, Wrong For Today*, 63 TAX NOTES 231 (Apr. 11, 1994).

¹⁴³ *Id.* at 546.

¹⁴⁴ In fact, Senator David Pryor introduced a bill to overturn the first *Albertson’s* decision before the second had come out. *Pryor’s Bill Would Reverse Albertson’s Decision*, 62 TAX NOTES 1309 (Mar. 7, 1994).

In short, when the statute is detailed, even if the purpose is clear, it is too dangerous for the courts to try to fill in the gaps by using purposivism. The gaps are often times left there for a reason, and filling them in will be upsetting the very delicate balance crafted by the legislature. It takes a risk that the court is enlarging the statute, and perhaps even overturning Congress' wishes.¹⁴⁶

VII. Conclusion

In *The Interpretation and Application of Statutes*, Professor Reed Dickerson talks about how lawyers and judges are overly concerned with the “pathology of the legislative process” and “sick” statutes -- meaning “ambiguous [or] overvague.”¹⁴⁷ I have specifically focused my analysis on just those overvague and ambiguous statutes, but this article argues that they are not “sick” at all. In fact, broad statutes with clear purposes are a legitimate use of Congress' power to delegate rulemaking authority to the courts, and it makes perfect sense for them to do so. Congress delegates authority to agencies all the time due to their expertise, and it makes similar sense that it would also delegate authority to courts for their expertise in resolving cases and formulating law that can achieve an articulated goal that Congress identifies.

The common complaints of purposivism, made mainly by textualists and public choice theorists, lose their force or are even wholly inapplicable when purposivism is used only on statutes that indicate that Congress meant to delegate such power. Their criticisms, however, are

¹⁴⁵ Livingston, *supra* note 62, at 716. Professor Livingston calls the *Albertson's* case “Purposivism Run Wild.” *Id.* at 712.

¹⁴⁶ Under this theory, though, the absurdity doctrine would still be viable even in a detailed statute. For example, in *Helvering v. Owens*, a taxpayer's automobile was damaged \$35, an amount that could be deducted on his tax form. However, the taxpayer sought to take a deduction for the total depreciation of the car from the time he purchased it, which was admittedly allowed by the literal text. 305 U.S. 468 (1939). Under the doctrine of absurdity, though, a court could find, as they did in that case, that the damage deduction should not include general wear and tear damage, but only the specific damage caused by the accident.

¹⁴⁷ DICKERSON, *supra* note 6, at 54.

well directed toward using purposivism as a general method of statutory interpretation, and it is for this reason that this paper urges that judges should only assume that Congress meant to delegate power in a very narrow circumstance: when the statute is broad and the purpose is clear.

Using other tools to interpret statutes that have clear purposes and are broadly written simply does not make sense. One cannot focus solely on the text when the text is a broad mandate with no specific instructions. One also cannot focus on the intent of Congress because their only intent might have been to pass the problem along to the courts. Looking at these types of statutes with other methodologies of construction is assuming that they are “sick” in some way -- that they are ambiguous not because Congress wanted them to be ambiguous, but because of error or poor draftsmanship. To extend Professor Dickerson’s analogy, trying to cure these supposedly sick statutes is like operating on a healthy patient. The statute is not sick at all -- it is exactly what Congress intended it to be -- purposefully ambiguous in that it delegates rulemaking power to the courts. Purposivism is the best way to interpret these kinds of statutes and is the only way to interpret them in compliance with Congress’ intentions.