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## A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao

*James E. Westbrook\**

Professor William Popkin asked the following questions in discussing competing perspectives on the interpretation of statutes:

But what is a statute? Is it what the writer intends, what the text means, or what the reader creatively derives from the evidence of statutory meaning?<sup>1</sup>

The same questions can be asked about collective bargaining contracts. In the collective bargaining context, writers refers to management and labor, the parties to the agreement; text refers to the express language of the contract; and reader refers to the arbitrator. The answers given to Popkin's questions have important implications for how arbitrators go about their task of determining the meaning of collective bargaining contracts.

There has been an explosion in writing about statutory interpretation in recent years.<sup>2</sup> Legal scholars have responded to theoretical writing about interpretation in general and to articles and judicial opinions by judges with an impressive array of articles and books. The purpose of this Article is to reflect on some of the common assumptions and interpretive practices of arbitrators in the light of this writing about statutory interpretation. It would

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1. WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 309 (1993). Much of the organization of this article is based upon Professor Popkin's reader, text, and writer framework. He also used this framework in William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865 (1993) [hereinafter Popkin, *Responsibility*].

2. See Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).

be a mistake for arbitrators to borrow ideas about statutory interpretation without carefully considering differences between collective bargaining and the legislative process and between the role of judges and arbitrators. On the other hand, arbitrators face many of the same issues in interpreting collective bargaining contracts that judges face in interpreting statutes. Both judges and arbitrators are charged with determining the meaning of a text. The new literature on interpretation can provide useful insights for arbitrators and the parties to arbitration proceedings. I believe that arbitrators and other labor relations professionals will understand interpretation issues better and be less apt to overlook such issues if they familiarize themselves with some of this literature.

First, I will summarize some of the common assumptions arbitrators make about the interpretation of labor agreements. I will give a brief overview of some of the interesting writing on statutory interpretation in recent years. I will then review some issues in the interpretation of collective bargaining contracts in light of this writing and my personal experience as a labor arbitrator. I will organize the discussion under three headings: the reader, the text, and the writers. I believe this organization is helpful because these are the three fundamental perspectives from which one can approach the task of interpretation. Looking at the same task from three different perspectives can enhance one's understanding.

There is a consensus among arbitrators that their primary responsibility is to discover and implement the mutual intent of the parties.<sup>3</sup> Since it is usually assumed that the text of the agreement is the best indication of party intent,<sup>4</sup> an emphasis on intent is not considered to be inconsistent with respect for the text. Arbitrators often base interpretations on the "plain meaning" of the text.<sup>5</sup> I believe that one reason the consensus on the importance of intent has developed is because experience and the insights of commentators have convinced most arbitrators that the text alone does not provide defensible answers to all of the issues they face. The text frequently is ambiguous. Some arbitrators and commentators assert that language is inherently

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3. FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 348 (4th ed. 1985); JAY E. GRENIG, *PRINCIPLES OF CONTRACT INTERPRETATION, LABOR AND EMPLOYMENT ARBITRATION* 14-4 (Tim Bornstein & Ann Gosline eds., 1993); Carlton J. Snow, *Contract Interpretation: The Plain Meaning Rule in Labor Arbitration*, 55 *FORDHAM L. REV.* 681, 683 (1987).

4. See, e.g., *Duluth Community Action Inc.*, 82 *Lab. Arb.* 426, 430 (1984) (Boyer, Arb.); *Phelps Dodge Copper Prod. Corp.*, 16 *Lab. Arb.* 229, 233 (1951) (Justin, Arb.).

5. See, e.g., *Kennecott Copper Corp., Ray Miles Division*, 70-2 *Lab. Arb. Awards (CCH)* ¶ 8849, at 5851 (1970) (Abernethy, Arb.); *Clean Coverall Supply Co.*, 47 *Lab. Arb.* 272, 277 (1966) (Witney, Arb.); ELKOURI & ELKOURI, *supra* note 3, at 86 (Marlin M. Volz & Edward P. Goggin eds., 1985-89 Cum. Supp.).

ambiguous.<sup>6</sup> Reliance on allegedly clear text could sometimes lead to absurd results.<sup>7</sup> In some cases there is evidence that the parties did not intend what the text appears to suggest.<sup>8</sup> The parties' agreements on how to deal with recurring issues not expressly covered by the collective bargaining agreement are routinely enforced by arbitrators.<sup>9</sup> Important issues arise which have not been dealt with in the agreement and have not been resolved by the parties in their day-to-day dealings.<sup>10</sup> These and other considerations have led arbitrators to look beyond the text on a regular basis for other evidence of the meaning of the agreement. The search for party intent provides a defensible rationale for consideration of much of this evidence.

The traditional guide to the appropriate use of text and other evidence of meaning is set forth in the plain meaning rule. When the language of the agreement is "plain," "clear," or "unambiguous," the arbitrator is supposed to follow it without considering other evidence of meaning.<sup>11</sup> Under the plain meaning rule, evidence of mutual intent such as bargaining history and past practice is not considered unless the arbitrator concludes that the text is ambiguous.<sup>12</sup> Although the plain meaning rule has been criticized by arbitrators, courts, and commentators, it continues to be invoked by arbitrators.<sup>13</sup>

## I. AN INTRODUCTION TO RECENT WRITINGS ON INTERPRETATION

Deconstruction, associated most prominently with French philosopher Jacques Derrida, denies the possibility of a single correct or most defensible interpretation of a text and asserts that it is impossible to discover a writer's intent.<sup>14</sup> Critical Legal Studies scholars have used the techniques of deconstruction to undermine established legal doctrines and interpretations.<sup>15</sup> By pointing out the assumptions underlying conventional doctrines and

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6. See Snow, *supra* note 3, at 685-88 (discussing ambiguous nature of language).

7. See Consolidation Coal Co., 83 Lab. Arb. 1158 (1984) (Duff, Arb.).

8. Maple Heights Bd. of Educ., 86 Lab. Arb. 338, 342 (1985) (Van Pelt, Arb.); Circle Steel Corp., 85 Lab. Arb. 738 (1984) (Stix, Arb.).

9. See Metal Specialty Co., 39 Lab. Arb. 1265, 1269 (1962) (Volz, Arb.).

10. See Clyde W. Summers, *Collective Agreements & the Law of Contracts*, 78 YALE L.J. 525, 551-56 (1969).

11. GREINIG, *supra* note 3, at 14-6; Snow, *supra* note 3, at 697.

12. Snow, *supra* note 3, at 681-82.

13. Snow, *supra* note 3, at 682, 684, 688-95.

14. Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815, 821, 826 (1990) [hereinafter Schanck, *Game*].

15. *Id.* at 820.

interpretations and showing that these assumptions are not inevitable, they try to turn consensus into uncertainty.<sup>16</sup> By asserting the primacy of the reader over the writer of text, deconstructionists have gone even further than the legal realists of the 1930's in emphasizing the freedom judges have in interpreting text.

Legal scholars such as Ronald Dworkin and William Eskridge, although accepting more limitations on judges' discretion than the deconstructionists, have responded to the literature on interpretation and cases such as *United Steelworkers v. Weber*<sup>17</sup> by developing theories of interpretation which urge judges to use their freedom to achieve good results. Dworkin asserts that judges should interpret law to make it the best it can be.<sup>18</sup> Eskridge's theory of dynamic statutory interpretation asserts that statutes should be interpreted in light of evolving societal and legal conditions to reach a result "that is most consonant with our current web of beliefs and policies surrounding the statute."<sup>19</sup>

Public choice scholars have developed a theory that has been particularly influential with conservative judges and scholars. Applying economics methodology to the legislative process, they offer what they believe is a more realistic view of the legislative process.<sup>20</sup> Public choice theory views statutes as frequently the result of compromises struck by competing interest groups, rather than as embodying broad public purposes, and it challenges the assumption that legislators should be thought of as reasonable persons

16. One of their interesting interpretive arguments is that the constitutional provision requiring the President to be thirty-five years of age should not prevent a mature thirty-four year old from becoming president, since the purpose of the provision is to prevent immature people from becoming president. *Id.* at 823-24. Compare Mark Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686-88 (1985), with RICHARD A. POSNER, *LAW AND LITERATURE* 219-20 (1988) [hereinafter POSNER, *LITURATURE*].

17. 443 U.S. 193 (1979). Philip Frickey believes that *Weber* played a pivotal role in reviving interest in statutory interpretation. Frickey, *supra* note 2, at 245.

18. Schanck, *Game*, *supra* note 14, at 852 (referring to RONALD M. DWORKIN, *LAW'S EMPIRE* 231, 233 (1986)). For a criticism of Dworkin's approach to statutory interpretation see Earl M. Maltz, *Rhetoric And Reality In The Theory of Statutory Interpretation: Underenforcement, Overenforcement, and The Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, n.59 (1991).

19. William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) [hereinafter Eskridge, *Dynamic*] quoted in Schanck, *Game*, *supra* note 14, at 853.

20. See Frickey, *supra* note 2, at 250. Acceptance of public choice theory does not always lead to a conservative position. See, e.g., Jonathan R. Macy, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

pursuing reasonable purposes.<sup>21</sup> Legislators should instead be viewed as brokering legislative deals between interest groups. These assertions have produced skepticism in some quarters about the widely held assumption that statutes should be interpreted to carry out their broad purpose.<sup>22</sup> Public choice proponents believe the "purpose approach" often leads to a result contrary to the actual legislative compromise and encourages judges to read their personal preferences into statutes.<sup>23</sup>

Three federal judges who once served together on the University of Chicago Law School faculty have had a major impact on statutory interpretation in recent years. They have built upon public choice theory and have added their own distinctive insights. Judge Richard Posner of the Seventh Circuit Court of Appeals accepts the necessity of going beyond the text in the search for statutory meaning,<sup>24</sup> but cautions against judicial reliance upon broad statutory purpose.<sup>25</sup> He asserts that "the idea of a statute's being a command issued by a superior body (the legislature) to a subordinate body (the judiciary) provides a helpful way of framing inquiry into the principles of statutory interpretation."<sup>26</sup> Viewing a statute as a command suggests that judges should respect the legislative compromise rather than try to make the statute the best it can be. Judge Posner believes that if the lines of legislative compromise are not clear, judges should "imaginatively reconstruct" what the legislature would have done if it had dealt with the issue before the court.<sup>27</sup> In terms of the questions asked at the beginning of this article, Judge Posner's emphasis is on the writer. His description of the task of interpretation is, however, more realistic and sophisticated than traditional formulations which stress the writer's intent.

Two other former Chicago professors have created an approach to interpretation that has been described as "new textualism."<sup>28</sup> Frank Easterbrook, also a judge on the Seventh Circuit, argues that legislatures "do

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21. Frickey, *supra* note 2, at 250-51; Schanck, *supra* note 14, at 843. The assumption of reasonableness was made in one of the most important works on statutory interpretation in the 1950's. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1415 (tentative ed. 1958).

22. The "purpose" approach of Hart and Sacks is summarized in Frickey, *supra* note 2, at 249.

23. Frickey, *supra* note 2, at 251.

24. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 262-69 (1990) [hereinafter POSNER, PROBLEMS].

25. Frickey, *supra* note 2, at 251.

26. POSNER, PROBLEMS, *supra* note 24, at 265.

27. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817-20 (1983).

28. Frickey, *supra* note 2, at 255.

not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."<sup>29</sup> This conclusion was based on that part of public choice theory which portrays the legislative process as chaotic and legislative choices as often the product of accident.<sup>30</sup> Some scholars have used the premise that it is impossible to discover legislative intent as an argument for judicial activism in pursuit of desirable goals;<sup>31</sup> Judge Easterbrook uses this premise as an argument for an increased emphasis on text. Unless the legislature uses general language which, in effect, invites the courts to play a creative role in developing rules to reach the legislative goal, he believes that a statute should be considered irrelevant to the case at hand unless the case is plainly resolved by express language in the statute.<sup>32</sup> Judge Easterbrook believes that this approach is more faithful to the proper role of judges in our system of government,<sup>33</sup> recognizes that only the text is voted on by both houses of Congress and signed by the President,<sup>34</sup> and has the virtue of preferring private over governmental ordering of social and economic relations.<sup>35</sup> Judge Easterbrook's conclusion that it is misleading to speak of legislative intent caused him to advocate a limit on the use of legislative history, although he does believe there are some appropriate uses of legislative history.<sup>36</sup>

In a series of speeches<sup>37</sup> and judicial opinions,<sup>38</sup> United States Supreme Court Justice Antonin Scalia launched an aggressive attack on the use of legislative history and argued for an increased emphasis on statutory text. Other commentators have stressed the vagueness and malleability of legislative history. Judge Harold Leventhal, for example, once said that the search for legislative history was like "looking over a crowd and picking out your

29. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) [hereinafter Easterbrook, *Domains*].

30. *Id.* at 547-48. See also Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 423-28 (1988).

31. See Eskridge, *Dynamic*, *supra* note 19, at 1538-44.

32. Easterbrook, *Domains*, *supra* note 29, at 544-46.

33. Easterbrook, *Domains*, *supra* note 29, at 552.

34. See Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 445 (1990) [hereinafter Easterbrook, *History*].

35. Easterbrook, *Domains*, *supra* note 29, at 549-50.

36. Easterbrook, *History*, *supra* note 34, at 444. For a discussion by Judge Easterbrook of appropriate uses of legislative history see *id.* at 442-44, and his opinion for the Court in *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

37. Frickey, *supra* note 2, at 254.

38. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

friends."<sup>39</sup> Justice Scalia has gone beyond admonitions to be cautious in the use of legislative history to challenge its reliability and legitimacy. Believing that legislators, lobbyists, and congressional staffers manipulate legislative history in order to influence judicial interpretation of statutes, he maintains that it is not reliable evidence of legislative intent.<sup>40</sup> He appears to question the desirability of even trying to determine legislative intent.<sup>41</sup> He believes excessive reliance on legislative history runs counter to the constitutional requirements for enacting a statute, since only the statutory text—not reports and speeches—is voted on by both houses of Congress and signed by the President.<sup>42</sup> He maintains that the subjectivity of the search for intent in legislative history gives judges more discretion than they should have under our system of government.<sup>43</sup> Justice Scalia's radical skepticism about the use of legislative history and the search for intent has led him to emphasize reliance on the text and canons of construction:

I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.<sup>44</sup>

Although Justice Scalia has not persuaded a majority of the Supreme Court to refrain from using legislative history,<sup>45</sup> his continuing critique of its use appears to be having a significant impact. In a 1983 article, Judge Patricia Wald made the following comment: "Not once last Term was the Supreme Court sufficiently confident of the clarity of statutory language *not* to double check its meaning with the legislative history."<sup>46</sup> Writing in 1992 when he was a Court of Appeals Judge, Justice Stephen Breyer pointed out that in

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39. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Levanthal).

40. *See, e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring).

41. *See West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 100 (1991); *Green*, 490 U.S. at 528 (Scalia, J., concurring).

42. *See Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring).

43. *See the discussion in William N. Eskridge, Jr., Legislative History Values*, 66 CHI.-KENT L. REV. 365, 372-73 (1990) [hereinafter Eskridge, *Values*].

44. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

45. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) (White, J. joined by seven Justices).

46. Wald, *supra* note 39, at 197.



1989, the Court decided ten out of sixty-five statutory cases without referring to legislative history and that in 1990, the Court decided nineteen out of fifty-five such cases without using legislative history.<sup>47</sup>

Legal scholars have written about the implications for statutory interpretation of deconstruction, the "conventionalism" of literary theorist Stanley Fish, and postmodern thought in general.<sup>48</sup> They have proposed comprehensive new approaches to statutory interpretation.<sup>49</sup> They have challenged Judge Easterbrook and Justice Scalia,<sup>50</sup> and have faced a counterattack from Judge Easterbrook.<sup>51</sup> They have comprehensively re-examined old issues such as the use of canons of construction.<sup>52</sup> They have produced new casebooks which capture the essence of the new developments.<sup>53</sup> They have provided insightful comparisons of statutory interpretation in various countries of the world.<sup>54</sup> Reflecting on the torrent of scholarship, one scholar has said that, "the past decade has probably been the most fruitful in history for legal academics in the field of legislation."<sup>55</sup>

47. Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1992).

48. See, e.g., Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992) [hereinafter Schanck, *Postmodern*]; Schanck, *Game*, *supra* note 14.

49. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992) [hereinafter Farber, *Practical Reason*]; William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988) [hereinafter Popkin, *Collaborative Model*]; Posner, *supra* note 27, at 817.

50. See, e.g., Eskridge, *Values*, *supra* note 43; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *New Textualism*].

51. Easterbrook, *History*, *supra* note 34.

52. Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV., 529, 529-795 (1992).

53. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988); OTTO J. HETZEL ET AL., *LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS* (2nd ed. 1993); POPKIN, *supra* note 1.

54. *INTERPRETING STATUTES: A COMPARATIVE STUDY* (D. Neil MacCormick & Robert S. Summers eds., 1991) [hereinafter *INTERPRETING STATUTES*].

55. Frickey, *supra* note 2, at 241. Professor Martineau appears to believe that Professor Frickey exaggerated the significance of this body of scholarship. Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 40-42 (1993).

## II. THE READER

### A. Introduction

Should the interpretation of labor agreements be viewed primarily as a creative effort in which arbitrators use their freedom to achieve good results? Can one understand contract interpretation better if she focuses primarily on the role of the reader? Would such an approach make it more likely that arbitrators will discharge their responsibilities in a way that meets the needs of the parties and is consistent with national labor policy?

If you are convinced that language is inherently indeterminate or that a text lacks meaning until it is interpreted and that interpretation is best understood as a dialogue between the interpreter and text,<sup>56</sup> it is natural to stress the role of the reader. The first premise of a reader perspective is that this is the most accurate description of the process of interpretation. It is possible to argue that if one wants to understand the latest thinking on the interpretation of text, it is necessary to approach the subject from a reader perspective. It would be inaccurate, however, to assume that any writer who emphasizes the creative role of judges in interpreting statutes shares the extreme text skepticism of the deconstructionists. Some of the most influential proponents of an active, creative role for judges in interpreting statutes accept the fact that judges are and should be constrained in a variety of ways by the text and other evidence of statutory meaning.<sup>57</sup> In the field of statutory interpretation, an emphasis on the reader can result in the extreme text skepticism of the deconstructionists or a desire for judges to use the discretion that arises from uncertainty in statutory meaning to promote good public policy and adapt statutes to societal changes.

### B. Misgivings About a Reader Perspective

Although there is much to be gained from looking at the interpretation of labor agreements from a reader perspective, I do not believe it should be the primary metaphor relied upon by arbitrators. The literature which emphasizes the reader's creative role can help arbitrators acquire a more realistic understanding of what is involved in interpreting a text. Its emphasis on the reader's freedom and discretion can serve as a helpful reminder of the wisdom of Dean Shulman's assertion while discussing the labor arbitrator's

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56. See Eskridge & Frickey, *supra* note 49, at 345-46 (discussing interpretation as a dialogue between interpreter and text).

57. See, e.g., POPKIN, *supra* note 1, at 314-15; Eskridge & Frickey, *supra* note 49, at 380-83; Cass R. Sunstein, *Interpreting Statutes In the Regulatory State*, 103 HARV. L. REV. 405, 423 (1989).

role that, "In the last analysis, what is sought is a wise judgment."<sup>58</sup> There are, however, several problems associated with a reader perspective, whether the emphasis is on extreme text skepticism or on using indeterminacy as a rationale to embark upon a search for good results.

An arbitrator who openly professed a deconstructionist point of view would drastically reduce her chances of being chosen by management and labor to arbitrate their disputes. Experienced representatives of management and labor are fully aware of the uncertainty which permeates the negotiation and arbitration processes, but neither the parties to the contract nor the courts would accept the notion that the contract is so indeterminate it places no significant constraints on the arbitrator.<sup>59</sup> I am convinced that an open espousal of deconstruction would not play well in the real world of labor arbitration. This, however, is not an argument against the merits of a deconstructionist position as much as it is a recognition of practical problems associated with its espousal. If an arbitrator believes that all texts are indeterminate—and I assume there are arbitrators who do—such an arbitrator is faced with the question whether she should hide her belief and whether such a course of conduct would be ethical.

The lesson I would draw from my more than twenty years of interpreting collective bargaining contracts is that deconstructionists exaggerate the degree of indeterminacy facing the interpreters of text. I frequently have experienced what I thought was "plain meaning," although I would now explain that experience differently. Today, rather than saying that the text is clear, I would say that the application of the text to a particular situation is clear. Further, I would assume that my conclusion was based on both text and contextual considerations. I believe that text and other evidence of contractual meaning can and should operate as significant constraints upon arbitrators. I also believe that often it is possible to predict the outcome of a contested interpretation of a labor agreement because of the shared assumptions that the arbitrator and the parties bring to their reading of the text of the agreement.

I also have misgivings about a reader perspective which assumes that the text is a significant constraint on arbitrator discretion but stresses the opportunity that textual uncertainty gives arbitrators to make contracts the best that they can be. There are articles by distinguished arbitrators which stress the arbitrator's creative role. Dean Shulman persuasively explained why collective bargaining contracts cannot cover everything clearly.<sup>60</sup> David Feller pointed out how, "The very nature of the agreement and the complex

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58. Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955).

59. See ELKOURI & ELKOURI, *supra* note 3, at 27-32 (discussing some of the relevant case law).

60. Shulman, *supra* note 58, at 1004.

organization which it governs often require substantial implication."<sup>61</sup> Clyde Summers explained how the parties to a contract may be bound in ways they "did not intend, foresee or understand."<sup>62</sup> Archibald Cox helped clarify the arbitrator's role by showing that the labor agreement can be viewed as an "instrument of government"<sup>63</sup> and that contract interpretation "is not limited to documentary construction of language."<sup>64</sup> Reading the literature on statutory interpretation reinforces the teachings of these commentators that the interpretation of a labor agreement cannot and should not be a mechanical process. On the other hand, re-reading these classics from the arbitration literature in light of the statutory interpretation literature, has caused me to question some aspects of Cox and Summers' descriptions of the arbitrator's role and to change my mind on a particular issue discussed by Professor Cox.

Professor Cox suggested that one appropriate role for an arbitrator is to

be an activist and impose his view upon the agreement when its words leave scope, bringing doubtful territory into the joint realm because he thinks that he knows that this is fair and good industrial relations. A wise and respected man may do much good through this conception of the arbitrator's function.<sup>65</sup>

Professor Summers asserted that the contract isn't rigidly limited by the parties' intent and that this fact

invites inquiry beyond the often futile or artificial search for nonexistent intent and encourages explicit consideration of such factors as the purposes of the parties and the institutional needs of collective bargaining, justice and fairness between the parties, the interests of third parties, and the public interest. It also prevents preoccupation with the particular wording of the document and focuses more attention on the legal effect to be given the agreement. In weighing all of these considerations, the choice is made in terms of the results to be reached; the agreement is then completed or shaped to accomplish that result.<sup>66</sup>

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61. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 748 (1973).

62. Summers, *supra* note 10, at 551.

63. Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1503 (1959).

64. *Id.* at 1499.

65. *Id.* at 1506. Professor Cox followed this statement with a quotation from Learned Hand which briefly stated the case for restraint. *Id.* at 1506-07.

66. Summers, *supra* note 10, at 551-52.

Professor Cox implied from the nature of the labor agreement an undertaking not to discharge an employee without just cause even when the agreement is silent on this issue.<sup>67</sup> Professor Feller reached the same conclusion but based the implication upon the existence of seniority provisions, "which appear to grant security of employment and the right to preference in both the filling of vacancies and in the choice of employees for layoffs."<sup>68</sup> Professors Cox and Summers emphasized the reader's role in interpretation. Professor Cox's conclusion that a just cause provision can be read into a silent contract was easier to reach because of his emphasis on the reader's perspective. I argue later that viewing a contract from the writer's perspective can help arbitrators discharge their responsibilities appropriately. The literature which discusses legislative intent has persuaded me that Professor Summers was wrong when he asserted that the search for a party's intent is often futile or artificial. I also argue from the writer's perspective it is a mistake to read a just cause provision into a silent contract. The point I want to make here, however, is that a sophisticated understanding of the nature of language and the inability of those charged with interpreting text to read the writer's mind do not, standing alone, justify efforts by arbitrators to do what they consider fair and good, or in the public interest. There are problems associated with any approach to interpretation, but the fact that there are no alternatives free of problems means that interpreters of text must of necessity work with an imperfect approach. There is an occasional tendency on the part of commentators to assume that one need not take an approach seriously once problems have been identified. The fact that the meaning of a text often is obscure, and that the intent of its drafters often cannot be ascertained, does not justify ignoring or downplaying text or intent. The most serious problem with that approach is it arrogates more power to the interpreter than appropriate. It can cause a judge to defer less than she should to the legislature and an arbitrator to defer less than she should to the parties to the contract. If one assumes that communication between writer and reader is possible, then text and intent should not be deemphasized just because working with them sometimes is difficult. There is a middle ground between result selection and literalism and this is where arbitrators should position themselves.

### C. *The Plain Meaning Rule*

An important lesson that can be learned from looking at interpretation from the reader's perspective is that the plain meaning rule is a wholly inadequate guide to dealing with the text of a collective bargaining contract. Not only does it fail to provide helpful guidance in deciding when and how

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67. Cox, *supra* note 63, at 1503.

68. Feller, *supra* note 61, at 749.

to use extra-textual sources in interpreting contracts, but there is reason to suspect that in practice it results in the text being given less respect than appropriate. The case against the plain meaning rule is grounded primarily in a broad consensus that the meaning of a text depends on context and background assumptions.<sup>69</sup> As Judge Easterbrook has said, "Words do not have natural meanings; language is a social enterprise. Textualists, like other users of language, want to know its context, including assumptions shared by the speakers and the intended audience."<sup>70</sup> When a legislature uses the word fruit in a statute and the statutory interpretation question is whether a tomato is a fruit or vegetable, the answer may turn on whether the intended audience was ordinary people or professional botanists.<sup>71</sup> When citizens of the United States read the constitutional provision that requires the President to be thirty-five years old, we assume that age is measured from birth rather than conception. According to Judge Posner, the assumption in India would be that birth is measured from conception.<sup>72</sup> If the phrase "foul play" were used, we would need to know the context in order to decide whether it referred to a criminal act or a baseball event.<sup>73</sup> People do not interpret written or oral messages by relying only on dictionaries and grammatical rules; readers and listeners rely on their total experience in interpreting messages and writers and speakers assume without conscious reflection that they will do so.<sup>74</sup> If a servant is told to bring into a room all of the ashtrays in another room, the speaker could reasonably assume that the servant's total experience would cause him to interpret the command as not including ashtrays that are attached to the walls.<sup>75</sup> When a reader believes that a text is "plain" or "clear," "[i]t is not the text which is plain, but its application to a given situation."<sup>76</sup> Easy cases seem easy because everyone involved is familiar with the context and shares background norms.<sup>77</sup>

The fact that all interpretation is contextual both refutes the literalism of the plain meaning rule and provides an argument against extreme text

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69. See, e.g., INTERPRETING STATUTES, *supra* note 54, at 517; POPKIN, *supra* note 1, at 307-15; POSNER, PROBLEMS, *supra* note 24, at 262-69; Eskridge & Frickey, *supra* note 49, at 341-45; Popkin, *Collaborative Model*, *supra* note 49, at 591-94; Sunstein, *supra* note 57, at 423.

70. Easterbrook, *History*, *supra* note 34, at 443.

71. This issue arose in *Nix v. Hedden*, 149 U.S. 304 (1893), discussed in POPKIN, *supra* note 1, at 338-39.

72. POSNER, PROBLEMS, *supra* note 24, at 266.

73. POPKIN, *supra* note 1, at 312.

74. POSNER, PROBLEMS, *supra* note 24, at 266.

75. POSNER, PROBLEMS, *supra* note 24, at 268.

76. POPKIN, *supra* note 1, at 312.

77. See Sunstein, *supra* note 57, at 423.

skepticism. Professor Sunstein asserts that "claims about the inevitable indeterminacy of interpretation usually suffer from a failure to take account of the contextual character of linguistic commands. . . . Judicial interpretation of statutes is . . . quite predictable, largely because background norms are uncontested among the judges."<sup>78</sup> An influential explanation of how agreement in the interpretation of texts is possible is the idea of the "interpretative community" developed by Professor Stanley Fish.<sup>79</sup> Similar background, training, and experience causes members of a group to hold certain assumptions in common. Consensus on the meaning of texts is possible because interpretation is based on these shared assumptions.<sup>80</sup> The American legal community can be viewed as an interpretive community, as can the various professionals involved in labor arbitration.

If the meaning of a text depends on context and background assumptions, a crucial step in interpretation is deciding what evidence of context and background assumptions will be considered.<sup>81</sup> The text which surrounds the words or phrases at issue is often helpful in interpretation. Professor Popkin refers to this as internal context.<sup>82</sup> Canons of construction such as *ejusdem generis* and *expressio unius est exclusio alterius* deal with issues of internal context. Examples of external context that might shed light on the meaning of a text are the discussions of the writers (legislative history in the case of statutes and bargaining history in the case of collective bargaining contracts) and the contemporary circumstances out of which the text emerged.<sup>83</sup> The interpreters of statutes and contracts have regularly consulted a broad range of evidence of internal and external context in their search for meaning. Justice Scalia, the most famous textualist of our time, looks to most of the relevant contextual evidence. According to Daniel Farber,

To deride this approach as mindless literalism would clearly be a mistake. On the contrary, Justice Scalia's approach extends beyond the dictionary meaning of the phrase in dispute to include a fairly rich array of other factors. Indeed, apart from his steadfast refusal ever to consider legislative

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78. Sunstein, *supra* note 57, at 441-42. Judge Posner makes a strong case against extreme text skepticism in POSNER, PROBLEMS, *supra* note 24, at 271, 293-95.

79. See Schanck, *Game*, *supra* note 14, at 833-37 (summarizing Professor Fish's ideas and citations to his writings).

80. Schanck, *Game*, *supra*, note 14, at 835. Professor Schanck describes the process as follows: "Readers do impose their own meanings, but their own meanings are determined by interpretive conventions—the tacit strategies, constructs, or practices of the communities to which they belong." *Id.*

81. See POPKIN, *supra* note 1, at 307, 309.

82. POPKIN, *supra* note 1, at 340.

83. See POPKIN, *supra* note 1, at 307.

history . . . his approach seems to contain nearly the full range of considerations that might be thought relevant.<sup>84</sup>

When the plain meaning rule is evaluated in light of the consensus on the importance of context and background assumptions, several shortcomings emerge.<sup>85</sup> A typical summary of the plain meaning rule used in labor arbitration states that "arbitrators are required to give effect to the literal meaning of the contract's language without consulting other indicia of intent or meaning when the language is 'plain' or 'clear and unambiguous.'"<sup>86</sup> The first thing wrong with the plain meaning rule is use of the words plain, clear, and unambiguous. Depending on one's assumptions about language and interpretation, either no text is plain or arbitrators encounter uncertainty in interpreting text often enough that the plain meaning rule is an inadequate guide to the relative importance of text and other evidence of contractual meaning. If an arbitrator following the plain meaning rule decides that the language at issue is ambiguous, there could be a tendency to forget about the text and concentrate solely on such evidence of meaning as bargaining history and past practice. Labor relations professionals need a summary of the use of text that stresses its primacy but does not condition this primacy on a condition—it must be clear—that is extremely difficult to satisfy.

Those who assume that textual clarity is possible must concede that there are degrees of clarity. How clear must the text be for the plain meaning rule to apply?<sup>87</sup> Courts have had difficulty dealing with this question.<sup>88</sup> Reliance on the rule can mask the considerations which lead the interpreter to characterize the text as clear. After all, one's common sense indicates that something that is clear does not need further explanation.

Although it is difficult to marshal empirical evidence on the issue, I believe that the plain meaning rule is sometimes relied on simply to save time and effort. I suspect it is used when arbitrators think the correct result is obvious and do not see a need to spell out all the contextual reasons why it is obvious. I also suspect it is used when arbitrators are skeptical of the reliability of evidence of past practice or bargaining history and do not want to go into the great detail necessary to explain why they believe it is

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84. Farber, *Practical Reason*, *supra* note 49, at 546.

85. For persuasive arguments against the use of the rule in labor arbitration see Snow, *supra* note 3.

86. GREINIG, *supra* note 3, at 14-6.

87. Professor Shauer discusses this issue in Frederick Shauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 737-38 (1992).

88. See Snow, *supra* note 3, at 685-86.



unreliable. In a situation such as this, it is tempting just to assert that the text is clear and that ends the matter.

Since the meaning of a text depends on context and background assumptions, it follows that interpretation should be based upon available, reliable evidence of internal and external context. As Judge Easterbrook once said, "[t]o decode words one must frequently reconstruct the legal and political culture of the drafters."<sup>89</sup> The plain meaning rule mandates a contextual interpretation unless the first reading of the text in issue raises questions. A refusal to consider contextual evidence will undermine the quality of the interpreter's decision making process. By tempting the interpreter to rely upon the text at issue in isolation, perhaps with assistance from a dictionary, the plain meaning rule diverts the interpreter from thinking about how people actually communicate.<sup>90</sup> It also tempts the interpreter to substitute her own background assumptions for those of the parties.<sup>91</sup> Moreover, what seemed clear after the first reading of a text, may not seem clear when all available, reliable evidence of context is considered. In asserting that legislative history may not be used to reach a result contrary to the text, but may be used to help discover the meaning of text, Judge Easterbrook stated that legislative history, "may show . . . that a text 'plain' at first reading has a strikingly different meaning."<sup>92</sup> This is the reason why some courts have held that non-textual evidence of meaning may be considered to determine whether ambiguity exists.<sup>93</sup>

It seems likely that the plain meaning rule does not in practice cause as many problems as one might expect. A high percentage of arbitrators probably are familiar with the criticisms so persuasively advanced by commentators such as Raymond Goetz,<sup>94</sup> Arthur Murphy,<sup>95</sup> and Carlton

89. *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989).

90. See POPKIN, *supra* note 1, at 340 (discussing literalism).

Professor Schauer argues that this is not inevitable. He asserts that "the reliance on plain meaning need not commit the interpreter to reading single words or even single sentences in isolation. The issue is one of the size of the domain of information available to the interpreter. Although an approach focusing on single sentences would be possible, it is not compelled by the notion of plain meaning." Schauer, *supra* note 87, at 740.

91. See Snow, *supra* note 3, at 704-05 and text accompanying notes 56-59, 71-74 (discussing the anomaly of arbitrators' usage of the plain meaning rule).

92. *Sinclair*, 870 F.2d at 1344. Judge Easterbrook's opinion for the Court in this case is an excellent example of how different his textualism is from the literalism of some judges and arbitrators who purport to follow a plain meaning approach.

93. See Snow, *supra* note 3, at 683, 689-92 (discussing judicial criticisms of the plain meaning rule).

94. RAYMOND GOETZ, COMMENT ON MUELLER, THE LAW OF CONTRACTS—A CHANGING LEGAL ENVIRONMENT, PROCEEDINGS OF THE 31ST ANNUAL MEETING,

Snow.<sup>96</sup> Aware of the problems with the rule, they probably ignore it, take the fairly easy route of declaring the text ambiguous or susceptible of more than one plausible meaning, or admit extrinsic contextual evidence to determine whether ambiguity exists.<sup>97</sup> I doubt that many arbitrators exclude external contextual evidence such as past practice and bargaining history. Most arbitrators follow the sensible approach of taking most evidence offered by the parties "for what it is worth."<sup>98</sup> I suspect that the typical reaction of an arbitrator to an objection to external contextual evidence on the basis that the contract is clear would be to assert that she needs more time to reflect on the text of the contract before deciding whether it is clear or ambiguous. At the very least, an arbitrator should read all related parts of the contract before concluding that a particular word or phrase is clear. It would slow down the hearing too much to do that before ruling on the objection. Moreover, as indicated earlier, there is authority supporting the admission of non-textual evidence to help in deciding whether the text is ambiguous.<sup>99</sup>

If, as seems likely, most arbitrators are not led astray by the plain meaning rule, can we simply conclude that the plain meaning rule is a harmless relic from the past? I suspect some courts and arbitrators who continue to use the plain meaning rule<sup>100</sup> have made mistakes in interpreting contracts by failing to broaden their inquiry because of a conclusion that the word or phrase in question was clear. I am especially concerned about the reaction of inexperienced arbitrators to evidentiary objections and interpretive arguments based on the plain meaning rule. Another problem I have with an approach of benign neglect is that we need summaries of how to use text along with other evidence of contractual meaning that draw on contemporary understanding of the nature of language and interpretation. I believe the inadequacy of the plain meaning rule sometimes causes arbitrators to give the text of a contract less weight than it deserves. I have read briefs in arbitration cases which failed to present internal contextual arguments that were available. Some advocates focus solely on the dictionary meaning of the words or phrases at issue and then move on to evidence of bargaining history and past

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NATIONAL ACADEMY OF ARBITRATORS 218, 222 (BNA 1979).

95. Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation In the Modern Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

96. Snow, *supra* note 3.

97. See Snow, *supra* note 3, at 683, 689-92.

98. See MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 7 (BNA 1980).

99. See *supra* text accompanying notes 92-93.

100. See Snow, *supra* note 3, at 683-84, 692, 697-99 (discussing the anatomy of the plain meaning rule and the plain meaning rule in arbitration decisions).

practice. There are persuasive arguments against wholesale adoption of the textualist approach of Justice Scalia and Judge Easterbrook, but I believe most arbitrators and advocates could improve their ability to work with text by reading some of the opinions dealing with internal contextual arguments.<sup>101</sup> The plain meaning rule tempts arbitrators to jump over these internal contextual arguments to evidence of past practice and bargaining history, once they conclude that the specific contractual language in question is ambiguous.

### III. THE TEXT

#### A. Introduction

In interpreting collective bargaining agreements, should arbitrators deemphasize external contextual evidence of meaning and focus primarily on the text? Would such an approach help arbitrators meet the needs of the parties better? Is it more consistent with our national labor policy? What light does the literature on statutory interpretation shed on these questions?

It will be helpful at the beginning to note the distinction which Professor Popkin makes between textualism and literalism. He points out that textualists make a genuine effort to understand how language is used while literalists tend to look at texts in isolation, often relying only on the dictionary.<sup>102</sup> Textualists such as Judge Easterbrook and Justice Scalia are aware of the importance of context and background assumptions and employ a range of contextual aids to interpretation. For example, they say that statutory terms should be interpreted to harmonize with the structure of the rest of the statute,<sup>103</sup> and so as to be "most compatible with the surrounding body of

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101. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.).

102. POPKIN, *supra* note 1, at 340.

Professor Popkin uses different terms in Popkin, *Responsibility*, *supra* note 1. He distinguishes between Plain Meaning Textualism, which is concerned with how legislative writers communicate with their audience, and Surface Textualism, which is concerned with grammar and style. *Id.* at 872-76. Professor Popkin's Surface Textualism is similar to the literalism I am criticizing. He asserts that Justice Scalia is guilty of Surface Textualism. *Id.* at 889 n.36. I find it useful to compare how Justice Scalia and Judge Easterbrook work with statutory text with how arbitrators relying upon the "plain meaning rule" work with the text of collective bargaining contracts. Although I do not accept the Textualist approach, I apparently have more admiration than Professor Popkin does for the facility with which Justice Scalia and Judge Easterbrook work with statutory text.

103. *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989).

law into which the provision must be integrated."<sup>104</sup> Justice Scalia and Judge Easterbrook are willing to depart from the text when it produces an absurd result.<sup>105</sup> The case for textualism is strengthened when interpreters go beyond literalism.

I indicated earlier that textualists emphasize the importance of text partly because they are skeptical of some of the other guides to statutory meaning. Judge Easterbrook, for example, does not believe that the subjective intent of legislators can be discovered and should not be considered "the law" if it could be discovered.<sup>106</sup> The most important evidence of legislative intent is legislative history. Although Judge Easterbrook believes legislative history can legitimately be used to show a statute's "context, including assumptions shared by the speakers and the intended audience,"<sup>107</sup> he does not believe it should be consulted to discover "where the sponsors wanted to go,"<sup>108</sup> to "dictate the meaning of rules,"<sup>109</sup> to imaginatively reconstruct a statute's meaning,<sup>110</sup> or to change a statute's "level of generality."<sup>111</sup> Textualism prefers the meaning derived from a contextual reading of text to the meaning derived from a search for intent. And the textualist is reluctant to use the uncertainty created by a divergence between text and alleged intent to choose the alternative that produces the best result.<sup>112</sup>

### B. For and Against Textualism

Several arguments can be made for a textualist approach. It is possible to maintain that it is more compatible with democratic values and our constitutional procedures for adopting statutes. Only the text was voted on by both houses of Congress and signed by the President.<sup>113</sup> The general public

104. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). For a discussion of Justice Scalia's use of structural arguments see Eskridge, *New Textualism*, *supra* note 50, at 660-63.

105. See, e.g., *Green*, 490 U.S. at 527; *Sinclair*, 870 F.2d at 1344.

106. Easterbrook, *History*, *supra* note 34, at 441.

107. Easterbrook, *History*, *supra*, note 34, at 444.

108. Easterbrook, *History*, *supra*, note 34, at 444.

109. Easterbrook, *History*, *supra*, note 34, at 445.

110. Easterbrook, *History*, *supra*, note 34, at 449.

111. Easterbrook, *History*, *supra*, note 34, at 449.

112. See Schauer, *supra* note 87, at 740. Professor Schauer uses the phrase "plain meaning approach" to describe essentially the same approach I have called textualist. I would prefer to discard the phrase "plain meaning" because of problems with the word "plain" and the fact that many interpreters who have relied on "plain meaning" have taken a literalist approach. The phrase has too much unfortunate baggage.

113. See Sunstein, *supra* note 57, at 416.

has easier access to statutes than to legislative history and is entitled to rely upon the text of statutes.<sup>114</sup> Legislative history, on the other hand, is subject to manipulation by both those involved in the legislative process and those who interpret statutes. Reliance on legislative history also gives an advantage to litigants with more resources because it is difficult and expensive to find and use.<sup>115</sup> Inasmuch as the search for intent and reliance on legislative history increases opportunities for courts to read their policy views into statutes, a textualist approach could be said to be more faithful to the separation of powers provided for in state and federal constitutions and more apt to confine judges to their proper role.<sup>116</sup> Textualism could be said to promote legislative supremacy more effectively.<sup>117</sup>

Although a good case can be made that judges should devote more time to analyzing statutory texts,<sup>118</sup> there are several persuasive reasons to reject the textualism of Judge Easterbrook and Justice Scalia. Statutory texts alone do not provide answers to many of the issues that courts must resolve, even when interpreted with the skill of Scalia or Easterbrook. A primary reliance on text will sometimes produce bad results that are not really required by respect for legislative supremacy, legislative history is not as unreliable as Justice Scalia asserts, and the textualism advocated by Justice Scalia and Judge Easterbrook is, in the final analysis, unfriendly to the legislative branch of government.

The nature of communication and the nature of the legislative process combine to produce statutes that, standing alone, fail to answer many of the issues that reach the courts. It was pointed out earlier that there is a broad consensus that the meaning of a statute depends on context and background assumptions.<sup>119</sup> Internal contextual evidence often will not be enough to give determinate meaning to a statute. Statutory indeterminacy has many causes. Statutory terms often are so general they amount to an invitation to the courts to look for guidance outside the text.<sup>120</sup> Courts sometimes have

114. See Sunstein, *supra* note 57, at 416; Popkin, *Collaborative Model*, *supra* note 49, at 595.

115. See Popkin, *Collaborative Model*, *supra* note 49, at 596.

116. See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62-63 (1988) [hereinafter Easterbrook, *Intent*]; Sunstein, *supra* note 57, at 416, 424.

117. See *American Mining Congress v. EPA*, 824 F.2d 1177, 1190 n.19 (D.C. Cir. 1987) (Starr, J.).

118. See Eskridge, *New Textualism*, *supra* note 50, at 625.

119. See *supra* text accompanying notes 69-80.

120. See Sunstein, *supra* note 57, at 421. Judge Easterbrook accepts a creative role for courts in such a situation. He views it as a delegation of power to courts to "create and revise a form of common law." Easterbrook, *Domains*, *supra* note 29, at 544.

to look beyond the text to ascertain whether words should be given an ordinary or a technical meaning.<sup>121</sup> Statutory provisions often have more than one plausible meaning.<sup>122</sup> Important issues are not dealt with in statutes because the legislative body failed to anticipate certain questions, could not agree on how to deal with a controversial issue and deliberately left the statute vague, or did not have enough time to deal with the issue.<sup>123</sup>

There are times when statutory text is determinant but points to a result a court believes legislators would not desire if they had anticipated the situation. Professor Sunstein suggests, for example, that a court should not construe a statute authorizing an employer to discharge an employee "for any reason" as permitting the employer to discharge an employee who refused to commit a crime on the employer's behalf.<sup>124</sup>

Determinant texts are sometimes questioned because they are over-inclusive. For example, Professor Sunstein asserts that a statute prohibiting vehicles in public parks should not be interpreted to exclude a monument consisting of tanks used in World War II because the monument would not contribute to the problems the statute was enacted to prevent.<sup>125</sup> Perhaps the most famous example of over-inclusiveness is the case of *Rector of Holy Trinity Church v. United States*.<sup>126</sup> An English minister was hired by a church in New York City. The question presented was whether this violated a statute prohibiting the importation of aliens "to perform labor or service of any kind in the United States."<sup>127</sup> The textual case against the church was strengthened by the fact that a list of exceptions to this general language did not include ministers but did include actors, artists, lecturers, singers, and domestic servants.<sup>128</sup> In holding that the statute was not applicable, the court emphasized that the purpose of the statute was to prevent the importation of cheap, unskilled labor, thus, importing a minister was not within the spirit of the statute.<sup>129</sup> *Holy Trinity* continues to be relied on by those seeking to

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121. See Popkin, *Collaborative Model*, *supra* note 49, at 600.

122. See the example in Breyer, *supra* note 47, at 853, text accompanying n.24. See also POSNER, PROBLEMS, *supra* note 24, at 263.

123. See POSNER, PROBLEMS, *supra* note 24, at 279. Judge Easterbrook accepts a creative role for judges when the legislature uses general language. See *supra* notes 32, 120, and accompanying text.

124. Sunstein, *supra* note 57, at 420.

125. Sunstein, *supra* note 57, at 419.

126. 143 U.S. 457 (1892).

127. *Id.* at 458.

128. *Id.* at 458-59.

129. *Id.* at 465.

escape the confines of statutory text. Justice Kennedy recently suggested that reliance on the *Holy Trinity* argument is un-democratic.<sup>130</sup>

Determinant texts are sometimes questioned because they are under-inclusive. Suppose, for example, that the literal text does not cover private conduct which causes the kind of mischief the statute was passed to suppress.<sup>131</sup> *Baker v. Jacobs*,<sup>132</sup> provides an example of under-inclusiveness. In that case, a successful plaintiff invited the jurors to a nearby hotel where he bought them cigars. A statute provided for setting aside verdicts when parties gave jurors "any victuals or drink" either before or after the verdict. Although cigars are not victuals or drink, the court set the verdict aside because it concluded that plaintiff's conduct was "within the true intent and spirit of the statute."<sup>133</sup>

I will discuss the concept of intent in the section on the writers' perspective. However, at this point I would like to mention some of the reasons why some writers have not been persuaded by the textualists' attack on legislative history. Courts regularly use legislative intent or history to justify going beyond or counter to the statutory text to fill gaps, avoid unacceptable results, resolve ambiguity, or expand or contract the text. The good achieved by doing so usually outweighs the problems identified by textualists. It has been argued that a refusal to consider legislative history would unfairly disappoint expectations created by the courts' long tradition of using legislative history.<sup>134</sup> The textualists' attack upon the reliability of legislative history has been challenged. Justice Stephen Breyer, for example, has argued from his personal experience that "in fact, the history itself often is clear enough to clarify" an ambiguous statutory provision.<sup>135</sup> Justice Breyer also has asserted that legislative history makes it easier for citizens to use statutes because it clears up uncertainty and he has expressed doubt that reliance on the kinds of canons used by textualists would be a less costly way for citizens to go about understanding unclear statutes.<sup>136</sup> He believes that average citizens would "find legislative history far more accessible than a Blackstone 'canon' . . ." <sup>137</sup> He also suggests that less use of the committee system would strengthen special interests because the committee system is

130. *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 473-74 (1989) (Kennedy, J., concurring).

131. See Sunstein, *supra* note 57, at 420-21. In the taxation field, courts sometimes stretch statutory language in order to combat evasion. *Id.* at 421.

132. 23 A. 588 (Vt. 1891).

133. *Id.* at 589.

134. See Eskridge, *New Textualism*, *supra* note 50, at 683.

135. Breyer, *supra* note 47, at 862.

136. Breyer, *supra* note 47, at 868-69.

137. Breyer, *supra* note 47, at 870.

more accessible to the public and requires more public justification by special interests.<sup>138</sup> To Justice Breyer, the textualists' arguments against legislative history "call, not for abandonment of the practice, but at most for its careful use."<sup>139</sup> Professor Eskridge and Professors Farber and Frickey have suggested that rather than promoting democratic values, textualism is unfriendly to democratically achieved legislation.<sup>140</sup> A court committed to working with, rather than against, the legislative branch should try to understand and implement the legislature's goals rather than insist that the legislature change the way it works by deemphasizing debates and committee reports. As Judge Posner has said,

If a court is reasonably sure what the legislators were driving at . . . , a refusal to give effect to their purposes because they did not dot every i and cross every t is defensible only if one has some principled objection to legislation in general. So one is not surprised to find that Easterbrook also defends his suggested approach by reference to the political principle of limited government.<sup>141</sup>

Daniel Farber suggests that textualists rely too much on language and do not rely enough on judges' good judgment.<sup>142</sup>

### C. *Textualism and Labor Arbitration*

The literature on the textualists' approach to statutory interpretation has convinced me that those involved with labor arbitration would benefit from a renewed emphasis on text. However, they should not accept the textualist attack on the concept of intent and the use of external contextual evidence of textual meaning. Most of what can be said about statutory interpretation can also be said about the interpretation of labor agreements. Both courts and arbitrators should devote more time to analyzing the language of the text they are charged with interpreting.<sup>143</sup> The distinction between literalism and textualism is as useful in understanding the interpretation of labor contracts as it is in understanding the interpretation of statutes.<sup>144</sup> There are as many

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138. Breyer, *supra* note 47, at 873.

139. Breyer, *supra* note 47, at 847.

140. Eskridge, *New Textualism*, *supra* note 50, at 683; Farber & Frickey, *supra* note 30, at 468.

141. POSNER, PROBLEMS, *supra* note 24, at 291. For an interesting example of how Judges Easterbrook and Posner apply their different approaches in a specific case see *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc).

142. Farber, *Practical Reason*, *supra* note 49, at 551.

143. See *supra* text accompanying note 119.

144. See *supra* text accompanying notes 103-06.



problems with sole reliance upon text in the interpretation of labor contracts,<sup>145</sup> as there are in the interpretation of statutes.<sup>146</sup>

Is there an appropriate application in labor arbitration of Judge Easterbrook's argument that in the absence of general language inviting courts to play a creative role, statutes should be considered irrelevant unless an issue is plainly resolved by express language?<sup>147</sup> Many labor agreements provide that the employer cannot discipline or discharge employees in the absence of "just cause." The phrase "just cause" is so general that it invites the arbitrator to play a creative role in defining the kind of conduct that justifies discipline or discharge. Assume, however, that the issue before an arbitrator is not covered by general language such as just cause or by specific language. Does that mean that the collective bargaining agreement is irrelevant? Experienced arbitrators probably will recognize that this sounds like the reserved rights doctrine. James Phelps argued at the 1956 meeting of the National Academy of Arbitrators that management retains discretion over all matters not covered by express language in the labor agreement.<sup>148</sup> C. C. Killingsworth has countered that this assumption ignores the practical situation faced by an employer whose employees are unionized but who has not yet agreed to a collective bargaining contract.<sup>149</sup> He also has argued that the pristine version of the reserved rights doctrine was rejected by the United States Supreme Court<sup>150</sup> in *United Steelworkers v. Warrior & Gulf Navigation Co.*<sup>151</sup> Proponents of this view believe that management has implied obligations not specifically provided for in the agreement.<sup>152</sup> Rather than choose between the reserved rights and implied obligation theories, most

145. See *supra* text accompanying notes 4-11.

146. See *supra* text accompanying notes 120-34.

147. See *supra* note 33.

148. JAMES C. PHELPS, MANAGEMENT'S RESERVED RIGHTS: AN INDUSTRY VIEW, PROCEEDINGS OF THE NINTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 117 (BNA 1956).

149. C. C. KILLINGSWORTH, THE PRESIDENTIAL ADDRESS: MANAGEMENT RIGHTS REVISITED, PROCEEDINGS OF THE TWENTY-SECOND ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 4-5 (BNA 1969).

150. *Id.*

151. 363 U.S. 574 (1960). "The labor arbitrator's source of law is not confined to the express provisions of the contract, . . . The parties expect that [the labor arbitrator's] judgment . . . will reflect not only what the contract says but . . . such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished." *Id.* at 581-82.

152. GLADYS W. GRUENBERG, MANAGEMENT RIGHTS, LABOR AND EMPLOYMENT ARBITRATION 16-4, 16-5 (Tim Bornstein & Ann Gosline eds., 1993).

arbitrators appear to focus instead on the particular facts and contract language in each case.<sup>153</sup>

I doubt that arbitrators who have not been persuaded by James Phelps would change their mind after reading Judge Easterbrook's article. Judge Easterbrook and James Phelps have both proposed guides to interpretation that are grounded in substantive preferences. As Judge Posner said:

It is not an accident that most "no constructionists" are political liberals and most "strict constructionists" are political conservatives. The former think that modern legislation does not go far enough and want the courts to pick up the ball that the legislators have dropped; the latter think it goes too far and want the courts to rein the legislators in. Each school has developed interpretive techniques appropriate to its political ends.<sup>154</sup>

Arbitrators who do not share James Phelps's substantive preferences are not likely to be more persuaded by textualist arguments to adopt the reserved rights approach.

Is there an appropriate application in labor arbitration of Justice Scalia's and Judge Easterbrook's arguments against the use of legislative history in the interpretation of statutes? The question arises because of the obvious parallel between the use of legislative history in interpreting statutes and the use of past practice and negotiating history in interpreting collective bargaining agreements. Arbitrators regularly admit and consider negotiating history in interpreting contract language.<sup>155</sup> They consider the proposals and counter-proposals presented by the parties during negotiations, minutes of negotiating sessions, handouts prepared for the other party, notes kept by the parties for their own files, oral testimony of persons who attended negotiations, and other evidence considered useful in interpreting disputed provisions.<sup>156</sup> Arbitrators also regularly consider past practice in interpreting ambiguous and general contract terms<sup>157</sup> and rely on past practice to add terms to silent contracts when these terms have been established by a consistent, mutually accepted

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153. *Id.* at 16-4 to 16-16.

154. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 293 (1990) [hereinafter POSNER, *FEDERAL COURTS*]. For a similar argument in a specific context, see Stephen F. Ross, *Reaganist Realism Comes To Detroit*, 1989 U. ILL. L. REV. 399.

155. GREINIG, *supra* note 3, at 14.03(3)(a).

156. ELKOURI & ELKOURI, *supra* note 3, at 357-59.

157. GREINIG, *supra* note 3, at 14.03(5)(b), (c).

course of conduct over a substantial period of time.<sup>158</sup> Arbitrators disagree on whether clear contract terms may be changed by past practices.<sup>159</sup>

Is there anything in the textualists' arguments against the use of legislative history that should cause arbitrators to rethink their reliance on negotiating history and past practice in contract interpretation? In my view, the arguments against the textualists' position on legislative history are strong enough in themselves to reject a rethinking of reliance on negotiating history and past practice. In addition, the collective bargaining and legislative processes are so different that the problems highlighted by textualist judges are simply not as serious in the collective bargaining context. One of the primary textualist arguments is that legislative history is not reliable. Justice Scalia and Judge Easterbrook have made this point in judicial opinions with amusing and telling examples of mistakes, manipulation, and posturing in the legislative process.<sup>160</sup> Although mistakes, manipulation, and posturing certainly occur during the negotiation and administration of collective bargaining contracts, the collective bargaining process is simpler and involves fewer players than the legislative process. Where the legislative process involves the President and the federal bureaucracy, two houses of Congress, numerous lobbyists and interest groups, and aggressive media representatives, labor negotiations usually involve two sides working through a limited number of designated representatives. Public sector negotiations are more complex than those in the private sector, but still involve fewer groups than the legislative process. Although it is not easy to evaluate the evidence of mutual intent manifested in negotiations and past practices, it is easier than using legislative history to determine Congressional intent. Another argument used by Justice Scalia and Judge Easterbrook is that excessive reliance on legislative history runs counter to the constitutional requirements for enacting a statute because only statutory text is voted on by both houses of Congress and signed by the President.<sup>161</sup> While collective bargaining negotiations are governed by federal law and union constitutions, there are good reasons why a process argument is less persuasive when applied to labor contract interpretation. A good summary of

158. GRENIG, *supra* note 3, at 14.03(5)(a), (d).

159. One of the best discussions of this issue is in RICHARD MITTENTHAL, PAST PRACTICE AND THE ADMINISTRATION OF AGREEMENTS, PROCEEDINGS OF THE 14TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 30, 40-44 (1961). Mittenthal revisited this issue at the 1993 fall educational meeting of the Academy. THE CHRONICLE, Jan. 1994, at 10.

160. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J., writing for the court); *Hirschey v. FERC*, 777 F.2d 1, 7-8, especially n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

161. See *supra* note 43 and accompanying text.

such reasons was given by Judge Easterbrook when he explained why he accepted an effort to imaginatively reconstruct party intent while interpreting contracts:

Contracts, like laws, may have omissions and ambiguities. It is standard practice to fill in the blanks of a contract, or interpret its ambiguities, by supplying terms that we believe the parties would have reached themselves if costs of bargaining were low . . . . The institution of contract becomes more useful when courts relieve parties of the need to dicker over everything in advance. . . . Everyone gains . . . when the legal rules allow parties to conserve on bargaining costs . . . . [T]he constitutional rules are designed to increase, not minimize, the costs of enacting statutes. The complex of hurdles, in the context of the limited time each legislature has to act, is an essential part of the plan. So a method of interpretation appropriate to contracts is inappropriate to legislation . . . .<sup>162</sup>

One point made by the textualists does apply with some force to the issue of whether past practice can change clear contract language. The textualists assert that since only the text was voted on by both houses of Congress and signed by the President, undue reliance on legislative history is contrary to the constitutional requirement for enacting a statute.<sup>163</sup> The legitimacy of a statute, in other words, results from those with authority adopting it after following the required process, and only the text has satisfied the necessary prerequisites for legitimacy. A similar argument could be made against using past practice to modify clear contract language. The text of the collective bargaining contract is the product of extensive pre-contract discussions on each side, negotiations between management and labor, and normally, subsequent ratification by the union membership of the proposed contract. This process responds to and accommodates the complex web of interests affected by collective bargaining contracts. Mutual agreement on past practices, on the other hand, can occur without the same opportunity for the various competing interests to participate in the process. In the conflict between text and past practice, therefore, the text could be said to have more legitimacy because of the superiority of the process which produced it.

Those of us who have arbitrated labor disputes for any significant period of time are fully aware that evidence of precontract negotiations and past practices can be unreliable or misleading. Arbitrators have pointed this out in their opinions.<sup>164</sup> The textualist criticisms of legislative history serve as

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162. Easterbrook, *History*, *supra* note 34, at 445-46.

163. *See supra* notes 42, 113.

164. *See, e.g., In re Hospital Serv. Plan*, 47 Lab. Arb. 993, 993-94 (1966) (Wolff, Arb.) (discussing a particular issue in pre-contract negotiations); *Ford Motor Co.*, 19 Lab. Arb. 237, 242 (1952) (Shulman, Arb.) (discussing past practice).

a useful reminder of the need for care in using any kind of extra-textual source in interpreting contracts. But as Justice Stephen Breyer said in his article, they "call, not for abandonment of the practice, but at most for its careful use."<sup>165</sup> Reading articles and judicial opinions by textualist judges has, I believe, improved my ability to work with the text of labor agreements, but I still subscribe to the following statement by William P. Murphy, a former President of the National Academy of Arbitrators:

But the words of the contract do not stand alone; they do not exist in a vacuum. Behind them stand the industrial practices to which the words of the contract have reference, the bargaining history of the parties over a period of years, and the understanding and intention of the parties when they executed their current contract.<sup>166</sup>

#### IV. THE WRITERS

##### *A. Introduction*

Is the primary responsibility of labor arbitrators to discover and implement the mutual intent of the parties? Is the search for intent the best way to meet the needs of the parties and further our national labor policy? Does the literature on statutory interpretation shed useful light on these questions? If one assumes that the search for party intent is appropriate, does the literature on statutory interpretation provide useful insights on how to discover and implement mutual intent? I pointed out earlier that there is a consensus among arbitrators that they should be guided by the mutual intent of the parties to labor agreements.<sup>167</sup> I also pointed out that some of the contemporary literature on interpretation questions the possibility or desirability of trying to discover the intent of legislative bodies<sup>168</sup> and that Professor Summers has asserted that the search for the intent of the parties to labor agreements is "often futile or artificial."<sup>169</sup>

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165. *See supra* note 139.

166. *In re Southwest Ornamental Iron Co.*, 38 Lab. Arb. 1025, 1027 (1962) (Murphy, Arb.).

167. *See supra* text accompanying note 3.

168. *See, e.g., supra* text accompanying notes 14, 22-25, 29, 30, 36, 39-44.

169. *See supra* text accompanying note 66.

### B. *The Arguments For and Against Using Legislative Intent*

An examination of the debate over intent in the statutory interpretation literature will assist in deciding whether arbitrators should modify their views on intent. It helps in considering this literature to know that courts and scholars distinguish between specific and general intent when they examine "the mind and will of a legislature."<sup>170</sup> Specific intent refers to the writers' intended meaning of a particular provision.<sup>171</sup> How were the words being interpreted intended to be understood?<sup>172</sup> General intent, usually referred to as purpose, refers to the general purpose of all or part of a statute.<sup>173</sup> What did the statute's proponents hope its enactment would achieve?<sup>174</sup> Specific and general intent overlap and both have been criticized.<sup>175</sup> Both are relevant in looking at a text from the perspective of the writers, whether the text is a statute or a collective bargaining agreement.

A recurring argument against searching for legislative intent is that hundreds of individual legislators cannot have a single, collective intent.<sup>176</sup> Professor Radin argued that only a few persons draft bills and that those who vote for these bills have different views of what they mean and vote for them for different reasons.<sup>177</sup> This argument has persuaded some writers that the concept of intent is incoherent and a fiction<sup>178</sup> and that the search for the purpose of a statute is an act of "invention rather than discovery."<sup>179</sup> Another argument is that since legislative history—the principal non-textual evidence of intent—is unreliable,<sup>180</sup> any conclusions on intent will be

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170. This phrase was taken from the title of Reed Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 IND. L.J. 206 (1975).

171. INTERPRETING STATUTES, *supra* note 54, at 416. See also Dickerson, *supra* note 170, at 224-25.

172. GERALD C. MACCALLUM, JR., LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY 6 (1993).

173. INTERPRETING STATUTES, *supra* note 54, at 514. See also Dickerson, *supra* note 170, at 224-25.

174. See MACCALLUM, *supra* note 172, at 6-10.

175. See, e.g., Sunstein, *supra* note 57, at 426-34.

176. See MACCALLUM, *supra* note 172, at 13-18; Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930).

177. Radin, *supra* note 176, at 870-71.

178. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 25 (1988); Sunstein, *supra* note 57, at 433; *supra* text accompanying notes 30, 31.

179. Sunstein, *supra* note 57, at 428.

180. See *supra* text accompanying notes 39, 40.

unreliable. Finally, it is asserted that legislative bodies vote only on the text of a statute, not on their interpretation of the text's meaning.<sup>181</sup>

Defenders of legislative intent maintain that they are not arguing that a majority of legislators share the same subjective view of a statute.<sup>182</sup> They do not assume that there is some kind of "aggregate mind."<sup>183</sup> Instead, they say that intent refers to the meaning attributed to the statute's provisions by the institutional actors who drafted or shepherded it through the legislative process.<sup>184</sup> Tradition and practical necessity legitimize acceptance by legislators of statements about the meaning of bills by sponsors, committees, staffers, and other important actors in the process.<sup>185</sup> The reader charged with interpreting a statute should examine all of the textual and non-textual evidence to try to determine what the words of the statute meant to these important institutional actors. A useful way of looking at this evidence is to ask what message or command these institutional actors were trying to convey.<sup>186</sup> The fact that this task cannot be perfectly performed is not a persuasive argument against trying since perfect performance is not possible under any of the alternative approaches to interpretation.<sup>187</sup> Nicholas Zeppos has pointed out that there are numerous areas of the law in which we inquire into the intent of a collective body.<sup>188</sup>

Legislative supremacy over the judicial branch is a basic premise of our legal culture.<sup>189</sup> Professor Reed Dickerson has said, "the most important function of the concept of subjective legislative intent is to put the judge or other interpreter in a proper, deferential frame of mind vis-a-vis the legislature."<sup>190</sup> Daniel Farber has asserted that ignoring legislative intent

181. See *supra* text accompanying notes 29, 30.

182. E.g., Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 290 (1989) [hereinafter Farber, *Supremacy*].

183. See Gwen T. Handelman, *Zen and the Art of Statutory Construction: A Tax Lawyer's Account of Enlightenment*, 40 DEPAUL L. REV. 611, 625 (1991).

184. See *id.* at 615; Farber, *Supremacy*, *supra* note 182, at 290. Professor MacCallum referred to this view of attributing intent to the institutional actors as the Agency Model of legislative intent. MACCALLUM, *supra* note 172, at 29-32.

185. See Farber, *Supremacy*, *supra* note 182, at 290; Nicholas S. Zeppos, *Toward a Fact Finding Model*, 76 VA. L. REV. 1295, 1345-47 (1990).

186. See POSNER, PROBLEMS, *supra* note 24, at 265, 269-78 (discussing a statute as a command to the judiciary and as analogous to an order from a platoon commander to a lieutenant heading the lead platoon in an attack).

187. See Maltz, *supra* note 18, at 778.

188. Zeppos, *supra* note 185, at 1341. An example would be a corporation, which can act only through the individual acts of many employees, being convicted of a crime which includes intent as an element of the offense. *Id.*

189. Farber, *Supremacy*, *supra* note 182, at 292; Maltz, *supra* note 18, at 769.

190. Dickerson, *supra* note 170, at 223.

would hinder the ability of the democratic branches of government to function effectively.<sup>191</sup> Nicholas Zeppos has written that such an approach would produce results that the legislative branch would never have enacted.<sup>192</sup> To Daniel Farber, the search for intent helps the interpreter see the difference between creative interpretation and "rewriting the statute to suit one's desires."<sup>193</sup> Gwen Handelman believes that critics of legislative intent have overstated the difficulty of discovering intent in order to help make the case for the exercise of broader discretion by judges in interpreting statutes.<sup>194</sup>

### C. *Using Mutual Intent In Interpreting Collective Bargaining Agreements*

The critique of the search for intent helps provide a realistic understanding of what is involved in such a search. Even so, the articles mentioned above have convinced me that there are important reasons to continue the search. There is an even stronger case for considering intent while interpreting collective bargaining contracts. The search for intent in collective bargaining is simpler than the search for legislative intent.<sup>195</sup> Although the collective bargaining process is more complex than the negotiations which produce most contracts, it is simpler and involves fewer players than the legislative process. Judge Easterbrook has stated that it is appropriate to imaginatively reconstruct the intent of parties to a contract because this helps parties conserve on bargaining costs, but reconstructing intent is inappropriate in interpreting statutes because the constitutional rules on the enactment of statutes are "designed to increase, not minimize the 'costs' of enacting statutes."<sup>196</sup> The search for intent encourages arbitrators to look beyond the text for evidence of the meaning of the agreement and this helps arbitrators deal with issues that cannot be resolved satisfactorily by relying only on the text. For example, if both parties misunderstood the words they used in the contract because they were not aware of linguistic conventions widely shared in the industrial relations community, I believe the arbitrator should usually interpret the contract to mean what they intended rather than what they actually said.<sup>197</sup>

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191. Farber, *Supremacy*, *supra* note 182, at 291.

192. Zeppos, *supra* note 185, at 1314.

193. Farber, *Supremacy*, *supra* note 182, at 297.

194. Handelman, *supra* note 183, at 613. *See also* Maltz, *supra* note 18, at 773, 779-82.

195. *See supra* text accompanying notes 161-63; POSNER, PROBLEMS, *supra* note 24, at 277.

196. Easterbrook, *History*, *supra* note 34, at 446.

197. *See* MACCALLUM, *supra* note 172, at 10-12.



An important reason why arbitrators should regularly consider evidence of party intent is that this will help keep them focused on their proper role. The concept of legislative supremacy influences courts to give greater weight to legislative commands than to their own views of desirable policy. Arbitrators give more weight to the parties' mutual intent than to their own views of justice and fairness because the legitimacy of a collective bargaining agreement derives primarily from the parties' agreement rather than from the agreement's compatibility with overriding concepts of justice and fairness.<sup>198</sup> Although federal law subjects labor agreements to a variety of requirements, the underlying policy of federal labor law is that most of the terms and conditions of employment should be determined by labor and management—representatives of the people who have to live with the terms and conditions. David Feller described the result as a system of industrial self-government.<sup>199</sup> The arbitrator's role in this system of industrial self-government is to serve as the parties' "officially designated reader of the contract."<sup>200</sup> Reed Dickerson's suggestion that the most important function of legislative intent is to put the interpreter in a deferential frame of mind toward the legislature<sup>201</sup> is applicable to arbitrators as well. Indeed, I would argue that the case for deference by arbitrators is stronger than the case for deference by judges since arbitrators are assigned a more modest role in our legal system. Searching for mutual intent reminds arbitrators that they are servants of the parties. To an arbitrator faced with an ambiguous contract, thinking of her task as a search for mutual intent helps remind her of her proper role. Professor Summers' characterization of the search for intent as "futile or artificial" and his emphasis on the need to focus on just results instead of the text<sup>202</sup> sends the wrong message to arbitrators. It is, of course, true that an arbitrator cannot always discover the parties' mutual intent and that an arbitrator's task is not a mechanical one. On the other hand, I believe Professor Farber's point about the search for legislative intent<sup>203</sup> is

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198. See Shulman, *supra* note 58 at, 1016.

199. DAVID E. FELLER, THE COMING END OF ARBITRATION'S GOLDEN AGE, PROCEEDINGS OF THE TWENTY-NINTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 107 (BNA 1976).

200. Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977). For an analysis of how the arbitrator's role is different when questions of external law are involved see Stephen L. Hayford & Anthony V. Sinicropi, *The Labor Contract and External Law: Revisiting the Arbitrator's Scope of Authority*, 1993 J. DISP. RESOL. 249.

201. Dickerson, *supra* note 170, at 223.

202. See the language quoted *supra* text accompanying note 66.

203. *Supra* text accompanying note 193.

equally applicable to labor arbitrators: focusing on mutual intent can help arbitrators see the difference between creative interpretation and rewriting the collective bargaining contract to suit their own policy views. Searching for party intent can help liberate literal-minded arbitrators and restrain those who have a tendency toward activism.

The search for intent can be illustrated by examining an issue that has received considerable attention from arbitrators. Most collective bargaining agreements provide expressly that employers may discipline or discharge only for "just" or "proper" cause.<sup>204</sup> A few contracts are silent on this issue. Arbitrators differ on whether it is appropriate to imply a just cause provision when the contract is silent.<sup>205</sup> One argument for implying such a provision is that a just cause provision is "part and parcel of the fabric of the collective bargaining process and is an inherent element of any collective bargaining agreement to which the parties have set their hands."<sup>206</sup> Another argument is that other contract provisions such as those giving seniority protection could be nullified if there were no limits on the employer's right to discipline and discharge.<sup>207</sup> The first argument amounts to an assertion that all labor contracts impliedly contain important provisions that are included in most labor contracts. This results in contract provisions based on consensus in the labor-management community rather than agreement by parties to the contract. In rejecting the second argument, arbitrator Dennis Nolan pointed out that "an arbitrator could easily prohibit discharges used to nullify seniority, layoff, or other specific provisions without requiring an employer to demonstrate just cause for every discharge."<sup>208</sup> My view is that arbitrators who interpret a silent contract as requiring an employer to demonstrate just cause for every discharge are reading their own substantive preferences into the contract.

How can an arbitrator deal with this issue on some basis other than simply deciding what she thinks is right? I do not think the reserved rights doctrine<sup>209</sup> should be relied on because the assumption that management

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204. ARNOLD ZACK, JUST CAUSE AND PROGRESSIVE DISCIPLINE, LABOR AND EMPLOYMENT ARBITRATION 19-5 (Tim Bornstein & Ann Gosline eds., 1988); ELKOURI & ELKOURI *supra* note 3, at 652.

205. For cases implying a just cause provision see the cases collected in ZACK, *supra* note 204, at 19-5 n.2; ELKOURI & ELKOURI, *supra* note 3, at 652 n.6. For cases refusing to imply such a provision see the cases collected in ZACK, *supra* note 204, at 19-6 n.3; ELKOURI & ELKOURI, *supra* note 3, at 651 n.4.

206. *In re Binswanger Glass Co.*, 92 Lab. Arb. 1153, 1155 (1989) (Nicholas, Arb.).

207. *In re Atwater Mfg. Co.*, 13 Lab. Arb. 747, 749 (1949) (Donnelly, Arb.).

208. *In re Westvaco, Virginia Folding Box Div.*, 92 Lab. Arb. 1289, 1291 (1989) (Nolan, Arb.).

209. See *supra* text accompanying notes 150-55.

retains discretion over all matters not covered by express language simply substitutes another kind of substantive preference. I believe that an arbitrator should begin the analysis of this issue by searching for the parties' mutual intent. She should consider other contract provisions, bargaining history, and past practices. If these sources do not provide evidence of intent, the arbitrator should try to imaginatively reconstruct contract negotiations in somewhat the same way that Judge Posner has said a legislative process can be reconstructed.<sup>210</sup> While it is true that this process of reconstruction could easily become a process of invention rather than discovery,<sup>211</sup> the search for mutual intent will help arbitrators avoid the temptation to rewrite the contract to suit their own policy preferences.<sup>212</sup> In reconstructing contract negotiations, it would be reasonable to assume that the union sought a just cause provision. I cannot imagine a union not asking for such a provision since protection from arbitrary discipline or discharge is probably the most important selling point unions have when they organize employees. Management normally agrees to such a provision. In many cases, management probably uses the union's desire for a just cause provision to extract union concessions on other issues. The absence of a just cause provision indicates that management considered it important not to include such a provision<sup>213</sup> and that the union was unable to overcome this resistance. I personally believe that all labor contracts should include a requirement of just cause, but our national labor policy leaves the decision on this issue with the parties, not the arbitrator. One of the reasons we allow the parties to develop terms and conditions of employment is to allow them to adapt their agreement to their unique circumstances. If arbitrators imply provisions because they are important and are included in most contracts, it will be harder for parties to adapt their contracts to their own unique circumstances. It is not a satisfactory answer to say that if this is really important to management, they should bargain for a provision specifically stating that the employer may discipline or discharge without regard to just cause. Getting the union membership to approve such a provision would be much more difficult than getting them to approve a contract that is silent on the issue. The difference between a silent contract and such a provision is the difference between losing and being humiliated.

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210. Posner, *supra* note 27.

211. This phrase was taken from Sunstein, *supra* note 57, at 428. Professor Sunstein criticizes the purpose approach to interpretation with this phrase.

212. See Farber, *Supremacy*, *supra* note 193.

213. See *Truck Drivers Local 705 v. Schneider Tank Lines*, 958 F.2d 171, 175 (7th Cir. 1992) (exemplifying the kind of situation where an employer considered it important to be able to discharge employees without being limited by a just cause provision).

On the other hand, there is a strong case for implying from a just cause provision arbitral power to modify penalties imposed by management. Some agreements expressly grant power to modify penalties and some expressly prohibit such modification.<sup>214</sup> Many, if not most, collective bargaining agreements include a just cause provision but do not deal expressly with whether an arbitrator has the power to modify penalties.<sup>215</sup> In such a situation, most arbitrators imply from the just cause provision the power to modify penalties that are considered too severe under all the circumstances present in the case.<sup>216</sup> It is reasonable to imply such a power because while it is just to punish an employee for misconduct, it is not just to impose punishment that is out of all proportion to the seriousness of the conduct under all the circumstances. There are cases in which it would be just to suspend an employee without pay but it would not be just to discharge the employee. An employer normally would not be justified in discharging an employee for a single instance of tardiness, absence from work, or negligence. Repeated instances of such conduct accompanied by appropriate warnings would justify a discharge.<sup>217</sup> When the question is whether there was just cause for a sanction imposed by an employer, proportionality between conduct and sanction is a necessary inquiry. Such an inquiry is justified by use of the word just in the contract and can also be justified by a reconstruction of contract negotiations. If an arbitrator is called upon to reconstruct contract negotiations on this issue, the clear link between proportionality of a sanction and justice would justify an arbitrator in concluding that the parties intended to give the arbitrator the power to modify penalties imposed by management when they agreed to a just cause provision. Experienced negotiators know that proportionality between conduct and sanction is a value shared by management and labor. While they often disagree on application of the idea in a particular case, they seldom disagree on the importance of seeking a sanction that is proportional to the misconduct.

I am convinced that the search for intent by arbitrators helps them meet the needs of the parties and further our national labor policy. On the other hand, there are enough problems in searching for and using intent that I am not persuaded that this should be the primary metaphor relied on by labor

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214. ELKOURI & ELKOURI, *supra* note 3, at 667.

215. See Harry H. Platt, *The Arbitration Process in the Settlement of Labor Disputes*, 31 J. AM. JUD. SOC. 54, 58 (1947).

216. *Id.* See the discussion in ELKOURI & ELKOURI, *supra* note 3, 667, 668. There are differences of opinion on how much an arbitrator should defer to management's judgment on the appropriateness of penalties. Compare *In re Stockham Pipe Fittings Co.*, 1 Lab. Arb. 160, 162-63 (1945) (McCoy, Arb.), with *In re Riley Stoker Corp.*, 7 Lab. Arb. 764, 767 (1947) (Platt, Arb.).

217. See the discussion in ELKOURI & ELKOURI, *supra* note 3, at 670-71, 682-83.

arbitrators. The concept of intent is a useful but not a perfect tool. Mutual intent cannot always be discovered. There often is no mutual intent to discover. Intent and purpose are difficult concepts that can easily be misunderstood<sup>218</sup> or misused. It is hard to deny that the search for intent has often been an act of creation rather than discovery.<sup>219</sup>

## V. CONCLUSION

I began this Article by using a quotation from a book by Professor William Popkin to ask whether statutes should be viewed from the perspective of the reader, the text, or the writer.<sup>220</sup> I suggested that the same question can be asked about collective bargaining contracts and that useful insights can be obtained by looking at the interpretation of such contracts from these three perspectives.

My review of the statutory interpretation literature has led me to several specific conclusions and a general conclusion on the most appropriate overall perspective. The reader perspective shows the inevitability of looking beyond text in interpreting both statutes and collective bargaining contracts.<sup>221</sup> It provides powerful arguments for rejecting the plain meaning rule as a guide to the relative importance of text as compared with other evidence of the meaning of labor agreements.<sup>222</sup> As Professor Popkin said in discussing statutory interpretation: "The interpretive process is almost certainly . . . one of moving back and forth between words and other indicia of meaning without preconceived notions about whether the words are clear."<sup>223</sup> However, too much emphasis on the reader perspective could tempt an arbitrator to rewrite the contract to suit her own substantive preferences.<sup>224</sup>

The appeal of the textual perspective results in part from wide agreement that the ordinary meaning of the specific section of the text in question is normally the strongest argument that can be made for a particular interpretation.<sup>225</sup> Textualists have also demonstrated the persuasiveness of

218. See, e.g., INTERPRETING STATUTES, *supra* note 54, at 520, 522 (discussing subjective and objective approaches).

219. See Sunstein, *supra* note 57, at 428.

220. See *supra* text and quotation accompanying note 1.

221. See *supra* text accompanying notes 6-11, 70-102, 102-43.

222. See *supra* text accompanying notes 70-102.

223. Popkin, *Collaborative Model*, *supra* note 49, at 594.

224. See Farber, *Supremacy*, *supra* note 182, at 297; *supra* text accompanying notes 192-97.

225. See INTERPRETING STATUTES, *supra* note 54, at 531, 533; Eskridge & Frickey, *supra* note 49, at 351.

contextual-harmonization arguments based on other parts of the statute.<sup>226</sup> Contextual-harmonization techniques are equally applicable to the interpretation of labor agreements. Textualist arguments against using legislative history serve to remind arbitrators to use great care when relying on past practice or bargaining history.<sup>227</sup> They do not make a good case for entirely disregarding such aids to contract interpretation.<sup>228</sup> A serious problem with giving too much emphasis to text is that this can lead to results the parties would never have agreed to and can be a subtle way of disregarding the parties' wishes.<sup>229</sup>

Searching for party intent is legitimized by long tradition. It is possible to argue that all interpretation consists of looking for the writers' intent. Professor Campos, for example, has pointed to a body of scholarly writing that he says

refutes the fallacy of the autonomous text, a fallacy that remains of crucial rhetorical importance to practically all theories of legal interpretation. If strong intentionalism is correct, then a text can only mean what its author intends it to mean, and it follows that interpreting a text simply consists in looking for that intention. Textual meaning and authorial intent are not separable concepts, and searching for one is by necessity synonymous with seeking the other.<sup>230</sup>

Searching for intent can serve as a reminder to arbitrators of their proper role and help them strike an appropriate balance when they evaluate conflicting evidence of contractual meaning.<sup>231</sup> On the other hand, intent means different things to different interpreters,<sup>232</sup> and even when there is agreement on the meaning of intent, it is often difficult or impossible to discover.<sup>233</sup> Further, there is no denying that the search for intent can serve as a cover for a deliberate reading of the arbitrators' personal values into the contract.<sup>234</sup>

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226. See *supra* text accompanying notes 103, 104. A description of contextual-harmonization arguments can be found in INTERPRETING STATUTES, *supra* note 54, at 464-65.

227. See *supra* text accompanying notes 114-18, 155-60, 164-65.

228. See *supra* text accompanying notes 160-66.

229. See Farber, *Supremacy*, *supra* note 182, at 289-90.

230. Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1091 (1993). See also *id.* at 1082 n.72.

231. See *supra* text accompanying notes 198-208.

232. See INTERPRETING STATUTES, *supra* note 54, at 522-25.

233. See Sunstein, *supra* note 57, at 433.

234. See Sunstein, *supra* note 57, at 428, 435-37.

My general conclusion is that arbitrators should not place primary emphasis on any single perspective or approach. Arbitrators will come closer to meeting the parties' needs and furthering national labor policy if they view the task of interpretation from all three perspectives. Some cases are best dealt with by emphasizing text; some cases call for an emphasis on party intent; some cases leave an arbitrator room to exercise considerable creativity. The arbitrator should look at each case from all three perspectives before she begins writing her opinion. To me, the most persuasive writers on statutory interpretation are those who argue that it is not possible to attain a unified theory.<sup>235</sup> I believe a unified theory of interpreting labor agreements is equally unattainable. The best one can do is identify the legitimate arguments that may be utilized. In this view, reliance on text, intent, or desirable results are arguments to consider in reaching a decision and in formulating arguments to explain an interpretation of a collective bargaining contract. Philip Bobbitt has described such an approach to the interpretation of the United States Constitution.<sup>236</sup> Bobbitt asserts that there is no overarching rule or theory governing the choice among arguments.<sup>237</sup> I believe this is true also of the interpretation of collective bargaining agreements. Richard Fallon has provided a typology of accepted arguments in constitutional interpretation<sup>238</sup> and Neil MacCormick and Robert Summers have reviewed statutory interpretation throughout the world to produce eleven argument types that play an important part in the interpretation of statutes.<sup>239</sup> If I had to list the arguments over the meaning of labor agreements in order of weight or persuasiveness, I would place text first and good results last. In particular cases, however, there usually is uncertainty about the decisiveness of a particular argument, and there are many opportunities to accommodate arguments. In practice, I suspect the best an arbitrator can do is review the various arguments and reach an intuitive judgment. As she writes her opinion, she should test her intuitive judgment against the arguments to see whether it stands up. If it does, she signs the opinion and sends it off to the parties.

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235. See, e.g., Farber, *Supremacy*, *supra* note 182, at 281. See also Bradley C. Karkkainen, "Plain Meaning:" *Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 464-71 (1994).

236. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 6-8, 246-49 (paperback ed. 1984).

237. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 168-70 (1991).

238. Richard Fallon, *A Constructive Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

239. See *INTERPRETING STATUTES*, *supra* note 54, at 512-15 (summarizing the eleven argument types).

The most appealing statement of what I believe is the best approach to interpretation is found in a work that did not focus on interpretation. It is included in a reading entitled "The Pivot" in Thomas Merton's book entitled *The Way of Chuang Tzu*:

Tao is obscured when men understand only one of a pair of opposites or concentrate only on a particular aspect of being. . . .

. . . .

. . . The pivot of Tao passes through the center where all affirmations and denials converge. He who grasps the pivot is at the still-point from which all movements and oppositions can be seen in their right relationships. Hence he sees the limitless possibilities of both "yes" and "no."<sup>240</sup>

Merton defines Tao as "The Way, The Absolute, The Ultimate Principle."<sup>241</sup> Merton says that Chuang Tzu took opposite sides of the same question in different contexts<sup>242</sup> and that the key to his thought is the "complementarity of opposites."<sup>243</sup> To Chuang Tzu, life changes continually and what is good in today's circumstances may be bad in tomorrow's. The Tao is obscured when one treats partial views as the answer to all questions.<sup>244</sup>

Clouds become rain and vapor ascends again to become clouds. To insist that the cloud should never turn to rain is to resist the dynamism of Tao.<sup>245</sup>

What, then, is a collective bargaining contract? It is what the arbitrator derives from the evidence of contractual meaning after grasping the pivot of Tao.

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240. THOMAS MERTON, *THE WAY OF CHUANG TZU* 42, 43 (New Directions 1965). Chuang Tzu was a Taoist who wrote toward the end of the classic period of Chinese philosophy. *Id.* at 15.

241. *Id.* at 15.

242. *Id.* at 29.

243. *Id.* at 30.

244. *Id.*

245. *Id.* at 31.



