

Hi, this is Chris Micheli with the Sacramento governmental relations firm of Aprea and Micheli, and an adjunct professor at McGeorge School of Law. Today's podcast is drawing a connection between judges and bill drafters. Basically, there's a connection between how judges interpret statutes and how these statutes are drafted by legislative counsel. In broad terms, there are two types of approaches to interpreting statutes; literalism and purposive.

Literalism is generally defined as the interpretation of words in their usual or most basic sense, while purposive is generally defined as the interpretation of words based upon having or being done with a purpose. If you look at a historical context for legal systems based upon common law and derived from the English tradition, literalism is the basis for most legislative interpretation, while those systems based upon the civil law tradition mainly utilize the purposive technique to interpreting statute.

Now, these two main approaches to statutory interpretation are based upon either using the words of a statute based upon their literal meaning, that's where we come up with the literalism theory, or using the words of a statute based upon their intended purpose or the purposive approach to statutory interpretation. Deriving from literalism is the plain meaning rule. It's also known as the literal rule, and it is one of the canons of statutory construction that's traditionally applied by the English courts. Under this approach, a court takes a literal approach to legislative interpretation when the statutory language is hopefully precise and doesn't contain ambiguity.

On the other hand, according to purposive interpretation, the purpose of the text is not part of the text itself. Instead, the judge determines the purpose of the statute, based upon information that the judge has obtained to ascertain the intent of the legislature.

Now, either of these two main theories of statutory interpretation results in judges and bill drafters being intertwined, in my mind. As is explained in the Athabasca University based in Alberta Canada's Graduate Diploma in Legislative Drafting Program, they say that drafting and interpretation have always been linked. And this is due to the fact that judges have developed their approaches to interpretation on the basis of the way legislation has been drafted.

And in turn, legislative counsel are influenced by judicial practice on interpretation. Judges have historically, and appropriately, placed a lot of weight on the manner in which particular words or expressions are used in statutes, which is why literalism has been a feature of common law statutory interpretation for centuries. Some commentators believe that judges have been moving away from literalism to the purposive approach.

This is because of a belief that the purpose of approach allows judges to give statutory words their meanings, based upon an underlying public policy. Now, whether a judge follows a literalism approach or purposive approach when interpreting a statute, judges usually start by looking at the plain or ordinary meaning of the text of the statute. And they follow that by using different interpretation aids, including the canons of statutory construction and legislative history.

In the end, both of these theories of interpretation are intended to ensure that the judicial branch is interpreting the statute in the manner desired by the legislative branch of government. Now, under the law US constitution and those of other states, and even here in California, in Article III separation of powers doctrine, remember it's the legislative branch that makes the laws, while the judicial branch interprets the laws.

And statutory interpretation is intended to respect the fact that the Legislature is the supreme lawmaker in the land. Of course, judicial problems arise when the judiciary branch attempts to determine the intent of the Legislature when examining the language of a statute that is at the center of a legal dispute. In many instances, it's difficult to ascertain the intent of the legislative branch from just the words of the text itself.

It is when the judiciary attempts to determine legislative intent, that judges take one of these two main approaches to statutory interpretation. A purposive proponent attempts to construe a statute to fulfill the intent of the legislature. And such a proponent will look at the legislative process to determine what policy goal or goals were intended by enactment of the statute.

Then the judge would interpret the law to be faithful to that stated legislative intent. By using the legislative process and the legislative history as a measure, these judges give credit to how and why a statute was originally enacted. Again, judges look to the context in which the legislation she was adopted, which is why for the purposive approach, the legislative history plays such an important role in this theory of interpretation.

Now, we know that state legislative history, especially in some jurisdictions like here in California, is pretty limited, as opposed to, say, the legislative history at the federal level where there are substantial benefits from reviewing the verbatim transcripts found in the Congressional Record, and the extensive mock-up sessions that committees use when they consider a legislation.

As such, some commentators critical of this approach, express that it's actually difficult for judges to always find the legislative purpose, and then ensure that that decision of the judge is consistent with that legislative purpose. Another concern is that this approach could lead to ignoring the text in an effort to achieve the legislature's believed purpose. Now, textualists, on the other hand, focus on the legislative texts and how a reasonable person would read the statutory language.

And purpose is to be gleaned from the text of the law. Some commentators actually use the phrase that "Judges who use this approach presume that legislators mean what they say when they draft that legislative text." Textualists also believe that attempting to find the purpose may allow judges to enter into exercising part of the lawmaking power, which again is reserved to a separate but equal branch, the legislative branch of government.

Rather than relying upon the legislative history of the bill, these judges utilize the canons of statutory construction and rules of grammar, to help with interpreting the statutory text. Now, some critics of this approach of interpretation believe the legislative branch understands that the judicial branch is charged with interpreting the laws that the legislature does write.

And as a result, they expect the judiciary to consider the legislative process, as well as the history of a statute that has been enacted, and the purpose of the law that was enacted. As you can probably imagine, many judges on the state and federal benches don't identify themselves solely within one theory or the other. In other words, some judges utilize aspect of both theories that shows up on occasion in judicial decisions.

In practice, this means that judges employing either theory, or a combination of them, begin their legal analysis with the text of the statute, and then consider rules of grammar, canons of statutory construction, and perhaps even legislative history. So, ultimately, these two theories of interpreting statutes at the federal and state levels create an obvious connection between how judges interpret statutes, and how these statutes are written by legislative bill drafters.

Judges interpret statutes based upon how they believe legislators have crafted these statutes. And in turn, bill drafters write these statutes based upon their understanding how judges will interpret the legislative text. So, each ends up relying on the other to fulfill their respective roles in the lawmaking process. Thanks for joining today's podcast. I hope you enjoyed it.