Book Review

THE WORST STATUTORY INTERPRETATION CASE IN HISTORY

STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION.

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Mark Twain is not mentioned in Professor William Popkin’s Statutes in Court: The History and Theory of Statutory Interpretation. The omission is excusable even though Popkin’s thesis is that a coherent theory of statutory interpretation depends upon an understanding of the history of statutory interpretation. Popkin recounts numerous authors who have written about how statutes should be interpreted, with special attention given to William Blackstone, Frank Easterbrook, William Eskridge, Felix Frankfurter, Learned Hand, Henry Hart and Albert Sacks, Oliver Wendell Holmes, John Marshall, Edmund Plowden, Roscoe Pound, Antonin Scalia, Theodore Sedgwick, Lemuel Shaw, and Joseph Story. But not Mark Twain.

The lesson that Popkin takes from his exhaustive reading of the history of statutory interpretation is that the best approach to the task is “ordinary judging.” An ordinary judge operates from the premise that “judging is an ordinary activity, neither grounded in any exceptional skill or expertise, nor threatening to usurp legislative power” (208). Ordinary judging rejects grand theories of statutory interpretation because none of them captures all of the lessons that history teaches about statutory interpretation (207). Instead, “[o]rdinary judging rests on the view that judges can reasonably lay a modest claim to lawmaking competence, helping the legislature implement good government by fitting statutes into their past and their future (their temporal dimension)” (5). It is this effort to “fit statutes into their temporal dimension” that is “the essence of ordinary judging” (210).

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Ordinary judging differs from both the purposivism of Justice Stevens and the republicanism of Cass Sunstein because it is not as ambitious in the role that it allots to a judge reading a statute. Ordinary judging differs from the textualism of Justice Scalia and Judge Easterbrook because “modern textualism rests on a denial of judicial competence and legitimacy that is unfaithful to our traditions of statutory interpretation” (207-08). And ordinary judging rejects dynamic statutory interpretation because that theory “places too much emphasis on the judge’s role in fitting statutes into an evolving legal landscape as the justifying principle for the judge’s collaborative interpretive role” (208).

This conclusion is sure to disappoint partisans of textualism, Republicanism, dynamic statutory interpretation, and any other theory that seeks to establish a correct theory of statutory interpretation. Yet part of the allure of ordinary judging is that it offers a compromise among rival theories that each appear unlikely ever to displace the others. Another attraction is that ordinary judging purports to reflect what courts actually do. This faithfulness to the variety of theories that judges have employed when interpreting statutes throughout history appeals most to Popkin (246-47). Ordinary judging will also please pragmatists who approach statutory interpretation as an endeavor that does not necessarily yield a single right answer in individual cases, let alone a theory that explains all such cases. Indeed, Popkin places ordinary judging squarely within the pragmatist tradition (219-22).

The problem with ordinary judging is that any theory of statutory interpretation must consider the costs of mistaken judicial interpretations of a statute. A theory that empowers judges to play a lawmaking role with respect to statutes enacted by the legislature and approved by the executive is dangerous if placed in the wrong hands. The danger, moreover, is hardly limited to judges whom one might describe as ordinary; in fact, the greatest threat might come from the most talented judges who are most confident of their abilities to abet the lawmaking process. Popkin errs by focusing on what a judge can do right while neglecting what a judge can do wrong.

The error can be illustrated by searching the very history of statutory interpretation that is so important to Popkin for examples of statutes that were misinterpreted in court. Or, to put it another way, what is the worst statutory interpretation case ever decided? While few commentators and judges have answered that precise question, their writings suggest several candidates: Justice Scalia decries Church of the Holy Trinity Church v. United States; Ronald Dworkin targets Tennessee Valley Authority v. Hill; 2

2 143 U.S. 457 (1892) (holding that a New York City church could hire an English pastor despite a federal law prohibiting the importation of any alien into the United States under a previous agreement to perform labor in the United States); see ANTONIN SCALIA, A MATTER OF INTERPRETATION 18-23 (1997) (criticizing Holy Trinity).

3 437 U.S. 153 (1978); see RONALD DWORKIN, LAW’S EMPIRE 20-23, 313-47 (1986) (critiquing TVA and offering an alternative resolution of the case). By contrast, I regard TVA as one of the best statutory interpretation cases yet decided, for reasons I explain infra notes 78-82 and accompanying text.
William Eskridge objects to *Boutilier v. INS*, while he and Philip Frickey single out *BFP v. Resolution Trust Corp.*

My nominee takes us back to Mark Twain. Twain’s experience as a silver miner and as a journalist with the Virginia City Territorial Enterprise offered him an occasion to reflect on the Chinese immigrants who worked in gold and silver mining towns and camps throughout the west. Twain reported that “[a]ny white man can swear a Chinaman’s life away in the courts, but no Chinaman can testify against a white man.” The case establishing that proposition arose when George Hall, a gold miner in California’s Nevada County, was prosecuted for murdering a Chinese immigrant in 1853. He was convicted, but in *People v. Hall* the California Supreme Court overturned his conviction because it interpreted a state statute to prohibit the testimony of any Chinese in court. Twain was thus right when he described the prevailing law, but that law existed only because the court misinterpreted the state statute.

*Hall* offers an opportunity to examine Popkin’s description of what history and theory teach about statutory interpretation. Popkin presents both an exhaustive account of the history of statutory interpretation and an integrated theory of how statutory interpretation should be pursued. But the weakness of that theory lies in its failure to recognize that the threads of the historical account are not just twisted, but some might actually be wrong. It takes a case as terrible as *Hall* to shift the focus to the implications of statutory misinterpretation for statutory interpretation.

I. **Popkin’s History and Popkin’s Theory**

The subtitle of *Statutes in Court* is “the history and theory of statutory interpretation.” History and theory play important, integrated roles for Popkin. “What is missing in the current literature is a sense of historical perspective—of the way statutory interpretation has evolved—that can help us understand how statutes fit into our law without insisting on more rigor than is appropriate to the task” (1-2). The ensuing account of the history of statutory interpretation is masterful, instructive for any effort to understand how statutes are or should be interpreted today, and especially crucial for Popkin’s theoretical claims. Popkin explains that his book “is dominated

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4 387 U.S. 118 (1967); see William N. Eskridge, Jr., Dynamic Statutory Interpretation 51-58, 140 (1994) (discussing *Boutilier* and citing it as an example of decisions that “overenforced federal statutes far beyond the expectations of statutory framers and inserted the federal government into arenas where the state performed wretchedly”).

5 511 U.S. 531 (1994); see William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 Harv. L. Rev. 1, 83-86 (1994) (characterizing Justice Scalia’s opinion in *BFP* as “an astonishing decision for a textualist” and describing Justice Souter’s dissenting arguments “as unanswerable under traditional rule-of-law premises”).


7 4 Cal. 399 (1854).
by one major idea and one major thesis—both informed by a historical perspective" (2). The idea is that "law is an overarching concept . . . into which all specific sources of law must fit," including both statutes and common law, and that "judges play a discretionary lawmaking role in working out that fit" (2). The thesis, in turn, "is that the best perspective for understanding the discretionary judicial role is an understanding of "ordinary judging," whereby judges indulge a modest competence to contribute to good government" (2). Popkin's ordinary judge is a product of the history of statutory interpretation who eschews textualism and more ambitious theories of interpreting statutes in favor of a modest, moderate effort to help shape the law.

Popkin's case for ordinary judging takes three steps. First, he describes the history of statutory interpretation. Next, he rejects the existing theories of statutory interpretation, and textualism in particular. Only then does Popkin advance the affirmative case for ordinary judging. But the historical journey that Popkin begins does not inexorably lead toward the theory of ordinary judging that he prefers.

A. Popkin's History of Statutory Interpretation

The history of statutory interpretation recounted by Popkin involves a longstanding struggle between theories that seek to limit the discretion of judges by emphasizing the primacy of the statutory text and theories that permit judges to consider numerous contextual and policy factors in an effort to produce the best law. The account of the battle between these forces fills more than half of Statutes in Court, with different combatants entering and then leaving the field, but with the battle itself fought to a stalemate. The inability of any theory of statutory interpretation to carry the day for an extended period of time is central to Popkin's theoretical claims about the inevitability and desirability of ordinary judging. While the historical account need not compel the theoretical conclusions that Popkin reaches, the account itself offers a masterful telling of the forgotten story of how statutory interpretation has developed over time.

Statutory interpretation could not exist until there were statutes. Additionally, "statutory interpretation could not exist until legislatures developed a sense of separation from judging" (9). The absence of any such separation between Parliament and the English courts enabled one twelfth-century judge to rebuke an attorney's proffered reading of a statute by stating, "Do not gloss the statute; we understand it better than you, for we made it." As the legislature and the judiciary gradually separated from the thirteenth to the seventeenth centuries, Popkin recounts that the courts adopted a theory of "equitable interpretation" that allowed a court to expand or limit the reach of a statute depending upon the statute's objectives or background

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8 POPKIN, STATUTES, supra note 1, at 10 (quoting Aumeye v. Anon., Y.B. 33 & 35, Edw. 1, 78-82 (c.1305-07)).
considerations often drawn from the common law (11). The theory, as explained by Plowden, posited that

words . . . do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes. And if they are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words, and these are the sages of the law whose talents are exercised in the study of such matters.\(^9\)

Popkin sees the examples of cases cited by Plowden as revealing “an unself-conscious judicial effort to help the legislature achieve its goals,” and to forestall any unnecessary conflicts between the courts and Parliament (14, 18).

Statutory interpretation was transformed by the declaration of Parliamentary sovereignty in 1688 and again by the ratification of the United States Constitution in 1789. The heightened power of the legislature and the formal separation of governmental powers supported theories of statutory interpretation that offered a more modest role for the courts. Popkin sees evidence of this in the writings of Blackstone and in American constitutions adopted in part in response to complaints about unwarranted judicial discretion prior to the independence of the United States. Nonetheless, Popkin concludes that the eighteenth century “did not end the uncertainty about how legislating and judging should interact” (44). He cites several examples of courts interpreting statutes “both to prevent absurdity and injustice (fundamental values) \and\ to avoid inconvenient results” in support of his conclusion (45).\(^10\)

The story of statutory interpretation in the nineteenth and twentieth centuries is more familiar to today’s audience. The nineteenth century is typically perceived as a time of reading statutes narrowly, followed by an emphasis on implementing the purpose of a statute, with a revival of textualist theories beginning with the ascendancy of Justice Scalia to the Supreme Court in 1986.\(^11\) Popkin confirms this general picture while adding much fascinating color and depth. He contrasts nineteenth-century com-

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\(^9\) Id. at 12 (quoting Partridge v. Strange & Croker, 75 Eng. Rep. 123, 130 (K.B. 1553)).

\(^10\) Popkin seems to misread one of his most interesting examples. A 1729 Pennsylvania statute exempted from creditors a debtor’s clothes, bedding, and tools “not exceeding five pounds in value of the whole.” In 1795, the Pennsylvania Supreme Court held that the statutory exemption “must be referred to such property of that description, as were of the value of 5£ at the time of the passing of the act in 1729, and must not be controlled by the present enhanced prices of those articles.” In re Mayo, 2 Yeates 31 (Pa. 1795). Popkin reads the case for the proposition that “the statutory term ‘five pounds’ did not mean five pounds, but was increased for price inflation” (49). That is not quite right. Mayo held that the statute measured the exemption by the value of the goods in 1729, not that the five pounds specified in the statute increased with inflation. The result was the same for the debtor, but the correct interpretive lesson is the opposite of what Popkin suggests: the court was unwilling to account for any change—in the amount specified in the statute or in the value of the goods—that had occurred since the enactment of the statute.

mentators who described a more limited judicial role in interpreting statutes with the actual practice of judges as overstating the unwillingness of the courts to take an active lawmaking role when interpreting statutes (60). Several commentators regarded equitable interpretation as obsolete, insisting instead that “[t]he duty of the judge is to adhere to the legal text, as his sole guide.” By contrast, an examination of the opinions of Chief Justice John Marshall and of Massachusetts Chief Justice Lemuel Shaw convinces Popkin that “equitable interpretation neither died out nor persisted in extreme form” (84) and that the claim of the commentators who insisted “that equitable interpretation had vanished seems overdrawn and tendentious” (81).

Popkin identifies a different dynamic in the second half of the nineteenth century. Judges began to evidence hostility toward legislation that was contrary to the common law because, Popkin asserts, popular democracy replaced the kind of governance by the elites who had supported the common law. Thus the law as a separately existing entity split from the people whose voice was reflected in the new legislation. Popkin finds evidence of this divide between the law and the people in the following three occurrences: the reduction of the role of the jury from a finder of law to only a finder of fact, the election of judges who sought to insulate themselves from popular discontent by stressing the unavoidable commands of the law, and the opposition to efforts to codify the law (88-96). Judicial hostility to statutory changes in the law was most obvious in the decisions zealously enforcing the canon stating that statutes in derogation of the common law are to be narrowly interpreted. But after Popkin reviews a fascinating collection of decisions from this era involving judicial interpretation of state statutes authorizing prejudgment attachment, statutes authorizing mechanic’s liens, wrongful death statutes, and Married Women’s Property Acts (102-12), he concludes that “many if not most of the judicial decisions provided examples of ordinary legitimate judging, whereby judges exercised their competence to help fit statutes into their temporal setting by integrating them with the prior law” (102-12).

The last section of Popkin’s historical account considers the period from 1900 to the 1960s. This was a time of “purposive interpretation”: “the view that statutes embodied a purpose that was the guide to their interpretation” (118). Purposivism became desirable as “[l]egislatures came to be viewed as the place where popular democratic will was expressed and the common good enacted into law” (131). This positive view of the legislature produced a positive view of legislation, which in turn both narrowed the earlier divide between the people and the law and supported judicial efforts to give effect to the goals of particular legislation. Judges learned what those goals were from the increasingly available legislative history of

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12 POPKIN, STATUTES, supra note 1, at 70 (quoting E. FITCH SMITH, COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION 588-89 (1848)); id. at 71 (indicating that Theodore Sedgwick’s 1874 treatise considered equitable interpretation to be obsolete).
a statute and by adopting canons reflecting the goals that the legislature presumably had in mind. Popkin describes Learned Hand as “[t]he most articulate judicial exponent of modern purposivism, as well as of the need for a ‘lively appreciation of the danger’ of purposivism” (133)—a description that fits Hand’s work and that others accept today as well.13 Purposivism was critiqued but generally supported by legal realists (who emphasized that judges retained the discretion to implement their own political preferences) and by the legal process work of Hart and Sacks (who viewed the legislature as working out the reasonable policy choices of all interested parties in society). But those critiques and newer critiques led to what Popkin describes as a loss of faith in “both judging and legislating” (149), thus setting the stage for the battle between purposivism, textualism, dynamic statutory interpretation, pragmatism—and now, ordinary judging—that characterizes the theoretical debate about statutory interpretation as we begin the twenty-first century.

That is Popkin’s telling of the history of statutory interpretation. Since the publication of Statutes in Court, however, John Manning has surveyed the same history and reached a decidedly different conclusion.14 Manning focuses on the historical support for the conclusion—accepted by Popkin and others—that American judges have long considered themselves free to pursue the equity of the statute when engaged in statutory interpretation. Manning agrees that such a historical case would present a serious challenge to textualism, but he denies that the historical evidence supports that case. He sees three flaws with the lessons that Popkin would take from the historical record. First, Manning advises that the claims for a judicial power to engage in equitable interpretation rely upon an oversimplified understanding of English history and its relationship to the United States Constitution. Second, Manning notes that equitable interpretation was never fully accepted in the United States, and that its decline occurred as the implications of the constitutional separation of powers and legislative supremacy were worked out in the nineteenth century. Third, Manning concludes that the English constitutional policies that supported equitable interpretation are rejected by the structure of the United States Constitution. Popkin, of course, cannot be faulted for not anticipating these arguments in Statutes in Court. But the extent to which ordinary judging depends on Popkin’s understanding of the history of statutory interpretation demonstrates the threat that Manning’s alternative reading of that history presents to ordinary judging, even before the theoretical arguments regarding such judging are considered.

13 See, e.g., ESKRIDGE, supra note 4, at 211 (describing Hand as “[t]he classic practitioner of imaginative reconstruction”).

B. Popkin’s Case Against Textualism

William Popkin is not a textualist. Of course, Popkin is not persuaded by purposivism, republicanism, or any other theory of statutory interpretation either. The ordinary judging that he prefers is really an anti-theory. It rests upon the conclusion that no single theory explains all statutory interpretation, and that there is a positive advantage to the absence of a single theory (5). Ordinary judging, therefore, presupposes the failure of all other theories of statutory interpretation. Popkin thus attempts to dismiss the rival theories demanding judicial allegiance before he explains ordinary judging. He spends most of his time addressing textualism, so I will too. 15

Popkin regards textualism as impossible and undesirable. He frames his argument against the desirability of textualism in terms of legitimacy and competence. Textualism insists that it possesses the greatest claim to legitimacy in statutory interpretation, and it questions both the actual competence of judges to interpret statutes best and the relevance of institutional competence in any event. By contrast, Popkin downplays claims that any particular theory of statutory interpretation is more legitimate than any other theory, and he focuses on which government institution is most competent to interpret statutes in a way that fits them into the broader law. His positive case for ordinary judging demands that his conception of legitimacy and competence is more accurate than the contradictory textualist conception, so Popkin questions the textualist claims about legitimacy and about competence.

Textualism posits that “legislatures legislate and judges do not” (38). Popkin describes textualism as premised on an “airtight compartment” vision of the separation of government powers that does not allow any overlap between legislative, judicial, and executive powers (38). Popkin prefers an alternative understanding of the separation of powers that accommodates judicial lawmaking through statutory interpretation. He sifts through the historical evidence and concludes that it is ambiguous concerning the original meaning of the separation of powers to the framers of the federal Constitution (37-45). Later, in the normative section of the book, Popkin is more certain that “the airtight compartment view of legislating and judging, which would deny judges a role in compensating for legislative shortcomings, requires a normative justification that is untrue to our legal traditions” (171).

The proper understanding of the constitutional separation of powers continues to divide academics and courts more than two centuries after the

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Constitution was adopted. Popkin fails to address much of that literature despite the fact that a flexible understanding of the separation of powers is essential to his claim for ordinary judging. Instead, Popkin notes the many instances in which courts have engaged in lawmaking when interpreting statutes as supporting the claim that it is appropriate for courts to do so. Popkin assumes that the conflicting historical record reflects a variety of permissible views, not a number of mistakes. But if the more formalist view of separation of powers is correct, even though it has not always been faithfully followed, then the statutory interpretation role that Popkin envisions for judges is illegitimate. Popkin’s repeated insistence that he is more concerned about competency than legitimacy thus rings hollow. The only reason why he is not concerned about legitimacy is because he believes that it is in fact legitimate for judges to interpret statutes in the manner that he advocate. But whether that role is legitimate is precisely the question that must be answered, and it is only because Popkin has decided that the role is legitimate that he is no longer interested in arguments on the topic.

Desirable or not, Popkin also views textualism as impossible because a judge cannot faithfully adhere to the theory. This is so, Popkin explains, because the concept of a text is indeterminate (177). His objection to the indeterminacy of statutory texts does not repeat the frequent—and frequently answered—complaints about the meaning of language. Rather, he asserts that textualism relies on contested assumptions about the statute’s author, audience, and breadth that render an objective understanding of the statutory text impossible to maintain (178-85).

The textualist assumption that is most important to Popkin concerns the temporal audience for which a statute is written. On one view, the meaning of a statute is fixed at the time that the statute is enacted. But Popkin responds that “[n]othing in the concept of a text precludes the future audience from having a claim on the text’s meaning” (179). His examples—and examples drawn from other recent cases—suggest that the meaning of a statutory term can be affected by subsequent legal, technological, or social developments (223-46). A legal development affects the

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16 For some of the recent literature, see Bruce Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 633 (2000) (cautioning against the exportation of the federal separation of powers to other countries); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153 (1992) (advocating a more formal separation of government powers); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123 (1994) (defending a view of the separation of powers that emphasizes the balance of power between the three branches); John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673 (1997) (explaining how the separation of powers supports textualist theories of statutory interpretation). Perhaps the most helpful contribution of Popkin’s discussion of the subject is the historical learning regarding the division of legislative and judicial lawmaking—rather than legislative and executive lawmaking—that he brings to the issue at hand (37-44).

17 See generally Peter C. Schanck, Understanding Postmodern Thought and Its Implications for Statutory Interpretation, 65 S. Cal. L. Rev. 2505 (1992) (describing and analyzing the argument concerning the indeterminacy of statutory language).
meaning of a statute when the statute relies upon a category whose composition is later changed by a change in the law. Perhaps the most famous instance of such a legal development occurred when courts interpreted statutes that entitled all "voters" to serve on juries after the Nineteenth Amendment extended the right to vote to women. The state courts were divided regarding the right of women to sit on juries: some courts insisted that "voters" included only those people eligible to vote when the statute was enacted, while others held that women could sit on juries because they were now "voters" within the meaning of the statute.\footnote{Compare Commonwealth v. Maxwell, 114 A. 825 (Pa. 1921) (holding that women were entitled to serve on juries in the aftermath of the nineteenth amendment) with People ex rel. Fyfe v. Barnett, 150 N.E. 290 (Ill. 1925) (holding that women were not entitled to serve on juries despite the nineteenth amendment).} The latter decisions seem plainly correct even from a textualist perspective because the content of the statutory term "voter" was changed by a subsequent law rather than by any extra-legal considerations.\footnote{That is why I disagree with the characterization of the female juror cases as involving dynamic statutory interpretation, see William N. Eskridge, Jr. & Philip P. Frickey, \textit{Cases and Materials on Legislation: Statutes and the Creation of Public Policy} 559-61 (2d ed. 1995), a theory that I have questioned. See John Copeland Nagle, \textit{Newt Gingrich, Dynamic Statutory Interpreter}, 143 U. Pa. L. Rev. 2209 (1995).}

Popkin offers Judge Easterbrook's opinion in \textit{In re Erickson} as an example of a technological change that affected the meaning of a statute. The 1935 Wisconsin statute at issue in \textit{Erickson} exempted a farmer's "mower" from the claims of creditors. Over the years, mowers were replaced on the farm by haybines, which both conditioned hay and mowed in ways more advanced than those possible in 1935. Judge Easterbrook held that a modern haybine is a "mower" within the meaning of the 1935 statute.\footnote{815 F.2d 1090 (7th Cir. 1987).} Popkin is right to question Judge Easterbrook's assumption that "change has made literal application of the text impossible" (229), but Popkin is less convincing in his effort to use the case to prove that textualism cannot be sustained in the face of technological changes. The proper textualist question is what made a mower a "mower" for the Wisconsin legislature that enacted the statute in 1935. That is the same question that explains why airplanes and electronic listening devices can conduct "searches" within the meaning of the Fourth Amendment even though neither technology was available in 1790. A haybine could be viewed as a mower, and a low-flying aircraft or a wiretap can be viewed as conducting a search, without resort to the lawmaking function of ordinary judging.

Social developments often provide the most controversial grounds for changing the meaning of a statute. Popkin cites the prominent example of the contested meaning of "family" as used in statutes written at least several decades ago but as interpreted by courts in more recent years (179-80). The
popular understanding of “family” today might include gay couples or
group homes that were not within the understanding of the legislature that
enacted the statute. These cases are troublesome for two reasons. The
development in meaning upon which they rely is contested, both vigorously de-
defended and vigorously opposed by people throughout society. Also, the
purported change would have the consequence of expanding the rights pro-
vided by the statute to individuals who had never enjoyed those rights before,
which presents a less forceful case for a dynamic interpretation than the de-
nial of those rights to individuals who had once enjoyed them. For example,
there was less controversy when the Supreme Court held that Arabs were a
separate “race” within the meaning of an 1870 federal civil rights statute even
though Arabs were no longer viewed as a separate race by the 1980s.\textsuperscript{22} A
textualist response to these cases resists the expansion of statutory meaning in
the midst of an ongoing debate about the meaning of a contested term, em-
phasizing the primacy of the legislative process in determining which new
social understandings are entitled to be adopted in a statute.

In addition to addressing the textualist assumptions about a statute’s
audience, Popkin also questions the textualist assumptions about a statute’s
author and a statute’s breadth. Again, his critique is powerful, but it does not
necessarily compromise textualism. The question of authorship asks whether
the language in a statute possesses its ordinary meaning or a more technical
meaning, with the general rule favoring the ordinary meaning absent evi-
dence that a technical meaning was intended.\textsuperscript{23} The question of breadth asks
whether the meaning of a statutory term is influenced by the position of the
term within a statutory subsection or the entire United States Code, with the
general rule allowing consideration of either context. Popkin rightly notes
that the text itself does not resolve choices between ordinary versus techni-
cal meanings and between specific and general contexts (178-80, 182-85).

Popkin portrays textualism as a failure once he shows that it is impos-
sible to achieve “the kind of certainty to which the textualist aspires” (185).
But the inability of the text to determine all questions of statutory inter-
pretation does not defeat textualism as a theory, at least as many textualists
themselves understand the theory. Popkin’s own chapter heading suggests
the solution when it describes textualism as “giving judges as little to do as
possible” (157), not “giving judges nothing to do at all.” Textualism may
be seen as an effort to limit the discretion afforded to judges in statutory
interpretation cases because of concerns about the legitimacy of judicial
lawmaking, while recognizing that it really is impossible to eliminate judi-
cial discretion completely. So viewed, textualism survives Popkin’s impos-
sibility argument, and whether it survives Popkin’s legitimacy argument

\textsuperscript{22} See St. Francis College v. Al-Khazraj, 481 U.S. 604, 609-13 (1987). A similar issue is raised in
People v. Hall, about which I will have much more to say soon. See infra at Part II.

\textsuperscript{23} See, e.g., ESKRIDGE & FRICKEY, supra note 19, at 635.
depends on the resolution of separation of powers issues that the book does not fully address.

C. Popkin’s Case for Ordinary Judging

Ordinary judging allows judges to perform a modest lawmaking role in order to place statutes within their appropriate context. Like other pragmatic theories, it is short on fixed rules and canons of construction that must be employed in every case. Popkin does offer five examples of “interpretive criteria” that are designed to guide ordinary judges encountering specific cases: “a judicial concern with political controversy and technical complexity; with overcoming legislative inertia; with the impact of decisions on the incentive to legislate; with lawmaking responsibility; and with the judge as ‘expert’ in particular areas of law” (232). Even with these criteria, though, Popkin acknowledges “how indeterminate ordinary judging can be” (238). Absent any formal rules or objective truth about the correctness of a decision, an ordinary judge seeks to “woo the consent” of the audience by crafting the most persuasive explanation for a particular interpretation that is possible (217-21).²⁴

Much of Popkin’s ordinary judging is attractive. Its descriptive claim that judges proceed in much this fashion despite the grand theories of academics garners much historical support. Its reaction against the exaggerated claims of other theories makes ordinary judging more believable than many of the proponents of those theories (207). Its admonition that judges “should be modest and restrained, willing to reveal doubts” is a welcome alternative to the strident language employed by judges adhering to a variety of different interpretive theories (218). Many statutory interpretation cases are difficult to decide—though some cases are more difficult under some theories than others—and the judicial unwillingness to acknowledge that detracts from the believability of the enterprise.

Ordinary judging’s normative claim that judges are both competent and entitled to view statutory interpretation as an opportunity to aid the legislature in the lawmaking process is less novel, yet more controversial. Even so, if Popkin is right to discount questions of legitimacy in statutory interpretation, then ordinary judging possesses a historical pedigree and the promise that competent judges will abet the lawmaking process. But the picture looks different if questions of legitimacy persist, and if judges fail to demonstrate their competence for the task of ordinary judging.

Ordinary judging, says Popkin, is inevitable and desirable. Popkin repeatedly refers to ordinary judging as “inevitable” (208, 211, 243), both because of the pragmatic nature of ordinary judging and because of the purportedly flawed nature of the other more ambitious theories. The inevi-

²⁴ Popkin does recognize that “[t]he threads that make up judging are not unlimited, and some criteria are more appropriate than others; the judge, like any politician, can do too much ‘wooing’” (221).
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tability argument also asserts that “[t]he simple act of thinking about the meaning of statutory language in this broader context [of the statute’s temporal dimension]—which the judges must do—requires judgment about how the text should interact with its past and its future” (211). Thus stated, ordinary judging is even akin to textualism, which likewise relies on numerous interpretive canons that seek to situate a statute in its temporal context. 25 But ordinary judging must mean more than that to Popkin. An ordinary judge differs from textualists and others only if an ordinary judge works to place a statute in its temporal context even if the statutory language, intent, or other criteria lead to a different interpretation. That effort may or may not be desirable, but it is not inevitable.

Ordinary judging is desirable to Popkin because judges are most competent to interpret a statute so that it fits in its proper contexts. The placement of a statute in its proper context is central to Popkin’s enterprise. “Ordinary judging simply responds to the judicial imperative to decide how a statute fits into the broader fabric of the law” (211). Often this involves reading new statutes in a manner that best fits not only preexisting statutes, but the common law as well. This contextualization presents a danger. The history that Popkin recounts illustrates that the courts have not been at their best at trying to reconcile statutes and the common law. For example, late nineteenth-century judges and early twentieth-century judges frequently deployed the canon that statutes in derogation of the common law should be narrowly construed. Popkin concludes that many of those judges engaged in “ordinary legitimate judging” (97)—one of the few instances where Popkin implicitly recognizes the force of legitimacy arguments. The majority view today, and the view of Roscoe Pound at the time, regarded judges as acting illegitimately by usurping the role of the legislature in fashioning laws contrary to the preexisting common law. 26

Popkin supposes that “[a]ll we need to justify a collaborative judicial role in statutory interpretation is to conclude that some decision-maker should be concerned with how a statute fits into its past and its future and should make judgments about the competence of various institutions to perform this task” (211). Here Popkin makes two questionable assumptions that are necessary to support the role he envisions for ordinary judges. It is hard to deny that the temporal context of a statute is worthy of attention, but Popkin means more than that. He contends that judges should interpret a statute differently than they otherwise might in order to achieve the best temporal contextualization. In other words, Popkin assumes that fitting a

25 See, e.g., ESKRIDGE & FRICKY, supra note 19, at 99-100 (listing seven interpretive canons designed to assure “continuity in law”).
26 See Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 821 (1983) (noting that “the canon that statutes in derogation of the common law are to be strictly construed ... was used in nineteenth-century England to emasculate social welfare legislation”); Roscoe Pound, Spurious Interpretation, 7 COLUM. L. REV. 379 (1907).
statute into its temporal context is a primary goal of statutory interpretation. The negative implication of this approach is that other historic goals of statutory interpretation—such as adhering to the text, implementing legislative intent, or furthering the statute’s purpose—must sometimes give way to situating the statute within its temporal context.

The primacy of competence over legitimacy is the second questionable assumption embedded in Popkin’s argument from context. Whether judges or legislatures are more competent to fashion the statutory code into a coherent whole raises an interesting empirical question, especially because both the United States Reports and the United States Code are littered with what many regard as unsuccessful efforts to achieve the contextualization that Popkin desires. But the more important point is that ordinary judging rests on the same questionable judgment regarding the legitimacy of an expanded judicial role in statutory interpretation that Popkin deploys to rebut textualism.

Moreover, the legislature might not want the ordinary judge’s help. The questions of fit and coherence in the law that justify ordinary judging might be answered quite differently by the legislature. Any statute that the legislature enacts can be viewed as adjusting the whole body of the law to account for technological changes, subsequent judicial or executive actions, or shifting public attitudes—placing the statute in its temporal context, if you will. The legislature also acts specifically to correct perceived mistakes in the existing body of the law. The House of Representatives has instituted a procedure designed to expedite the legislative correction of statutory mistakes.\textsuperscript{27} Many other statutes are enacted through the regular legislative process for the express purpose of correcting judicial or executive mistakes. The legislature, in short, has demonstrated the ability to accomplish the temporal contextualization that ordinary judging says should be performed instead by the judiciary.

Of course, the legislature does not always act to resolve the kinds of interpretive questions that are raised when it is not apparent how a statute fits within the broader body of statutory and common law. Indeed, legislative updates and corrections are probably the exception rather than the rule. But Popkin’s insistence that the legislature’s failure to act justifies ordinary judging presumes that the legislature would welcome the help of the courts in the lawmaking process. Popkin thus overlooks two explanations for legislative inactivity that cast doubt on the need for judicial assistance. First, it is not obvious that the law should always be made to fit in the way that Popkin describes. Sometimes the legislature self-consciously enacts statutes that do not fit into the law. Second, sometimes the legislature does not act because it lacks the time to do so. Popkin describes judges as having

more time than the legislature to place statutes within the temporal context 
(211), though that portrayal might come as a surprise to both judges and 
legislators. Popkin also acknowledges the constitutional argument against 
allowing the legislature to essentially expand its limited sessions by dele-
gating continuing lawmaking authority to the courts (231). As John Man-
nning has observed, the constitutional separation of powers operates "as a 
structural nondelegation doctrine; by placing lawmaking and law elabora-
tion in distinct hands, the Constitution forces Congress to incur substantial 
agency costs whenever it leaves unresolved issues in a statutory text." 
This latter point calls into question the relevance of any evidence of legisla-
tive support for a more expansive judicial role in statutory interpretation. 
The legislature might want the courts to continue the work of lawmak-
ing—and Popkin correctly identifies many instances of the courts doing so—but whether that judicial lawmaking is legitimate is the recurring ques-
tion that Statutes in Court does not adequately answer.

My final concern about ordinary judging involves an aspect of the his-
tory of statutory interpretation that Popkin surprisingly neglects. History 
offers countless examples of judges misinterpreting statutes. Yet Popkin 
eglects the consequences of ordinary judging gone bad. The ordinary 
judge imagined by Popkin will always act in a conscientious fashion to aid 
the legislature in the lawmaking fashion. Moreover, ordinary judging re-
quires competence for the lawmaking task that Popkin has in mind. In 
other words, ordinary judging only works if performed by an extraordinary 
judge, or at least an ordinary judge. Alas, not all judges fit that description.

II. THE LESSONS OF HALL

People v. Hall offers an opportunity to consider why judges sometimes 
get statutory interpretation tragically wrong. It does not, of course, prove or 
disprove any theory of statutory interpretation, for Popkin is right that no 
one case can accomplish that (224). Yet Hall is instructive because it de-
mands consideration of a question that Popkin does not really address: the 
role of a theory in avoiding bad decisions instead of simply promoting good 
decisions. Ordinary judging presupposes the ability of judges to advance 
the good. Hall calls into question whether ordinary judging—or other theo-
ries of statutory interpretation—can resist the bad.

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THIRD BRANCH 1, 3 (2000) (detailing the increased workload of the federal courts) with 146 CONG. REC. 
29 Manning, supra note 16, at 707.
30 See, e.g., Statutory Interpretation and the Uses of Legislative History: Hearing Before the Sub-
committee on Courts, Intellectual Property, and the Administration of Justice of the House Committee 
A. The Decision in Hall

In August 1853, a miner named George W. Hall and two other men were indicted for murdering a Chinese immigrant named Ling Sing in Nevada County, California. Ling's death occurred just five years after the discovery of gold in nearby Sutter's Fort attracted fortune hunters to California from all over the world, including a large number of men from China. Ling's death also occurred just four years after California became a state. On April 16, 1850, acting during its first session, the California legislature enacted a statute providing that “[n]o black, or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against any white person” in a criminal proceeding. Another contemporary statute governing civil proceedings provided that no Indian or Negro was allowed to testify in any proceeding in which a white person was a party.

In October 1853, Hall was convicted of murdering Ling and sentenced to be hanged. His conviction, however, rested in part upon the testimony of three Chinese witnesses. Even though he had not objected to their testimony at trial, Hall appealed his conviction arguing that Chinese witnesses were barred from testifying by the 1850 criminal proceedings statute. The California Supreme Court agreed and overturned Hall's conviction in a 2-1 decision issued in its October 1854 term. Chief Justice Hugh Murray wrote the majority opinion joined by Justice Solomon Heydenfeldt; Justice Alexander Wells dissented without explanation.

The majority offered three reasons for reading the statute to exclude the testimony of the Chinese witnesses. First, Chinese are "Indians" within the meaning of the statute. The majority explained that "the name of Indian, from the time of Columbus to the present day, has been used to designate, not alone the North American Indian, but the whole of the Mongolian race, and . . . the name, though first applied probably through mistake, was afterwards continued as appropriate on account of the supposed common origin." The majority viewed the meaning of the California's criminal proceedings statute as copying similar statutes from other states—"our Statute being only a transcript of those of older States"—that understood the term "Indian" in that fashion. The evidence that the "older States" so viewed their statutes came from Chief Justice Murray's explanation of why from the time of Columbus "down to a very recent period, the American Indians and the Mongolian, or Asiatic, were regarded as the same type of the human species." That categorization was "still held by many scientific

31 The most detailed account of the circumstances of the case appears in CHARLES J. McCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY AMERICA 20-23 (1994).
33 Civil Practice Act, ch. 22, § 306.
34 People v. Hall, 4 Cal. 399, 402 (1854).
35 Id. at 400.
writers, and is supported by Cuvier, one of the most eminent naturalists of modern times.”36 The majority admitted that the term “Indian” had since come to refer exclusively to those whom we now know as Native Americans, but it refused to so limit the term because the majority viewed the meaning of the term as being fixed by the statutes upon which the California criminal proceedings statute was presumably modeled.37 The majority, however, did not cite any authority for the proposition that earlier state statutes had interpreted “Indian” in the broader sense. Nor did the majority provide any evidence that “Indian” still possessed a broader connotation by the time the California legislature enacted its statute in April 1850, despite the fact that Chinese immigrants were familiar in California by that time.

The majority’s second argument in favor of its interpretation was that the terms “Black,” “Mulatto,” and “Indian” collectively referred to anyone who was not white. The legislature, said the majority, “adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the white person from the influence of all testimony other than that of persons of the same caste.”38 This argument contradicts the opinion’s recognition that the terms black, mulatto, and Indian were not comprehensive. During the middle of the nineteenth century, Chinese and other Asians were regarded as “Mongolians.” The majority admitted as much when it contended that “down to a very recent period, the American Indians and the Mongolian, or Asiatic, were regarded as the same type of the human species.”39 But the “down to a very recent period” caveat shows that the majority knew that Indians and Mongolians were regarded as different races by 1850, as any visitor to San Francisco at that time would have noted. As Charles McClain has commented, the majority’s effort to place Chinese immigrants into the same category as blacks, mulattoes, and Indians relied upon “a kind of amateur foray into history and ethnography” that also plagued that opinion’s earlier effort to treat Chinese as “Indians.”40

The majority’s third argument rested squarely on public policy. The majority described the possibility that Chinese immigrants could be seen “at the polls, in the jury box, upon the bench, and in our legislative halls” as “not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.”41 Lest there be any ambiguity in the majority’s attitude toward the Chinese, it explained:

36 Id. at 401.
37 See id. at 402 (explaining that “at the origin of the legislation we are considering, it was used and admitted in its common and ordinary acceptation, as a generic term, distinguishing the great Mongolian race, and as such, its meaning then became fixed by law, and in construing statutes the legal meaning of words must be preserved”).
38 Id. at 403.
39 Id. at 400.
40 McClain, supra note 31, at 21.
41 Hall, at 404-05.
The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State, except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.\textsuperscript{42}

This passage was as offensive to many Californians in 1854 as it is today. California’s growing Chinese community was outraged by the judicial expression of these sentiments,\textsuperscript{43} but it was not alone. Many leading white Californians joined in the condemnation of \textit{Hall}.\textsuperscript{44} Yet the tide of public opinion was moving against the Chinese, so that by 1863—the year of the Emancipation Proclamation—the legislature codified the result in \textit{Hall}.\textsuperscript{45} That did not last long either, though, because the ban on Chinese testimony was challenged soon after the enactment of the Fourteenth Amendment. Even then the California Supreme Court sustained the ban, ruling that there was no equal protection problem because white, black and mulatto citizens alike could now all exclude the testimony of a Chinese person.\textsuperscript{46} It was left to the legislature to repeal the ban in 1872, thus permitting Chinese to testify in California state courts for the first time.

\textit{Hall} was wrong, not just because it yielded an inequitable result, but because it read the 1850 California criminal proceedings statute incorrectly. The question has since been derided by numerous courts and commentators.\textsuperscript{47} The question remains, however, how the result could have been avoided.

\textsuperscript{42} \textit{Id.} at 405.
\textsuperscript{43} \textit{See} McClain, \textit{supra} note 31, at 22-23.
\textsuperscript{44} \textit{See id.} at 22 (noting that “the ban on Chinese testimony was a source of deep embarrassment to the more civilized elements of white society”). It is thus wrong to dismiss Chief Justice Murray’s remarks as reflecting the sentiments of a bygone era. But see J.A.C. Grant, \textit{Testimonial Exclusion Because of Race: A Chapter in the History of Intolerance in California}, 17 UCLA L. Rev. 192, 194 (1969) (suggesting that the majority’s opinion in \textit{Hall} “doubtless was accepted by the leading citizens of the day as the epitome of reason and logic and a sound exposition of history’’). Additionally, note that the issue of equating Asians with African-Americans is still with us. See, e.g., Janine Young Kim, Note, \textit{Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm}, 108 YALE L.J. 2385 (1999).
\textsuperscript{45} \textit{See McClain, supra} note 31, at 22-23.
\textsuperscript{46} \textit{Act of March 18, 1863, ch. 70 § 1} (providing that “[n]o Indian, or person having one half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor or against any white person”).
\textsuperscript{47} \textit{See} McClain, \textit{supra} note 31, at 21 (describing Chief Justice Murray’s opinion as “containing some of the most offensive racial rhetoric to be found in the annals of California appellate jurisprudence’’); Thomas Wull Joo, New “Conspiracy Theory” of the Fourteenth Amendment: Nineteenth
B. Ordinary Judging and Hall

The interpretive approach in Hall matches the central aspiration of ordinary judging: to encourage judges to contribute to the lawmaking function by helping a statute fit into the rest of the law. Each of the three reasons offered by Chief Justice Murray for reading the 1850 statute to forbid the testimony of Chinese witnesses is grounded in a desire to place the statute in the context of the rest of the law. The first two reasons—interpreting “Indian” to include Chinese, interpreting “Black, Mulatto, or Indian” to mean “anyone who is not white”—reflect an attempt to fit the California statute into earlier statutes adopted by other states. But there is no evidence that the California legislature wanted to fit its criminal proceedings statute into the framework established by other states. Moreover, the earlier statutes were typically found in slave states, while California was never a slave state and the Chinese were never slaves. On the other hand, many in California wrongly believed at the time that Hall was decided that the Chinese immigrants had come to the state bound by illegal slave labor contracts. It would have been unimaginable, however, for a California court to try to imitate the law in slave states given the anguish that attended California’s admission to the union as a free state. In other words, the temporal context of the court’s decision was complicated, and the majority’s effort to place the statute in that context overlooked several important variables—not least of which is whether the legislature wanted its statute to fit with the earlier statutes of other states at all.

The majority’s racist public policy concerns were also motivated by a desire to fit the 1850 statute into the body of law existing at the time of the court’s decision. Chief Justice Murray could not imagine that the law would ever allow Chinese immigrants to become American citizens and to vote, so he read the statute before him to avoid any possibility of those unthinkable results. Murray represented the Know Nothing Party, which expressed hostility toward all immigrants and which enjoyed widespread support at the time. But the criminal proceedings statute at issue in Hall was enacted “before the crusade against the Chinese and before the American, or ‘Know Nothing’, movement became important in the state.”

The swift change in attitudes toward the Chinese in California between the stat-
ute's enactment in 1850 and the court's decision in 1854 frustrates any effort at judicial lawmakerng to fit the statute into the appropriate temporal context.\(^{51}\)

An ordinary judge might consider the statutes that the California legislature enacted after the 1850 criminal proceedings statute but before the court decided *Hall* in 1854. In May 1852, the legislature imposed a tax on foreign miners that was targeted at the growing number of Chinese immigrants working in the mines.\(^{52}\) In May 1854, the legislature approved a concurrent resolution seeking congressional authorization to impose a direct capitation tax on all Chinese immigrants arriving in California.\(^{53}\) More generally, public hostility toward the Chinese had increased dramatically between 1850 and 1854.\(^{54}\) The majority's decision in *Hall* fits the criminal proceedings statute within the context of those subsequent events.

Ordinary judges are also supposed to benefit from political experience (212-14). *Hall* casts doubt upon that proposition, too. Chief Justice Murray had served as a member of the San Francisco city council prior to his ascension to the California Supreme Court in 1851 at the age of twenty-six.\(^{55}\) He began his political career as a member of the Democratic Party, though he was reelected to the Supreme Court in 1855 as a member of the "Know Nothing" Party. Beyond his political experience, Murray was known for drinking, gambling, sexual promiscuity, physical assaults, and numerous other intemperate judicial opinions—all before he died of consumption in 1857 at the age of thirty-two.\(^{56}\) But lest one assume that the effects of dubious political experience like Murray's can be readily identified and avoided, remember that it was exactly one century after *Hall* when the California governor who had authorized the internment of Japanese-Americans wrote the Supreme Court's opinion in *Brown v. Board of Education*.\(^{57}\)

Of course, it is far too simplistic to assert that ordinary judging leads to the majority's conclusion in *Hall*. Popkin would be horrified by the reasoning employed by the majority in *Hall*. As he rightly points out, "[j]udges, of course, may get the answer wrong" when interpreting statutes, regardless of what theory they try to apply (247). Nonetheless, *Hall* illustrates that the encouragement of even a modest judicial lawmakerng power can yield results that no theory would want to defend.

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\(^{51}\) The deterioration of the image of the Chinese in California is discussed *infra* at notes 60-75 and accompanying text.

\(^{52}\) See McClain, *supra* note 31, at 12.

\(^{53}\) See id. at 17.

\(^{54}\) See *infra* at notes 65-75 and accompanying text.


\(^{56}\) See id. at 367-70.

\(^{57}\) 347 U.S. 483 (1954) (Warren, C.J.). Note, too, that a good case can be made that the worst constitutional decisions include those involving Chinese and other Asian immigrants. See Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of Japanese-Americans during World War II); Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581 (1889) (upholding a federal ban on Chinese immigration).

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C. Textualism and Hall

Textualist theories focus on the meaning of the statutory terms at the time the legislature enacted the law. Several things suggest that the California legislature of 1850 would not have viewed the statute as including Chinese within the prohibition of "Blacks, Mulattos, or Indians." Chief Justice Murray assumed that the California legislature of 1850 unthinkingly adopted the understanding of "Indian" as including Chinese that he attributed to previous legislatures in previous generations. There is no evidence to support that assumption. Murray himself backed away from insisting that "Indian" still retained the broad meaning which it had once possessed, though he did not abandon the argument altogether. No court had ever held that the Chinese or any other Asian immigrants were encompassed within the meaning of the terms black, mulatto, or Indian. And yet Chinese immigrants were known to Californians by 1850 when the legislature enacted the statute. Those immigrants, moreover, were scandalized at the suggestion that they were equivalent to Indians—and the Indians objected to the comparison too. The awareness of Chinese immigrants coupled with the contemporary narrower meaning of "Indian" belies the majority's assumption that the legislature of 1850 understood the statutory prohibition to apply to the Chinese.

Yet a textualist could also struggle with the issue presented in Hall. A textualist would want to discern the meaning that statutory terms had at the time that the legislature enacted the statute in 1850. The majority plausibly asserts that the statutory terms black, mulatto, and Indian really signified an intent to include anyone who was not white. On the other hand, early nineteenth-century legislatures had proven quite capable of limiting statutes to "white persons" when they desired to do so. Additionally, as noted above, the contemporary understanding that the terms black, mulatto, and Indian each conveyed a specific meaning casts doubt upon the assumption that they referred to anyone who is not white, as does the absence of any previous judicial decisions equating Chinese with blacks, mulattos, and Indians. Most importantly, though, a textualist would resist the opportunity to allow either personal preferences or subsequent societal developments to influence the original meaning of the statute. Chief Justice Murray erred not just by proclaiming racist views of Chinese, but also by attributing those views to the California legislature that had enacted the statute in 1850.

58 Compare McClain, supra note 31, at 22 (quoting a letter from a leading Chinese-American merchant in San Francisco who maintained that the Chinese had been civilized for thousands of years whereas "these Indians know nothing about the relations of society; they know no mutual respect; they wear neither clothes nor shoes; they live in wild places and in caves") with Alexander McLeod, Pigtails and Gold Dust 26 (1947) (observing that "[t]he Indian was never flattered by the comparison" to the Chinese).
59 See, e.g., Harris v. Hardeman, 55 U.S. 334 (1852) (interpreting a statute referring to a "free white person"); see also In re Yup, 1 F. Cas. 223 (C.D. Cal. 1878) (holding that a Chinese man was not a "free white person" within the meaning of the federal statute governing citizenship).
Hall presents a striking example of a dramatic shift in public attitudes toward the issue at hand in the short four-year period between the enactment of the statute and its interpretation by the court. Chinese immigrants first arrived in California in 1849, joining the thousands of men from around the world who journeyed there in search of the newly discovered gold.\textsuperscript{60} Three hundred twenty-five Chinese arrived in California in 1849, and 450 joined them in 1850.\textsuperscript{61} Those first immigrants were either welcomed by the local community or regarded as harmless visitors who should be helped or at least tolerated.\textsuperscript{62} They were invited by San Francisco civic leaders to participate in ceremonies in August 1850 marking the death of President Zachary Taylor and they joined in the celebration of California’s admission to the United States in October 1850.\textsuperscript{63} California Governor John McDougald described the Chinese as “one of the most worthy classes of our newly adopted citizens” during a speech to the state legislature in January 1852.\textsuperscript{64}

But hostility to the Chinese immigrants surged as their numbers increased. Another 2,716 immigrants arrived in California from China in 1851, followed by 20,026 more in 1852.\textsuperscript{65} The state legislature’s Committee on Mines and Mining complained in 1852 that “the preeminent evil threatening the well-being of the mining districts [is] ‘the concentration, within our State limits, of vast numbers of the Asiatic races, and of the inhabitants of the Pacific Islands, and of many others dissimilar from our-

\textsuperscript{60} See McLeod, supra note 58, at 23-23 (observing that “[w]hen the Chinamen heard of the mountains of gold across the great eastern ocean, where masses of the precious metal were said to be lying everywhere, and could be picked up freely by anyone, they went wild”). Chinese immigration also occurred because of unrest in China. See Hyung-Chan Kim, A Legal History of Asian Americans, 1790-1990, at 44-46 (1994); Takaki, supra note 48, at 192. Fewer than 50 Chinese had emigrated to the United States between 1820 and 1848. See Kim, supra, at 47.

\textsuperscript{61} See Takaki, supra note 48, at 194.

\textsuperscript{62} See Mary Coolidge, Chinese Immigration 21-25 (1909) (describing the positive reception of the first Chinese immigrants in California); Otis Gibson, The Chinese in America 224 (1878) (agreeing that “[a]t first the Chinamen were well received in California”); McClain, supra note 31, at 9 (stating that “[t]he first Chinese to arrive in California were greeted with a mixture of enthusiasm and curiosity”); McLeod, supra note 58, at 25 (explaining that “[a]t first the pigtailed Chinaman was regarded as a novelty, and he was most amusing to the curious Californians. He added picturesqueness to the population.”); Id. at 39 (concluding that “[i]n the first few years the Chinese were welcomed, praised, and considered almost indispensable. There was no race antipathy in those days.”); Stuart Creighton Miller, The Unwelcome Immigrant: The American Image of the Chinese, 1785-1882, at 4 (1969) (reporting that scholars have long agreed that “the initial American response to Chinese immigration was a favorable one; as representatives of an old and respected civilization the Chinese were welcome additions to the melting pot”); Takaki, supra note 48, at 195 (noting that “[a]t first, there were signs that the Chinese were welcome in California”).

\textsuperscript{63} See Gibson, supra note 62, at 224-25; McClain, supra note 31, at 9; McLeod, supra note 58, at 37-39.

\textsuperscript{64} McClain, supra note 31, at 9.

\textsuperscript{65} See Takaki, supra note 48, at 194.
selves in customs, language and education." Governor John Bigler echoed that report one week later with a call to stop the Chinese immigration that threatened to inundate the mining districts of the state, with a specific objection to the service of Chinese on juries because they did not honor the obligations of an oath. In May 1852, the legislature enacted both a three dollar per month license tax on foreign miners and a commutation tax designed to discourage Chinese immigrants from even coming to California.

In response, several prominent newspapers and missionaries objected to the portrayal of the Chinese and the actions that view had spawned. One leading newspaper even predicted that the Chinese would obtain the right to vote, the very prospect that Chief Justice Murray considered unimaginable. But 1852 also saw the Chinese immigrants themselves begin to warn those still in China not to come to California because of the anti-Chinese sentiment that was growing in the state. More Chinese left California in 1853 than arrived there.

Public opinion was even more hostile to the Chinese by the time that Hall was decided late in 1854. Another 16,084 Chinese immigrants arrived in California that year. The legislature’s Committee on Mines and Mining acknowledged the veracity of Chinese complaints about the increased number of violent attacks on the Chinese by white miners. A municipal committee visited San Francisco’s Chinatown in 1854 and concluded that most

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67 See McClain, supra note 31, at 10-11.

68 See id. at 12.

69 See id. at 11-13. The leading American defender of the Chinese immigrants was the Reverend William Speer, a Presbyterian missionary who had ministered in China before opening a mission for the Chinese in San Francisco in 1852 and beginning to promote their cause. See Gibson, supra note 62, at 161-62, 228-34; McClain, supra note 31, at 19; Michael L. Stahler, William Speer: Champion of California’s Chinese, 1852-57, J. Presbyterian History 48 (1970). Speer also served as the translator for the Chinese witnesses whose testimony was held inadmissible in Hall. See McClain, supra note 31, at 20.

70 See Takaki, supra note 48, at 195 (quoting the Daily Alta California’s forecast that “the China boys will yet vote at the same polls”).

71 See McClain, supra note 31, at 9.

72 See Gibson, supra note 62, at 19 (citing statistics that appeared in the San Francisco Evening Post on April 13, 1876).

73 See id. at 19.

74 See McClain, supra note 31, at 15. The Chinese were not the only victims of violent attacks in the mining districts. See McLeod, supra note 58, at 58 (reporting that “[t]here were 4,200 murders committed in California during those first five years, but with very few legal convictions of the killers”).
of the women there were prostitutes.⁷⁵ Those kinds of attitudes persisted for many years, though even by the end of the nineteenth century the judicial response to the Chinese was much more ambiguous. But the short four-year gap between the 1850 statute and the decision in *Hall* also divided the positive and negative views of the Chinese. Chief Justice Murray gave no indication of that in his opinion, even though the statute he was interpreting was enacted by a legislature to which the animus that he expressed cannot be attributed.

In short, the California legislature that enacted the prohibition on the testimony of “Blacks, Mulattos, and Indians” in 1850 acted at a time when the meaning of “Indian” had narrowed to include only Native Americans, when the presence of Chinese immigrants was known to the lawmakers, and when such immigrants were not viewed with the suspicion or hostility to which blacks, mulattos, and Indians were subjected. Those factors would lead a textualist to interpret the statutory terms black, mulatto, and Indian as not including Chinese immigrants like those who testified against George Hall. Again, this one case does not prove the supremacy of textualism, but it does demonstrate that a theory that seeks to constrain the lawmaking power of judges can avoid abuses of that power like that which occurred in *Hall*.

### III. Conclusion

Perhaps Professor Popkin and I see statutory interpretation differently because of our different areas of substantive expertise. Popkin offers three explanations for “why [his] own background makes [him] less anxious about judging and more confident about the judge’s discretionary imperative role” (214). His experience with state law minimizes his concerns about the separation of governmental powers because of the ways in which state constitutions blend legislative, executive and judicial powers to a greater extent than the federal constitution. This is an excellent point that directly responds to the legitimacy questions that Popkin otherwise downplays. The received wisdom suggests that state court judges have been more likely to follow textualist approaches than federal judges, but Popkin offers an insightful reason for why the opposite should be the case.

The two other lessons that Popkin takes from his background are open to competing interpretations. His focus on interpreting statutes rather than constitutions makes him less concerned about the consequences of any particular judicial decision because the legislature can always correct it (214). The possibility of legislative correction, however, can also support a diminished interpretive role for the courts. For example, stare decisis possesses greater force in statutory cases than in constitutional cases precisely

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because judicial corrections are less necessary in the statutory context. Likewise, while his expertise in the “mundane” income tax code teaches Popkin that “the role of the courts in helping to reach sensible conclusions has long been a routine activity” (214), the ability to generalize about statutory interpretation based on tax law has long been questioned.

My own substantive area of federal environmental law leads me toward textualism and away from the judicial role employed in ordinary judging. Federal environmental statutes reduce aspirations that everyone shares—e.g., clean air and water, the preservation of wildlife—to texts which impose legally enforceable obligations. But the consensus supporting general environmental goals often disappears by the time a particular application of the statute arises. To take the most famous example, it is unlikely that Congress wanted to protect the snail darter at the expense of the Tellico Dam, but in Tennessee Valley Authority v. Hill, the Supreme Court interpreted the Endangered Species Act to require that result because the statutory language so clearly demanded it. That interpretation of the statute did not “fit” the law at the time: common law equity jurisprudence would have allowed the dam to be completed despite the presence of the snail darter, and nothing in the existing body of environmental law necessitated that result. Ronald Dworkin and others have since cited TVA v. Hill as an example of the awful consequences of an unwillingness to allow judges to move beyond the text when interpreting a statute. Chief Justice Burger, by contrast, did a great service to environmental law by treating the case as dictated by the statutory text and leaving the wisdom of the result for Congress to decide. Wisely or not, Congress acted to achieve a different resolution of the conflict between the snail darter and the Tellico Dam.

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76 See, e.g., Reno v. Bossier Parish Sch. Bd., 120 S. Ct. 866, 889 (2000) (Souter, J., concurring in part and dissenting in part) (acknowledging that “[t]he policy of stare decisis is at its most powerful in statutory interpretation (which Congress is always free to supersede with new legislation)”). It has even been suggested that the courts should never abandon stare decisis in statutory cases. See Lawrence C. Marshall, “Let Congress Do It”: The Case for an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 177 (1989).

77 See Michael Livingston, Practical Reason, “Purposivism,” and the Interpretation of Tax Statutes, 51 Tax L. Rev. 677, 678 (1996) (noting that “[s]cholars have long suggested that the unique features of tax law, including its high level of detail, frequent revision, and largely self-contained nature, require a special set of interpretive tools”).

78 437 U.S. 153, 173 (1978) (observing that “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act”).

79 See id. at 211-13 (Rehnquist, J., dissenting).

80 See DWORKIN, supra note 3, at 23 (using TVA to illustrate different views about the meaning of the “law,” and rejecting the result reached by the Court in the case).

81 See CHARLES C. MANN & MARK L. PLUMMER, NOAH’S CHOICE: THE FUTURE OF ENDANGERED SPECIES 169-174 (1995) (explaining how Congress amended the ESA in response to the Supreme Court’s decision, but when the snail darter defeated the Tellico Dam under the revised statute, Congress exempted the dam from all federal laws).
But the principle that the Court drew from the language of the statute—
"Congress intended endangered species to be afforded the highest
priorities"—continues to animate the understanding of the law more than
twenty years later.\(^\text{82}\) The legacy of TVA v. Hill was to make the law fit the
statute, a legacy that would have been lost if an ordinary judge sought to
make the statute fit the law.

Popkin concludes his book by stating that "[s]tatutory interpretation
has always been less about what the statutory words mean, or even what the
statutes mean, than about who should decide what issues and when" (248).
I agree, but unlike Popkin, I regard the question of "who should decide" as
a question of legitimacy, not competence. People v. Hall offers an especi-
ally stark illustration of the distinction. It was unjust for the California
legislature to adopt that rule in 1858. It was unjust and illegitimate for the
California Supreme Court to adopt that rule in 1854. The court lost its le-
gitimacy when it assumed a lawmaking function in an effort to fit the statute
into the temporal context of 1854. The tragic consequence of the
court's lawmaking effort was to superimpose an anti-Chinese policy on a
statute whose text did not require that result.

Mark Twain responded to the rule established in Hall by observing that
"[o]urs is the 'land of the free'—nobody denies that—nobody challenges it.
(Maybe it is because we won't let other people testify.)"\(^\text{83}\) That the freedom
of California's Chinese immigrants was deprived by the court instead of the
legislature raises questions of legitimacy well beyond the questions of in-
stitutional competence that Popkin skillfully addresses. For statutory inter-
pretation is as much about not getting it wrong as it is about getting it right.

\(^{82}\) TVA, 437 U.S at 174. For a collection of lower courts that have relied upon that language in de-
ciding cases involving endangered species, see John Copeland Nagle, Endangered Species Wannabees,

\(^{83}\) Twain, supra note 6, at 391.