

THE ROLE OF PURPOSIVISM IN THE DELEGATION OF RULEMAKING POWER TO THE COURTS

Michael Rosensaft*

INTRODUCTION

Gay marriage, abortion, the 2000 presidential election, the National Do-Not-Call Registry—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 Congress for thrusting the federal courts into contentious political battles, 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 for 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 this problem and it makes sense that the courts should interpret the legislation to that end.

Once Congress has delegated a problem to the courts, it follows that purposivism should assume a prominent role in the interpretation of the statute, since the purpose of the statute may be all that the legislators could agree on. Felix Frankfurter eloquently explained the logic behind purposivism: “Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy [The aim] 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 purposivism, explained quite succinctly how to apply it:

* Associate, Cleary Gottlieb Steen & Hamilton, LLP; 2004, Law Clerk to the Honorable Jane R. Roth, United States Court of Appeals, Third Circuit; J.D. 2003, University of Pennsylvania Law School; B.A. 1999, Johns Hopkins University. I'd like to thank Professor Catherine Struve for sharing with me her keen insights into statutory interpretation, Menachem Z. Rosensaft for tirelessly reading through draft after draft of this article, and my lovely wife Joana Rosensaft, without whose help and inspiration, this article would never have been written.

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

2. *Id.*

3. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947). Ironically, it is the legislation itself that creates some of the inadequacy.

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, when Congress has, in effect, delegated rulemaking authority to the courts just as it does with administrative agencies. It certainly does not 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, in effect, a delegation of rulemaking power to the courts. Purposivism has come a long way since it was “the touchstone of statutory interpretation.”⁶ Understandably, this tool of statutory interpretation has

4. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958). Hart and Sacks have argued that “[e]very 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.” *Id.* at 1124. Judge Hand was also a proponent of using the purpose of a statute to construe its meaning and argued:

[I]t 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, “[t]he 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 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

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 contending 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 article argues 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 I of this article 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 II explains 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 III discusses generally what purposivism is and specifically how to find the purpose in a statute. Part IV addresses some of the common critiques of purposivism and analyzes how these critiques fare when looked at in the light of delegating rulemaking power to the courts, and Part IV also discusses the problems with allowing Congress to duck political issues in this manner. Finally, Part V argues that although purposivism should play a major role when the statute is broad and the purpose is clear, it is dangerous to apply it in all situations; thus, purposivism should take a back seat to other forms of statutory interpretation either when the statute is detailed or the purpose is

that statutes embody the legislative writer’s public purposes.”).

7. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 228 (2000); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. REV.* 621, 623 (1990) (“The new textualism posits that once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant.”). Justice Scalia has been particularly critical of using purposivism. *See, e.g.*, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.* 515 U.S. 687, 726 (1995) (“I thought we had renounced the vice of ‘simplistically . . . assum[ing] that *whatever* furthers the statute’s primary objective must be the law.”) (Scalia, J., dissenting) (alteration and omission in original) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)). *See generally* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (presenting Scalia’s version of textual originalism).

8. Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 *CHI.-KENT L. REV.* 123, 134 (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); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STAN. L. REV.* 321, 335 (1990) (“Judicial attempts to fancy up those deals [between interest groups and legislators] with public-regarding rhetoric either are naive or simply substitute the judge’s conception of public policy for that of the legislature. . . . [T]his *is* judicial lawmaking . . .”).

vague. Congress may, in these instances, be passing its problem to the courts, but the courts have a responsibility to solve those delegated problems and purposivism is the correct tool with which to do so.

I. 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. Occasionally, Congress expressly indicates this delegation in the statute itself.⁹ Congress may feel that it is more efficient to leave the details of a statute to the courts.¹⁰ Congress does the exact same thing when it gives rulemaking authority to administrative agencies. The courts, like administrative agencies, have their own types of expertise that can be useful to Congress. This parallel was recognized by Justice Jackson, speaking for the Court in *Skidmore v. Swift & Co.*, when he analyzed the Fair Labor Standards Act (FLSA) and noted, “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. Instead, it put this responsibility on the courts.”¹¹ In that case, the Court also cited the case of *Kirschbaum Co. v. Walling* several times, which likewise noted that “the [FLSA] puts upon the courts the independent responsibility of applying . . . the statute to an infinite variety of complicated industrial situations.”¹² Congress is obviously extremely busy, and just as it is efficient for it to delegate some rulemaking authority to administrative

9. For example, the Tennessee Valley Authority Act “expressly provides that the Act shall be ‘liberally construed to carry out the purposes of Congress.’” *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 551 (1946) (quoting 16 U.S.C. § 831dd (2000)); *see also* *Donnelley v. United States*, 276 U.S. 505, 512 (1928) (noting that the federal prohibition laws stated that they “shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented”); *Cox v. Copeland Bros. Constr. Co.*, 589 S.W.2d 55, 61 (Mo. Ct. App. 1979) (observing “the legislative admonition that the terms of the Workmen’s Compensation Act shall be liberally construed with a view to the public welfare”).

10. Grundfest has argued that “Congress may lack the foresight and expertise needed to specify every last jot and tittle of a rule in the text of the statute, and it could be inefficient for a legislature even to try.” Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 640 (2002); *see also* Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243, 1314 (1999), which noted:

It is tempting to say that one should try to make all rules as explicit as possible, in order to maximize the stability, predictability, and democratic accountability of the legal system. In reality, explicitness is like other human goods: it is valuable, but costly to produce and suffers from diminishing returns.

11. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944).

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

agencies, it also stands to reason that it would be efficient for it to delegate some rulemaking authority to the courts.

Congress might choose to use the federal courts, rather than an administrative agency, because of the courts' expertise in developing law on a case by case basis. As Judge Posner has explained, "a statute necessarily is drafted in advance of, and therefore with imperfect appreciation for, the problems that will be encountered in its application."¹³ 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 interpret the statute as necessary so that the courts can work out some of the statute's details. 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.¹⁴ Justice O'Connor notes in her recent book how fortuitous it was that criminal procedure developed in this fashion, allowing a continuing reexamination and tweaking of the law.¹⁵

As mentioned previously, a parallel can be made between Congress's delegation of rulemaking authority to the courts and the delegation of rulemaking authority to administrative agencies. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Court held that agencies should get broad deference in interpreting statutes because of their expertise in their areas.¹⁶ Specifically, in interpreting the Clean Air Act, the Court in *Chevron* gave deference to the Environmental Protection Agency because "[p]erhaps [Congress] consciously desired the Administrator to strike the balance at [that] level."¹⁷ Just as administrative agencies have expertise in

13. POSNER, *supra* note 1, at 280.

14. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) ("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 (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.

15. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 11 (2003). "[T]his continuing process of reexamination is healthy. First, it helps to remind us all that important issues are at stake Second, it allows the law to be developed gradually and in small steps. Third, it enables the Court to correct or refine rules that prove ineffective or counterproductive." *Id.*

16. *Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865 (1984).

17. *Id.* at 865.

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 case law on an incremental basis.

It also may be the case, though, that Congress just cannot agree how to solve a 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.”¹⁸ Considering the delicate balancing act that legislators must perform, oftentimes they cannot agree on a specific solution to the problem. Their only agreement, then, is to purposely leave the statute ambiguous, thereby giving the problem to the courts.¹⁹ In these cases, deliberately ambiguous language “*can* be interpreted to include [all] their positions.”²⁰ Here again, Congress agrees that a problem needs to be fixed, but leaves the solution to the courts.

Whether for efficiency or due to 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 is discussed in Part V, but if a court is to treat such statutes differently, it must be able to recognize when a statute constitutes such a delegation.

18. Eskridge & Frickey, *supra* note 8, at 335.

19. See Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) (“Sometimes the compromise may be to toss an issue to the courts for resolution . . .”); Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 105 (1995) (“In fact, when the legislation is controversial, language is sometimes purposefully left ambiguous to facilitate passage of an Act in spite of unresolved conflicts.”).

20. Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 118 (1995); see also William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288 (1988) (positing that when a legislator cannot appease all interest groups, “the legislator’s next-best strategy will be to support an ambiguous law, with details to be filled in later by courts or agencies”); Grundfest & Pritchard, *supra* note 10, at 628 (noting that “[a]mbiguity serves a legislative purpose” as “[l]egislators with opposing views can then claim that they have [each] prevailed in the legislative arena”).

II. 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 that Congress has, in effect, delegated rulemaking power to the courts is that a 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 a specific solution to the problem. It follows then that the statute Congress passes will not be detailed, but will only broadly outline what Congress 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."²¹ Two definitions should first be explained in full. First, 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 is the Tax Code, which is discussed more fully below.²² 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 Part, the Civil Rights Act of 1991 is discussed as one such example.²³

Even if the wording of the statute is broad, 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 is unable to agree how to fix it, Congress would make the purpose of the statute apparent. The purpose in such an instance 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 situations, a complete discussion of how to

21. O'CONNOR, *supra* note 15, at 60, 63.

22. I.R.C. §§ 1 to 9833 (2004).

23. Civil Rights Act of 1991, 42 U.S.C. § 1981 (2000).

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 majority of legislators 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 Congress delegating rulemaking authority to the courts is the Sherman Act, a statute that formed the basis of modern antitrust law.²⁴ Section one of the Act simply reads: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”²⁵ The term “restraint of trade” specifically referenced common law, but the Act was not simply an authorization for the courts to continue using common law.²⁶ As Professors Ernest Gellhorn and William E. Kovacic 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.”²⁷ 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 construed the Act’s terms “restraint of trade” and “monopoly” in *United States v. E.C. Knight Co.*, it resorted to common law

24. Sherman Act, 15 U.S.C. §§ 1–7 (2000). 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.

25. 15 U.S.C. § 1.

26. See RICHARD A. POSNER, *ANTITRUST LAW* 33–35 (2d ed. 2001) (“The draftsmen of the Sherman Act borrowed common-law terminology, but without meaning to codify, the common law of competition and monopoly.”). Judge Posner explains:

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 common law of monopolies and restraints of trade had a miscellany of objectives mostly unrelated and sometimes antipathetic to competition and efficiency.

Id. at 33. Although the Sherman Act had perhaps a more directed focus than the common law, the common law did form the foundation and starting point for modern antitrust law. See ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 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. 2456 (1890) (statement of Sen. 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”).

27. GELLHORN & KOVACIC, *supra* note 26, at 21.

explanations from the prominent scholar Lord Coke and to Coke's use of the Latin definition of "monopoly."²⁸ The Sherman Act is clearly a broad statute that does not give detailed instructions to the 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. Commentators have suggested that the Act was meant to preserve opportunities for firms and individuals to compete;²⁹ to prevent unfair redistributions of wealth from consumers to producers;³⁰ to sustain the vitality of democratic institutions;³¹ or to shift wealth from large manufacturers to small merchants.³² More generally, Robert Bork has argued that the Sherman Act "displays the clear and exclusive policy intention of promoting consumer welfare."³³ Many of these purposes could conflict, but in most cases, they are in harmony. It is fairly clear in certain circumstances which purpose should prevail. James May has suggested that, at the time it passed the Sherman Act, Congress considered these aims to be consistent and mutually reinforcing.³⁴ More on the problem of multiple purposes is discussed in Part III. If a case arises where the purposes do conflict, courts will

28. *United States v. E.C. Knight Co.*, 156 U.S. 1, 9–10 (1895). Lord Coke's Latin was hardly helpful: "[Q]uod est cum unus solus aliquid genus mercaturae universum vendat, ut solus vendat, pretium ad suum libitum statuens. . . ." *Id.* at 10. Perhaps by focusing on the purpose of the Act rather than other commentators, the Court could have spared itself the need to rely on Latin definitions.

29. See Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1146–48 (1981) (describing pre-Sherman Act conditions in which competitors "joined forces, usually in the form of trusts[, and] swallowed up hundreds of small proprietors and stamped out others").

30. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93 (1982) ("The [Sherman Act's legislative] debates strongly suggest that Congress condemned trusts and monopolies because they had enough power to raise prices and 'unfairly' extract wealth from consumers, turning it into monopoly profits.").

31. See David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1228 (1988) ("The rise of the great monopolies decisively upset the balance of economic power on which a true democratic republic depends.").

32. See Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. L. & ECON. 73, 87 (1985) (noting that "critics of the trusts in the Congress . . . complained that falling prices drove less efficient 'honest men' out of business"); Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-examined*, 30 ECON. INQUIRY 263, 264, 273 (1992) (positing that the Act's purpose was to satisfy various interest groups, including giving "advocates of small, localized firms some prospect of a buffer against the waves of creative destruction").

33. ROBERT BORK, *THE ANTITRUST PARADOX* 61 (1978).

34. See James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 291 (1989) (suggesting that the principles of "competitive pricing, efficiency, economic opportunity, and political freedom . . . took on larger meaning as part of a still widely accepted paradigm stressing basic natural rights of labor, property, and exchange and the labor theory of value").

obviously have to turn to other methods of interpretation—just as a textualist would turn to other means if the words in a statute conflicted. 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 Association*, 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.³⁵ Thus, unlike under the 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 as a violation of the Act. This produced 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.³⁶ Ultimately, Justice White’s more purposive methodology prevailed in *Standard Oil Co. v. United States*, in which his reasoning swayed the Court to adopt the “rule of reason.”³⁷ The Court’s analysis focused on “one of the fundamental purposes of the statute”—protecting, not destroying, property rights.³⁸ The Court went from an unworkably simplistic literal reading of the Act that “had the vice of overinclusiveness” to the current “‘full blown’ rule of reason” that governs modern antitrust law.³⁹ The Court changed its view of the Sherman Act and, by focusing on the broad purpose of the Act, 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 played originally, and would have played if it had construed the Act using purposivism.⁴⁰

35. *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 312 (1897).

36. *Id.* at 343–44 (White, J., dissenting).

37. *Standard Oil Co. v. United States*, 221 U.S. 1, 66–67 (1911).

38. *Id.* at 78. Thus, the Court indicated that its original reading of the Act was overinclusive. *See id.* at 67–68 (confining the “general language” of *Trans-Missouri Freight Association* to the facts and context of that case).

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

40. As discussed more fully 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. For more on Judge Posner’s arguments see POSNER, *supra* note 1, at 292.

C. The Civil Rights Act of 1991

The Civil Rights Act of 1991 is an example of a statute that is not necessarily broad in its entirety, but which contains one broad subpart, such that a court should assume that power has been delegated to it.⁴¹ There was agreement that the purpose of the Act was to make it easier for plaintiffs to sue in employment discrimination cases and to overrule several Court precedents that had made it more difficult to sue.⁴² 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 of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”⁴³ There are parts of the Act that are detailed. For example, Congress shifted the burden in employment discrimination actions⁴⁴ and permitted punitive damages.⁴⁵ Congress was not able to decide, though, whether the Act should be applied retroactively.

As mentioned above, an entire statute need not 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 is ambiguous, but there was other evidence that Congress intended that the courts resolve the retroactivity issue. This was a politically contentious

41. Civil Rights Act of 1991, 42 U.S.C. § 1981 (2000). The same could also be said about the Civil Rights Act of 1964. See Sunstein, *supra* note 5, at 422 (explaining that “[t]he basic prohibition of ‘discrimination’ [in the 1964 Act] provides no guidance on the role of discriminatory effects, the appropriate burdens of proof and production, and the mechanisms for filtering out discriminatory treatment”).

42. 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.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071 (1991); see also Henry P. Ting, Note, *Who’s the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL’Y 515, 542 n.191 (1996) (stating that the 1991 Act was specifically enacted to “reverse five Supreme Court decisions that were undermining the existing employment discrimination laws”); Thomas W. Lee, Comment, *Deducting Unemployment Compensation and Ending Employment Discrimination: Continuing Conflict*, 43 EMORY L.J. 325, 351 (1994) (noting that the 1991 Act was meant “to enhance the effectiveness of title VII in ending employment discrimination”).

43. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071 (1991).

44. In disparate impact suits, the Court placed the burden of persuasion on the plaintiff to prove that an employer’s practice is not a “business necessity.” *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). However, the Civil Rights Act of 1991 requires that the employer “demonstrate[] good faith efforts . . . to identify and make a reasonable accommodation that would provide [the employee] with an equally effective opportunity and would not cause an undue hardship on the operation of the business.” 42 U.S.C. § 1981a(a)(3).

45. § 1981a(a)(1), (b)(1).

issue, and when the law was passed in 1991, retroactivity was opposed by the Bush administration, but supported by the Democratic leadership in Congress.⁴⁶ As the Court speculated in *Landgraf v. USI Film Products*, “[i]t is entirely possible—indeed, 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.”⁴⁷ Since the purpose was clear and the statute was broad, the Court should turn to purposivism as a guide in adjudicating cases that come under the Act.

The Court did just that. It saw parts of the Act as a delegation of rulemaking power from the legislature and used common legal standards of fairness and notice to find that the Act should not be retroactively applied.⁴⁸ The Court looked at the broad purpose of the Act as a restraint.⁴⁹ True, allowing the statute to be retroactive would further promote its remedial purposes,⁵⁰ but Congress’s aim in passing the Act was not to create a voluminous number of claims. Rather, Congress wanted to make it easier to bring an employment discrimination suit without being impeded by the procedural restraints that had been imposed by the Court. Retroactivity was never a part of the Civil Rights Act, was never a part of the Court’s interpretation of the Act, and is 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. This is a prime example of a law where the text was not helpful, as Congress intended to give this problem to the courts. 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.

III. HOW TO FIND THE PURPOSE IN A STATUTE

46. Linda Greenhouse, *Ginsburg at Fore in Court’s Give-and-Take*, N.Y. TIMES, Oct. 14, 1993, at A1.

47. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 261 (1994). Some courts criticized Congress for not resolving this issue. *See, e.g.*, *King v. Shelby Med. 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, this Alabama Judge felt that the delegation was not an efficient one.

48. *Landgraf*, 511 U.S. at 286.

49. *See id.* at 259 (“[P]rospective application . . . would prolong the life of a remedial scheme, and of judicial constructions of civil rights statutes, that Congress obviously found wanting.”).

50. *Id.* at 285. “It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity. Statutes are seldom crafted to pursue a single goal . . .” *Id.* at 285–86.

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. While some of the critiques of these methods lose their force in the delegation framework, later discussed in Part IV, the same methods remain. Seven of these methods are discussed shortly below: reading the language of the statute; reading the purpose sections in the statute; looking at the statute as a whole; looking at similar statutes; considering interest groups and legislative compromises; using the legislative history; and finally, in some instances, examining case law. Each of these methods has been critiqued by academic commentators, and this paper does not fully discuss the merits of each. However, as noted above, 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 methods.

A. *Language of the Statute*

The Court often remarks that any reading of a statute must start with the text itself.⁵¹ 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.⁵² 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 give specific instructions to the courts. Still, courts can use the text itself as a guide when trying to find purpose.⁵³ Examining the text of the statute to discern its purpose is a practice that even 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. According to Professors Eskridge and Frickey, “[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.”⁵⁴

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

52. See HART & SACKS, *supra* note 4, at 1374.

53. See *United States v. Smith*, 740 F.2d 734, 738 (9th Cir. 1984) (explaining that courts should look to a statute’s purpose “to ensure that literalism is not used to undermine the purposes and protections of legislation”). “After all, Congress expresses its purpose by words [in the statute].” *Id.*

54. Eskridge & Frickey, *supra* note 8, at 337. Justice Scalia reasons 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, 546 (1992) (Scalia, J., concurring in part and dissenting in part) (alteration in original) (emphasis omitted) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)). See generally Sunstein,

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, when Congress wishes to delegate rulemaking power to the courts because it cannot decide on a specific solution to a 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 carefully crafted. In fact, Professor Reed Dickerson cautions legislative drafters to “be careful not to create, by the omission of other legislative purposes, the misleading impression that they were not also relevant.”⁵⁵ Dickerson adds 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.”⁵⁶ Thus, a court should not rely solely on such sections when trying to find the purpose of a statute.

C. Looking at the Entire Statute

When trying to find the purpose of a single section of a statute, it might be helpful to identify what the statute as a whole is meant to achieve. Looking at a single section 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 is revealed.⁵⁷ Justice Cardozo 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.⁵⁸ On its face, section 9 of the Act delegated broad powers to the President, but Justice Cardozo argued that the Act must be read “as a whole.”⁵⁹ He reasoned that the individual sections of the Act, in their entirety, expressed a clear purpose to restrain that delegation of presidential power, thus

supra note 5, at 415–18 (discussing the textualist approach).

55. DICKERSON, *supra* note 6, at 97.

56. *Id.* at 97–98.

57. This idea follows from contract law. See *W. Lumber Co. v. Willis*, 160 F. 27, 30 (9th Cir. 1908) (“In construing a contract, the intention is to be collected, not from detached parts of the contract, but from the whole of it.”).

58. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 410–411 (1935).

59. *Id.* at 434 (Cardozo, J., dissenting). Cardozo relied on the canon of interpretation “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.” *Id.* at 438–39.

making the delegation specific and constitutional.⁶⁰ 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 above, even when the entire statute is detailed, Congress can specifically delegate only a part of the statute to the courts. This is especially true in 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 in order 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.⁶¹ 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 both statutes addressed similar concerns and were enacted by the same Congress in the same session.⁶² 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.”⁶³ Thus, finding purpose in this manner is most valid when the statutes deal with the same matters and were enacted at the same time 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.⁶⁴ A similar approach could be used when trying to find the purpose of a statute. These compromises occur not only between competing interest groups, but also between the House and the Senate,

60. *Id.* at 438–40.

61. *See, e.g., Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992) (using identical language in ERISA to interpret language in the ADA). However, courts should always consider the different purposes of the statutes before applying the same rule of law. *See Miller v. United States*, 597 F.2d 614, 616 (7th Cir. 1979) (construing the Recreational Use Act and the Recreational Area Licensing Act *in pari materia*, but noting that because their purposes were limited to certain geographical areas, the language must also reflect this difference).

62. *United States v. Stewart*, 311 U.S. 60, 64 (1940).

63. POSNER, *supra* note 1, at 268–69.

64. *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 purposes of one group of legislators, but the compromise itself.”) (footnote omitted).

between Congress and the President, and/or between competing factions within each body.⁶⁵ In fact, the purpose of a statute could very well be to 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 they advance the public interest or were passed to help a specific interest group.⁶⁶ Traditional notions of purposivism have focused only on public purposes, but in light of recent public choice research, it is clear that there are not always such purposes in statutes. Sometimes Congress's purpose may be to favor certain interest groups.⁶⁷ 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 statute's 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, to find the purpose of a statute.⁶⁸

F. Legislative History

Looking at the legislative history of a statute is another way to find the statute's purpose. Legislative history has lately been severely attacked 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 a brief submitted to the Court that concerns legislative history.⁶⁹ One of

65. Simmons, *supra* note 20, at 118.

66. POSNER, *supra* note 1, at 265. Posner adds that this simplistic categorization would not suffice for "intermediate cases" in which statutes serve a public purpose *and* further advance the interests of specific interest groups. *Id.* For these statutes "we shall need a richer categorization." *Id.*

67. 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).

68. See, e.g., *Gen. 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. Reid*, 490 U.S. 730, 743 (1989) (respecting 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, supervised by the Copyright Office and, to a lesser extent, by Congress"). Not everyone agrees with this notion, though. See, e.g., *Bowen v. Owens*, 476 U.S. 340, 352 (1986) (Marshall, J., dissenting) (arguing that "legislative classifications that result from compromise must bear at least a rational relationship to a legitimate governmental purpose" and cannot merely be "a way station on the road to a sensible destination"). By this, Justice Marshall undoubtedly meant a legitimate public purpose.

69. Justice Antonin Scalia, *Constitutional Interpretation*, Owen J. Roberts Lecture at the University of Pennsylvania (Feb. 13, 2003). See generally SCALIA, *supra* note 7, at 29-37 (criticizing the use of legislative history). See also Sunstein, *supra* note 5, at 429 ("Justice Scalia suggests that legislative history is frequently written by well-organized private groups, and much of it, especially the floor debates, reflects little, if any general congressional will.").

the reasons for this is the inherent unreliability of some legislative history.⁷⁰ 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.⁷¹ Also, Professor John F. Manning has argued that it is constitutionally invalid for courts to use legislative history in many instances, as legislative history does not go through bicameralism and presentment.⁷² Thus, a court's use of legislative history, in effect, "authorizes committees and sponsors to speak for Congress as a whole[.]" allowing these groups "to 'say what the law is.'"⁷³ However, this has been countered by academics suggesting that legislative history is a valid part of any statute.⁷⁴ 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," adding that many times members of Congress do not even read the bills they vote on, but rely solely on statements by the bill's sponsors.⁷⁵ Even Justice Rehnquist, usually considered a staunch conservative, has stated that he "had thought it well settled that the legislative history of a statute is a useful guide to the intent of Congress."⁷⁶

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.⁷⁷ The different types of legislative history might best be seen along a funnel, as in the following diagram:⁷⁸

70. See generally ESKRIDGE ET AL., *supra* note 7, at 295–312 ("Examin[ing] criteria that might be applied to determine what legislative history is admissible and for what purposes, the hierarchy of legislative history sources, and the conditions (if any) under which legislative history might trump a statutory plain meaning.").

71. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 242–43 (1990).

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

73. *Id.*

74. See Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1460–61 (2000) (arguing that legislative history can be incorporated either implicitly or by reference into the statutory text).

75. POSNER, *supra* note 1, at 269.

76. *County of Washington, Oregon v. Gunther*, 452 U.S. 161, 182 (1981) (Rehnquist, J., dissenting).

77. See ESKRIDGE ET AL., *supra* note 7, at 302–307 (presenting a hierarchy of legislative history sources).

78. This diagram appears in ESKRIDGE ET AL., *supra* note 7, at 307.



As 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 partly based on how available these types of legislative history are to the legislators and, perhaps to some extent, to the courts and the public.⁷⁹ It is likely that most legislators will have at least skimmed, if not read, the committee report before they vote for a bill. However, whether they are aware that nonsponsoring legislators made a comment about the bill during a floor

79. *Id.* at 302; see also DICKERSON, *supra* note 6, at 147 (“Whether a broader or ulterior legislative purpose as revealed by a reliable element of legislative history is part of the context of the statute . . . depends largely on the availability of knowledge of that purpose . . .”). There was a time when critics described courts who used legislative history as “rummag[ing] . . . among ‘the ashcans of the legislative process.’” *Id.* at 149 (quoting CHARLES P. CURTIS, *IT’S YOUR LAW* 52 (1954)). 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 derisive 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 have not read the committee reports, a court should still consider them, as the legislators no doubt relied on the committees and their party leaders when making their vote. See *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276 (1996) (Stevens, J., concurring) (“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 in casting their votes.”).

hearing (which have notoriously low attendance) is anybody's guess.⁸⁰ 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.⁸¹ It is often the case that the purpose of a statute can easily be found in many of these sources of legislative history.

G. Current Case Law

Finally, in many cases Congress may be explicitly delegating to the courts an area of law 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.⁸² The Sherman Act's language was based on the existing common law and incorporated the general purposes of antitrust law already stated by different courts.⁸³ Thus, by adopting the Sherman Act, Congress was showing approval of the existing common law, and only modified it marginally in some places.⁸⁴ The words of the Sherman Act itself were basically irrelevant,⁸⁵ and the purposes that were identified in the common law became the guide posts in all future interpretations of the Act.

80. POSNER, *supra* note 1, at 270. "[I]t 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 witnesses, or nonsponsoring legislators (perhaps opponents of the legislation) who want to impart some twist to the statute when it is applied by the courts." *Id.*; 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 purposes of later interpretation.") (footnote omitted).

81. See, e.g., *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . . eschew[ing] reliance on the passing comments of one Member and casual statements from the floor debates.") (citations omitted); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (finding that a Senate Report written eleven years after passage of the Age Discrimination in Employment Act was not persuasive).

82. 15 U.S.C. §§ 1–7 (2000).

83. See 21 CONG. REC. 2,456 (1890) (statement of Sen. Sherman) (assuring his colleagues that the Sherman Act "does not announce a new principle of law, but applies old and well recognized principles of the common law"); see also *supra* note 26 and accompanying text.

84. See POSNER, *supra* note 1, at 288 (noting that when Congress codifies common law, "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").

85. POSNER, *supra* note 1, at 278. 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] [A]ct 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

Id.

IV. PROBLEMS WITH USING PURPOSIVISM IN THESE INSTANCES

As noted above, purposivism has been heavily criticized in the past ten years, mainly by textualists⁸⁶ and public choice theorists.⁸⁷ Many of these criticisms are addressed in the following sections. Some of these critiques are wholly unconvincing when purposivism is used to interpret statutes that delegate rulemaking power to the courts, and the remaining critiques lose much of their force because of the narrow instances in which purposivism is advocated. This Part also addresses the wisdom of allowing Congress to delegate such power to the courts, effectively ducking 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 many interest groups that Congress is trying to appease.⁸⁸ The Court has also recognized that many statutes are compromises between different interest groups. Consequently, there sometimes exists opposing purposes in one piece of legislation.⁸⁹ However, when 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 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, the Supreme Court seems to rely more heavily on textualism when it is apparent that the legislation is a product of an ironed-

86. See *supra* note 7 and accompanying text.

87. See *supra* note 8 and accompanying text.

88. See Macey, *supra* note 8, at 227–33 (arguing that the multiple purposes held by interest groups cannot be aggregated into one public purpose); Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492, 494–95 (1995) (explaining that “public choice theory . . . denies that any single purpose, or any combination of public-spirited purposes, prompts particular legislation”). Similarly, simply finding the purpose of a statute is often problematic, but “[i]n the face of multimember institutions, the problem becomes even more troublesome.” Sunstein, *supra* note 5, at 427.

89. See, e.g., *Stewart v. Abend*, 495 U.S. 207, 225 (1990) (“The process of compromise between competing special interests leading to the enactment of the 1976 [Copyright] Act undermines any such attempt to draw an overarching policy . . . [because the section of the Act] ‘was part of a compromise package involving . . . controversial and intertwined issues’”) (quoting Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987)).

out compromise.⁹⁰ Accordingly, we will not usually have the problem of multiple purposes when Congress is delegating authority to the courts. Using purposivism and assuming a delegation of rulemaking authority when the purpose is not clear is dangerous, as is discussed more fully in Part VI.

Sometimes, Congress identifies multiple problems and tries to solve them all in one statute—leaving the statute with multiple purposes. Congress may be trying to delegate power to the courts to achieve 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 identify all of the possible conflicts between the statute’s multiple purposes, but purposivism may still be used to elucidate a statute’s goals. First, most statutes will only have one overriding purpose.⁹¹ Obviously, in these cases, using purposivism is relatively easy. If there are minor goals that Congress meant to achieve, a court would be justified in allowing the overriding purposes to trump these minor goals. Second, 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 problematic circumstances would be when the statute has multiple purposes; when the purposes would lead to opposite results in the interpretation of the text; and when 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 not be probative and other tools should be considered.

B. Reasonable Legislators

Another major critique by public choice theorists is that purposivism mistakenly assumes that legislators are rational and reasonable, when they are oftentimes neither. One of the two branches of public choice theory, interest group theory, advocates that “‘rational’ legislators responding to

90. Simmons, *supra* note 20, at 134.

91. For example, 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 be stopping anti-competitive behavior. *See, e.g.*, *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 1914 Clayton Act “to prevent economic concentration in the American economy by keeping a large number of small competitors in business”); *Transamerica Corp. v. Bd. of Governors*, 206 F.2d 163, 169 (1953) (“[I]t is the purpose of the Clayton Act to nip monopoly in the bud.”).

rational interest groups will not, in fact, produce purposive statutes.”⁹² Moreover, “[t]o speak of a statute’s ‘purpose’ is incoherent, unless one means the deal between rent-seeking groups and reelection-minded legislators.”⁹³ The interest group theorists complain that the purpose of many statutes is to appease certain groups—thus, crafting a statute becomes a balancing act among competing factions as opposed to legislators trying to do public good with an overarching purpose.

There are two responses to this criticism. 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.⁹⁴ The public choice theorists’ complaint is that trying to find a public purpose is a useless endeavor in most cases because many laws are not passed with a public purpose. However, there does not need to be a public purpose—merely 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, if we assume Congress is delegating power only when the purpose is clear, this entire complaint becomes inapplicable. If the statute truly has no overarching purpose, purposivism should not be used.

C. No Purpose Exists

A third complaint of the public choice camp is that there is never an overriding purpose which prompts legislation. Decision theorists have analyzed voting structures, agenda setting, and decision proofs to conclude that “[s]tatutes are . . . the vector sum of political forces expressed through some institutional matrix which has had profound, but probably unpredictable and non-traceable, effects on the policies actually expressed.”⁹⁵ First, this article does not advocate trying to find a *public*

92. Eskridge & Frickey, *supra* note 8, at 334; *see also* Simmons, *supra* note 20, at 130–31 (describing the interest-group theory’s critique of purposivism).

93. Eskridge & Frickey, *supra* note 8, at 334.

94. Posner seems to argue the same, as he questions Hart and Sacks’s suggestion that when divining a statute’s purpose

the judge should ignore interest groups, popular ignorance and prejudice, and anything else that deflects legislators from the single-minded pursuit of the public interest as the judge would conceive it. But this approach risks attributing to legislation not the purposes reasonably inferable from the legislation itself but the judge’s own conception of the public interest.

POSNER, *supra* note 1, at 288.

95. Mashaw, *supra* note 8, at 134; *see also* Macey, *supra* note 8, at 228 (noting that because “laws are passed for a wide variety of reasons . . . it is impossible for judges to reconstruct the complex array of motives that prompted the passage of a particular statute”); Sunstein, *supra* note 5, at 427 (“The characterization of legislative purpose is an act of creation rather than discovery.”).

purpose for a statute, but only advocates for an attempt to determine what purpose prompted Congress to pass the legislation.⁹⁶ 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 if purposivism is used only when the statute's purpose is clear, the tightrope-walking compromises envisioned by decision theorists—where multiple purposes barrage the legislator from all sides—simply do not 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 that purpose. The Supreme Court addressed this problem in the Civil Rights Act of 1991 as discussed above.⁹⁷ There the Court was able to determine how far to go by using the history of civil rights jurisprudence as a limit. There will be other cases that will not be as clear, but it is a court's specific expertise at developing case law 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 at the outset, 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 also been seen as a blank check that judges could use to usurp power from the legislature.⁹⁸ In fact, this balance of power problem has been put forth as a point of divergence between the "grand theories" of statutory interpretation: purposivism, intentionalism, and

96. 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 267–68 (distinguishing between legislative motive and legislative intent).

97. See *supra* Part II.C.

98. See POSNER, *supra* note 1, at 291 (critiquing the view that "it should not be considered . . . usurpative for judges to treat old statutes with the freedom they treat old precedents"); Simmons, *supra* note 20, at 132 (arguing that by using purposivism the court is in danger of crossing over into judicial legislating); 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) (finding the purposivist argument "unconvincing . . . because it enables courts, instead of Congress, to make laws, which is a clear violation of the separation of powers").

textualism.⁹⁹ However, this critique does not apply when Congress purposely delegates 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 could also 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 reminds us, Congress can always take the power back “with the stroke of a pen.”¹⁰⁰ One only need look at the recent legislation concerning the Do-Not-Call Registry to support this reality.¹⁰¹ Within twenty-four hours of an Oklahoma judge invalidating the Registry, Congress rewrote the statute to specifically fix the problem the judge identified.¹⁰²

F. Allowing Congress to Duck Political Issues

It could be argued that viewing a statute as a delegation of power to the courts allows Congress to duck political issues and avoid its constitutional responsibilities. However, there are legitimate reasons for 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. The courts should have a role, however, in promoting legislative responsibility. As noted in *Girouard v. United States*, “it is not lightly to be implied that Congress has failed to perform [its duty] . . . and has delegated to this Court

99. See generally Eskridge & Frickey, *supra* note 8, at 324–45 (comparing the characteristics, merits, and failings of the “grand theories” of statutory interpretation).

100. POSNER, *supra* note 1, at 273. “If legislative history of the Sherman Act (1890) turned up that conclusively proved that the act had been intended to protect competitors rather than consumers . . . Congress could restore the judicial interpretation with the stroke of a pen.” *Id.*

101. National Do-Not-Call Registry, Pub. L. No. 108-82, 117 Stat. 1006 (2003). The Do-Not-Call list is a registry that allows people to put their names on the list in order to stop many types of telemarketers from calling them. Federal Trade Commission, National Do Not Call Registry, at <http://www.ftc.gov/donotcall> (last updated Jan. 23, 2004).

102. On September 24th, 2003, an Oklahoma judge ruled that the FTC did not have the power to enforce the Do-Not-Call Registry because that power was specifically given to the FCC. *U.S. Security v. Fed. Trade Comm’n*, 282 F. Supp. 2d 1285, 1290–91 (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 A1. 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*, WASH. POST, Sept. 26, 2003, at A1.

the responsibility of giving new content to language” because this would “discourage, if not . . . deny, legislative responsibility.”¹⁰³ But refusing the delegation of this authority—to punish Congress for ducking the issue—will not create a “helpful” judiciary, nor advance the courts’ duties to the process of legislation, the litigants, or society.¹⁰⁴ 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 this in the most obvious of situations.

Although this article does not explore the constitutionality of such delegation of rulemaking power to the courts,¹⁰⁵ from a judicial standpoint it makes sense to accept such delegation. A judge has the important responsibility of deciding every case or controversy which comes before her.¹⁰⁶ As noted above, there are political 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.¹⁰⁷ As discussed in Part I, 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.¹⁰⁸ Responsibilities cannot be ignored. Current and potential litigants rely on

103. *Girouard v. United States*, 328 U.S. 61, 76 (1946) (Stone, C.J., dissenting).

104. See POSNER, *supra* note 1, at 292 (suggesting that broad delegation of rulemaking authority allows the courts the freedom to solve problems not anticipated by the legislature). *But see* Grundfest & Pritchard, *supra* note 10, at 629 (discussing “the battle between the legislative incentive to obscure and the judicial incentive to interpret”).

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

106. 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. U.S. CONST., art. III, § 2.

107. 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.”); Easterbrook, *supra* note 19, 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 I HOLMES-LASKI LETTERS 249 (Mark DeWolfe Howe ed., 1953)). However, not everyone is in agreement, and Professor Sunstein argues that this view of the federal courts is erroneous. Sunstein would have the courts take a more active role “when conventional interpretation would produce absurdity or gross injustice, when changed circumstances call for creativity, [or] when constitutional considerations counsel courts to interpret statutes in one direction.” *Id.* at 440. In these cases, Sunstein argues that “courts should be more aggressive in statutory interpretation.” *Id.* at 441.

108. *Kirschbaum Co. v. Walling*, 316 U.S. 517, 523 (1942) (emphasis added).

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 just dismiss the case out of hand; it is within the scope of the legislative delegation to him.¹⁰⁹

A judge cannot simply 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 was not explicit enough in its 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 shoulders, 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.¹¹⁰ Whether the courts should use different judicial tools on account of this heavy administrative burden is a question better left to other commentators.¹¹¹ However, there is no doubt that judges are up to the task. Felix Frankfurter reminds judges that "[p]erfection 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."¹¹²

G. Conclusion

The common critiques of purposivism lose much of their force, or are wholly inapplicable, when purposivism is used only in these narrow instances. It is of course true that there will always be problematic cases, but this is true of any method of statutory interpretation. As Morell E.

109. POSNER, *supra* note 1, at 289.

110. *See generally id.* at 59–93 (arguing that the increase in caseload of the federal court system has led to a crisis which demands a new set of interpretive tools).

111. *Compare id.* at 198–207 (arguing that the increased caseload should make courts eager to practice judicial restraint, among other things), with Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation"*, 6 U. PA. J. OF CONST. L. 377, 378 (2003) (countering that the fear of increased litigation should not be a valid judicial consideration in deciding cases).

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

Mullins, Sr., cautioned, “we should not demand from the interpretation of statutory language a theoretical perfection that language itself cannot give.”¹¹³

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—namely, when the statute is broad and the purpose is clear—one could go even further and argue that anytime Congress leaves an ambiguity in a statute, it is delegating rulemaking power to the 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 further 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 plan to achieve its goals and has gone to great lengths to make sure the words of the statute express that design. Additionally, in cases where the statute is detailed there may not even be an agreed upon purpose, only an agreed upon implementation, and attempting to apply purposivism would contort the purposeless statute.

This Part discusses 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 ideally should predominate:

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

113. Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 70 (2000).

A. *The Statute is Broad and the Purpose is Ambiguous*

When the statute is broad and the purpose 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, without a clear purpose in the statute, there is no 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 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, as in contract law (where if there is no meeting of the minds there is not a valid contract), there is no statute.¹¹⁴ 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.”¹¹⁵ While Professor Llewellyn used that statement to generally support purposivism, in the category of statutes that we are talking about in this Part, there is much more than no purpose—there is no clear rule either. Perhaps Professor Llewellyn would call this something even worse than nonsense. Judge Easterbrook has said as much when he proposed “[d]eclaring legislation inapplicable unless it either expressly addresses the matter or commits the matter to common law.”¹¹⁶ 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 enacted.

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 have meant to solve a societal problem but only had a general idea of what the problem was and, thus, could not have articulated a clear purpose. Judge Posner has criticized Judge Easterbrook’s approach because “it denies the courts a *helpful* role in relation to

114. Public choice theorists have proposed analyzing the bargains reached to make legislation just as they would construe a contract. See Easterbrook, *supra* note 19, at 18 (“If statutes are bargains among special interests, they should be enforced like contracts.”). But see Mark L. Movsesian, *Are Statutes Really “Legislative Bargains”? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1167 (1998) (arguing that “statutes and contracts differ in fundamental ways; their interpretation cannot be assimilated”).

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

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

legislation.”¹¹⁷ 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.

An alternative, then, is to say that when the purpose is unclear and the statute is broad, 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.¹¹⁸ Judge Calabresi suggests that courts be able to treat statutes like common law.¹¹⁹ He argues 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.¹²⁰ Commentators have criticized this as an “usurpation” of legislative power.¹²¹ However, if Congress has explicitly or implicitly delegated this power to the courts, courts would not be usurping legislative power.¹²² In fact, by passing broad statutes with unclear purposes, Congress could have intended to authorize the courts to make common law in that area, such as they have explicitly done with collective bargaining agreements.¹²³ As Cass Sunstein notes, when a judge fills in gaps of a statute that were left by Congress for the courts to solve, “this approach is hardly . . . a usurpation, but instead an inevitable part of interpretation.”¹²⁴

Whether one takes Judge Easterbrook’s draconian approach to these sorts of statutes or considers them to be particular instances ripe for a dose of Judge Calabresi’s dynamic interpretation, it is clear that purposivism

117. POSNER, *supra* note 1, at 292.

118. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–43 (1982) (discussing the use of statutory interpretation as a means of dealing with anachronistic laws). 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, 1481 (1987) (noting that “[t]his approach is related to, but stops short of, the proposal in G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982), that courts ought to be able to update statutes by overruling them”).

119. See CALABRESI, *supra* note 118, 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”).

120. *Id.* at 164. “[T]he courts would not be bound to declare or promulgate the new in order to find that the old fails to fit.” *Id.* at 165.

121. See, e.g., POSNER, *supra* note 1, at 291 (asserting that “treat[ing] old statutes with the freedom [judges] treat old precedents . . . would be usurpation” unless there were “express legislative authorization”).

122. See *id.* (supporting this argument with regard to explicitly delegated power).

123. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450–51 (1957) (stating that the Labor Management Relations Act of 1947 “authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements”).

124. Sunstein, *supra* note 5, at 422.

should not play a major role. Obviously, without a clearly articulated purpose, using purposivism would not do much good. However, at a more structural level, Congress either did not mean to delegate rulemaking power to the courts, or 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 a very helpful tool of statutory interpretation. One cannot start with the purpose of the statute if no articulated purpose exists. Given all the problems with purposivism listed above in Part IV, 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, the text will be the predominant tool of statutory construction. One might ask why intentionalism does not play a larger 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 beyond the text 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 is clear, this article parts with traditional notions of purposivism. A detailed statute suggests that Congress spent an inordinate amount of time crafting the exact wording of the law. As such, one can assume that Congress took the time to painstakingly consider the intricacies of the law passed and tried to apply 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. Because one can assume that Congress did not intend 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. Often, a broad purpose is articulated in the statute, and yet when it comes to the implementation of that purpose, Congress chooses only to take small steps towards its goal.¹²⁵ The more

125. 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.”); *see also* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991) (“[T]he

specific the steps Congress takes, the greater the 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, were specified, preclude an extension of any provision by implication to any other subject.”¹²⁶ The Court noted that to disregard the detail in the statute enacted by Congress would be “an enlargement of [the statute] by the court.”¹²⁷ There are supporters of using a purposivism approach in the Tax Code,¹²⁸ 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.”¹²⁹ The example of the Tax Code as a detailed statute will be explored more fully below. The court’s role in the legislative process is not to enlarge statutes, but to interpret 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, it is taking the chance 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,¹³⁰ conceded that “[t]he 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.”¹³¹ We can assume with a detailed statute that Congress spent most of its time, not crafting the purpose section, but deliberately choosing the wording of the actual statute. It is for this reason that the wording of the statute must take precedence over any articulated purpose—even if it is very clear what the purpose was meant to achieve. Considering all of the problems with purposivism 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

purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone.”).

126. *Iselin v. United States*, 270 U.S. 245, 250 (1926).

127. *Id.* at 251.

128. See, e.g., Geier, *supra* note 88, at 494 (discussing favorably the limited use of purposivism in interpreting the Tax Code); Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623 (1986) (arguing “that nonliteral interpretations of statutes, including the Internal Revenue Code, are sometimes proper”).

129. Livingston, *supra* note 67, at 679.

130. See generally DICKERSON, *supra* note 6, at 87–102 (discussing the value of the legislative purpose in the interpretation and application of statutes).

131. *Id.* at 90–91.

quite small.

Finally, it could be argued that a gap in a detailed statute was unintended by Congress; the gap could represent something forgotten or overlooked. 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 purposely left a gap, 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,¹³² cautioned that "[a]n omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion."¹³³ 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 considerable time crafting its intricacies, the courts take a significant risk in trying to close apparent gaps using purposivism, particularly 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 tax law. In 1994, the Tax Code contained 1,339,000 words.¹³⁴ While I argued above that the number of words alone is not determinative of whether a statute is detailed,¹³⁵ the voluminous amount of specific instructions given to the courts on how to interpret every element of the tax law indicates that it is a very detailed statute indeed.¹³⁶ It has likewise been argued by commentators that the Tax Code has clear purposes. For example, Professor Deborah Geier suggests that the Tax Code's purposes include taxing dollars only once, not taxing

132. See, e.g., *Md. Cas. Co. v. Cushing*, 347 U.S. 409, 414 (1954) (Frankfurter, J.) ("[W]e must read the statute in light of its expressed purposes."); 62 Cases of *Jam v. United States*, 340 U.S. 593, 596 (1951) (Frankfurter, J.) ("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.").

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

134. Geier, *supra* note 88, at 511 (citing Guy Gugliotta, *Deciphering a Code That is Mostly Just Taxing*, CLEVE. PLAIN DEALER, Nov. 27, 1994, at 6C).

135. See *supra* Part II.A.

136. See, e.g., 26 I.R.C. § 280F(a)(1)(A) (2004) (setting specific depreciation amounts for luxury automobiles for successive taxable years); § 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 any one of seven different categories of bonds and meeting the detailed requirements set forth in sections 146 and 147).

income until it is realized, and only taxing net wealth.¹³⁷ Geier argues that a textualist approach to tax interpretation “frustrates” the purposes of the Tax Code and requires Congress to enact more legislation—adding to the already voluminous material.¹³⁸

Professor Geier’s approach to tax law—emphasizing the broad purpose and goals of the Internal Revenue Code instead of the text—would no doubt produce a less voluminous, cohesive code. However, its cohesiveness would say 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.¹³⁹ This is especially true in tax law. Trying to pass a new tax law elicits responses from each of the major parties’ leadership and most interest groups, and usually catches the attention of many voters.¹⁴⁰ The Tax Code has been painstakingly hammered out by Congress with extraordinarily specific detail and input from all sides. To upset this balance would undermine the compromises that Congress has reached with respect to each element. Thus, interpreting the law to achieve some general tax purpose would not further congressional intent at all—for its 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 practice of tax lawyers trying to find loopholes in the legislation is unappealing to many people,¹⁴¹ the creation of these loopholes is oftentimes purposeful. Upsetting this delicate balance in the name of an overriding purpose is a very dangerous business and frequently results in destroying the compromises that Congress has reached with competing interest groups.

137. Geier, *supra* note 88, at 497. Geier has also noted that usually it is the taxpayer who wants a more textual approach to tax law and the government that wants a more purposive approach. *Id.* at 495. However, on average each approach probably does not benefit either group more than the other. *Id.* at 496.

138. *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.” *Id.*

139. See *supra* note 8 and accompanying text.

140. See, e.g., Virginia Gannon, *Stores to Closely Track Congress*, DAILY NEWS RECORD, Jan. 11, 1991, at 9 (noting the pressure on Congress to create more revenue while store owners are pressuring Congress to cut taxes), available at 1991 WL 3100041; Dan Walters, *A Tax Hike with No Fingerprints on It*, SAN DIEGO UNION-TRIBUNE, Mar. 13, 2003, at B15 (explaining that in considering new tax legislation on cars, California’s then-Governor Gray Davis had differing pressure from the police, firemen, motorists, Republicans who would supply the key votes, and, most of all, voters).

141. For instance, William S. McKee, a prominent tax attorney at King & Spalding, was paraphrased 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.” Geier, *supra* note 88, at 510–11 (quoting Lee A. Sheppard, *Partnership Antiabuse Rule: Dirty Minds Meet Mrs. Gregory*, 64 TAX NOTES 295, 296 (July 18, 1994)).

The question of whether purposivism or textualism should control in the Tax Code was faced by the Ninth Circuit in *Albertson's Inc. v. Commissioner*.¹⁴² The Ninth Circuit first used textualism to interpret the statute,¹⁴³ but then it agreed to rehear the case and overturned its original opinion, replacing it with a purposivism analysis.¹⁴⁴ 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 404.¹⁴⁵ *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.¹⁴⁶ It nevertheless got around this hurdle by taking the deduction as a general business deduction, which was technically allowed under section 163.¹⁴⁷ 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 equivalent amounts had been included in employees’ income—seemed to oppose it.”¹⁴⁸ It was a direct clash between the clear text of the statute and the apparent 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 cited legislative history and noted that “Congress was fully aware of the differences between the [sections pertaining to business expenses and interest, and] if Congress had intended section 404 to govern the timing of interest deductions, it could have made specific reference to the predecessor of section 163”¹⁴⁹ The statute was detailed and purposefully deliberate. The Ninth Circuit made the right decision in the first instance.

However, the Ninth Circuit reversed its decision in part after rehearing the case, and decided that purposivism should control.¹⁵⁰ Upon

142. *Albertson's Inc., v. Comm'r*, 42 F.3d 537, 541 (9th Cir. 1994).

143. *Albertson's Inc., v. Comm'r*, 12 F.3d 1529 (9th Cir. 1993) (withdrawn from bound volume and available at 1993 WL 537807, at *6).

144. *Albertson's*, 42 F.3d at 541.

145. See Livingston, *supra* note 67, at 712–16 (discussing the Ninth Circuit's use of purposivism in *Albertson's Inc. v. Comm'r*, 42 F.3d 537 (9th Cir. 1994)).

146. *Id.* at 712–13.

147. *Id.* at 713–14.

148. *Id.*

149. *Albertson's*, 1993 WL 537807, at *6 (citing H.R. Rep. No. 1337, 83rd Cong., 2d Sess., reprinted in 1954 U.S.C.C.A.N. 4017, 4181).

150. *Albertson's*, 42 F.3d at 546.

reconsidering the issue in the face of much academic criticism,¹⁵¹ the court felt “that, despite the literal wording of the statute, Congress could not have intended to exclude interest payments.”¹⁵² It may be that Congress was not aware of the gap in the statute and would have closed it when it was brought to its attention,¹⁵³ 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 Professors Hart and Sacks’ injunction against giving the words of a statute ‘a meaning they will not bear.’”¹⁵⁴ There was legislative history suggesting that Congress knew of this gap 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 intended to leave this gap. The Ninth Circuit’s second decision, although perhaps good for the promotion of qualified employee benefits plans, did not focus on what it should have: the painstakingly detailed plan that Congress passed with its 1.4 million words.

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 left there for a reason, and filling them would upset the delicate balance crafted by the legislature. By using purposivism to fill these intentional gaps, a court risks enlarging the statute and, perhaps, reversing Congress’s wishes.¹⁵⁵

151. See, e.g., Daniel Halperin, *Ninth Circuit’s Decision in Albertson’s Is Outrageous*, 62 TAX NOTES 1083, 1085 (Feb. 21, 1994) (stating that “[t]he *Albertson’s* decision cannot be supported” and must be overturned); Lee A. Sheppard, News Analysis, *The Ninth Circuit Creates a New Interest Deduction*, 62 TAX NOTES 405, 405 (Jan. 24, 1994) (characterizing the Ninth Circuit’s decision as “a wildly incorrect result”). However, some commentators supported the original decision. See, e.g., Steven J. Willis, *Albertson’s: Less Emotion and More Reason Would be Helpful*, 64 TAX NOTES 961, 961 (Aug. 15, 1994) (“I found the *Albertson’s* opinion to be supported by a literal reading of the statutes.”); Edward A. Zelinsky, *The Ninth Circuit’s Albertson’s Decision: Right for 1983, Wrong for Today*, 63 TAX NOTES 231, 235 (Apr. 11, 1994) (asserting that the Ninth Circuit was wrong in its interpretation of the revised statute at issue and in its decision).

152. *Albertson’s*, 42 F.3d at 546.

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

154. Livingston, *supra* note 67, at 716 (quoting HART & SACKS, *supra* note 4, at 1374). Professor Livingston calls the *Albertson’s* case “Purposivism Run Wild.” *Id.* at 712.

155. 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 incurred \$35 worth of damage, an amount that could be deducted on his tax form. 305 U.S. 468, 469 (1939). 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. *Id.* at 470–71. 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

CONCLUSION

In *The Interpretation and Application of Statutes*, Professor Reed Dickerson suggests that lawyers and judges are overly concerned “with the pathology of the legislative process” and “sick” statutes—meaning “ambiguous [or] overvague.”¹⁵⁶ I have specifically focused my analysis on only overvague and ambiguous statutes, but this article argues that they are not “sick” at all. In fact, broadly written statutes with clear purposes are a legitimate use of Congress’s power to delegate rulemaking authority to the courts, and it makes perfect sense for it to delegate such power. Congress delegates authority to agencies all the time due to agency expertise, and it makes sense that it would also delegate authority to courts due to their expertise in resolving cases and formulating laws that can achieve an articulated goal identified by Congress.

The common critiques of purposivism—made mainly by textualists and public choice theorists—lose their force or are wholly inapplicable when purposivism is used exclusively with statutes that indicate Congress’s meant to delegate rulemaking authority. Their criticisms, however, are well-directed toward using purposivism as a general method of statutory interpretation, and it is for this reason that this article urges that judges only assume that Congress meant to delegate power in a very narrow circumstance: when the statute is broad and the purpose is clear.

Using tools other than purposivism 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 it may have only intended 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’s intentions.

damage, but only the specific damage caused by the accident. *Id.* at 471; *see also* United States v. Hudspeth, 42 F.3d 1013, 1014 (7th Cir. 1994) (Posner, C.J.) (“Even strict constructionists reject literal interpretation when the result would be senseless.”).

156. DICKERSON, *supra* note 6, at 54 & n.1.