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## JUSTICE GINSBURG AND THE NEW LEGAL PROCESS

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Justice Ginsburg exemplifies the New Legal Process style of interpretation. The old Legal Process course—which Justice Ginsburg (and three of her current colleagues) took in law school<sup>2</sup>—taught us three basic things. First, “[t]he idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible.”<sup>3</sup> Second, in our constitutional system, interpreters must “[r]espect the position of the legislature as the chief policy-determining agency of the society, subject only to the limitations of the Constitution.”<sup>4</sup> Third, it follows that judges faced with a statutory question should ask “what purpose ought to be attributed to the statute” and then “[i]nterpret the words of the statute immediately in question so as to carry out its purpose as best it can.”<sup>5</sup>

All of this made good sense—so much so that the Legal Process school effortlessly dominated post-New Deal thinking about statutes for generations.<sup>6</sup> But embedded in this purposive philosophy was a tension. With no acknowledgment of the contradiction, the Legal Process materials developed by Harvard Professors Hart and Sacks presented two conflicting techniques for effectuating statutory purpose. Option A said that in ascertaining purpose, interpreters must ultimately respect the text: “The words of the statute are what the legislature has enacted as law, and all that it has the power to enact.”<sup>7</sup> So, whatever else they do, judges must not “give the words . . . a meaning they will not bear.”<sup>8</sup> Option B seemed to assume that if the text did not capture the law’s true purpose, the former must yield: “The meaning of words can almost always be narrowed if the context seems to call for the narrowing.”<sup>9</sup> And judges could legitimately extend statutes to situations “seemingly within [a statute’s]

purpose but not within any accepted meaning of its words.”<sup>10</sup>

Though Hart and Sacks were apparently of two minds about the text, the post-New Deal Court was not. It took Option B. Because laws are complex and legislators are human, judges might have to go beyond the text to get at what legislators really meant to achieve. In searching for this legislative purpose, nothing was out of bounds. As the Court unanimously wrote in *United States v. American Trucking Associations*:

[W]hen the plain meaning . . . produce[s] . . . an unreasonable [result] plainly at variance with the policy of the legislation as a whole this Court . . . follow[s] that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.<sup>11</sup>

In the five decades after *American Trucking*, the Court did not hesitate to reshape a statute’s text to reflect the background intentions or purposes that the Justices perceived in the statements of pivotal legislators or the telling changes made to successive drafts of a bill.<sup>12</sup>

The Court, however, now takes a different approach. I am not referring to textualism, which would exclude *all* legislative history on the ground that it is unenacted, unrepresentative, and thus illegitimate *per se*.<sup>13</sup> Whatever the merits or demerits of that position, it has not captured the Court’s center. Instead, the consensus now seems to have clustered around Hart and Sacks’s Option A. The new approach, like the old, still considers anything that might cast light on a statute’s objectives—including its legislative history. What’s new is this: The semantic meaning of the enacted text, when clear, now sets a hard cap on the judge’s discretion. Justice Ginsburg is at the epicenter of this New Legal Process approach.

Consider her opinion for the Court in *Koons Buick Pontiac GMC, Inc. v. Nigh*.<sup>14</sup> As is true of many classic statutory opinions, *Nigh* does not involve a headline-grabbing issue. The Truth in Lending Act (TILA) requires creditors to disclose to consumers certain information pertaining to interest rates, finance charges, and the rights of borrowers.<sup>15</sup> Because actual damages from nondisclosure may be difficult to prove, TILA

accomplishes its remedial purposes through specific formulae that assess “statutory” damages based on the kind of transaction.<sup>16</sup> Prior to 1995, the key provision—15 U.S.C. § 1640(a)—prescribed the following formulae for statutory damages:

(2)(A)(i) in the case of an individual action, twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000. . . .<sup>17</sup>

That is, where a lender or lessor failed to make the required TILA disclosures, § 1640(a)(2)(A) called for statutory damages equal to twice the amount of the finance charge (in the case of consumer credit) or one-quarter of a monthly payment (in the case of a consumer lease). As the lower courts uniformly held, the final clause—the \$100/\$1,000 proviso—set a floor and a ceiling for the amounts that could be recovered under *either* of the specified transactions—loans or leases.<sup>18</sup>

*Nigh* arose out of a 1995 amendment that added yet another provision—one setting higher limits for statutory damages arising out of certain loans secured by real property—namely, closed-end credit requiring repayment at a fixed time, as opposed to revolving lines of credit.<sup>19</sup> Congress inserted this proviso as a new clause (iii) at the end of the existing provision, which then read as follows:

(2)(A)(i) in the case of an individual action, twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open-end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2,000. . . .<sup>20</sup>

*Nigh* alleged that Koons Buick had failed to make required TILA disclosures in an auto financing transaction *and* that, after the 1995

amendment, the \$100/\$1,000 proviso no longer applied to the routine credit transactions governed by clause (i). Why? Based on the post-amendment *structure* of § 1640(a)(2)(A), the \$100/\$1,000 proviso seemed logically to apply only to clause (ii)—the one governing consumer leases. Again, the proviso states that the \$100/\$1,000 limitation governs “the liability under *this subparagraph*.” But once Congress added clause (iii), one could no longer comfortably read “this subparagraph” to mean § 1640(a)(2)(A) as a whole; to do so would be to apply the \$100/\$1,000 proviso to the subset of transactions that § 1640(a)(2)(A)(iii) now subjected to the new \$200/\$2,000 proviso. Nor would it make structural sense to read “this subparagraph” to refer to *both* § 1640(a)(2)(A)(i) and (ii), as Koons Buick urged. If one were to read “subparagraph” to refer to the statutory subdivisions marked off by Roman numerals, then the phrase “under *this* subparagraph” would presumably refer only to the Roman numeral subdivision in which the proviso actually appeared—that is, § 1640(a)(2)(A)(ii) and its damages rule for consumer leases.

Justice Ginsburg’s opinion for the Court, however, did not reach that conclusion. Rather, she reasoned that restricting the \$100/\$1,000 proviso to consumer leases would go beyond the evident purposes of the 1995 amendment. Prior to 1995, as noted, § 1640(a)(2)(A) applied that proviso to all credit transactions. And Justice Ginsburg found it most unlikely that by inserting a \$200/\$2,000 proviso for a subset of transactions secured by real property, Congress intended to *uncap entirely* the statutory damages for all other credit transactions. Nothing in the legislative history of the 1995 amendment suggested that Congress meant to perform such radical surgery on the statutory damages scheme in such an indirect way.<sup>21</sup> Nor could the Court see any apparent policy justification for Congress to impose a \$2,000 cap on damages for a subset of secured credit transactions—but no cap at all for other kinds of credit.<sup>22</sup> Reading the statute in light of its drafting history and a common-sense assessment of legislative policy, Justice Ginsburg held that the specific \$200/\$2,000 proviso applied only to transactions specified by clause (iii), while the more general \$100/\$1,000 proviso reached all other transactions encompassed within subparagraph (2)(A).

So Justice Ginsburg relied heavily on statutory purpose. But in contrast with the Old Legal Process approach that once prevailed, her approach did not treat purpose as a free-standing concept. Rather, she deemed it necessary first to ensure that the statute's semantic meaning could bear the meaning ascribed to it by the Court. How did she do this? She asked whether "subparagraph" was a term of art. It turns out that it is. In a world in which a statutory provision can have as many tiers as § 1640(a)(2)(A)(ii), the legislative drafting community has developed uniform conventions for identifying each tier:

"To the maximum extent practicable, a section should be broken into-

(A) subsections (starting with [a]);

(B) paragraphs (starting with [1]);

(C) subparagraphs (starting with [A]);

(D) clauses (starting with [i]) . . ."<sup>23</sup>

Accordingly, Justice Ginsburg could say that semantic convention, as well as evident statutory purpose, supported her conclusion that the phrase "this subparagraph" in the \$100/\$1,000 proviso reached every part of § 1640(a)(2)(A) . . . except the one to which the more specific \$200/\$2,000 proviso explicitly applied.

This put Justice Ginsburg smack in the Court's center, with a majority of her colleagues. In dissent, Justice Scalia argued that if one read the provision cold, one would not expect to find "a purportedly universal [proviso] at the end of the second item in a three-item list."<sup>24</sup> Since the text would be clear to an ordinary reader, the drafting history just did not come into play. In a concurrence, Justice Stevens, joined by Justice Breyer, lamented the Court's new tendency to consult extrinsic evidence of legislative intent or purpose only where semantic meaning permitted.<sup>25</sup> For them, it seemed "wiser to acknowledge that it is always appropriate to consider all available evidence of Congress's true intent when interpreting its work product."<sup>26</sup> Justice Ginsburg's opinion walked a line between the two.

Though I have written much about the virtues of textualism, I find a great deal to admire in the middle course taken by Justice Ginsburg and the New Legal Process. It seems to me that she was quite right to think that

Congress would not have made such a radical change in such an indirect way. Her sensitivity to Congress's evident purpose made sense of the likely legislative outcome and deftly avoided a result that seems quite evidently to have been the product of awkward drafting. At the same time, by considering those factors only *after* verifying that the text allowed it, Justice Ginsburg welded her purposivism to the idea of legislative supremacy that our constitutional order has long embraced. Congress acts purposively but does not express its purposes in the abstract. Through the rules it embeds in the statutory text, Congress tells us how far the majority wishes to go in pursuit of its purposes and what it is willing to pay to achieve them. As the Court wrote in an opinion that marked the beginning of its shift from the Old to the New Legal Process approach:

Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the “plain purpose” of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise. . . .<sup>27</sup>

Justice Ginsburg's statutory jurisprudence—nicely typified by *Koons Buick Pontiac GMC, Inc. v. Nigh*—reflects that reality. Congress legislates to make policy, and a judge who wishes to show fidelity to Congress must take policy into account . . . but only to the extent that a statute allows. Justice Ginsburg has followed that course for two decades, and the law is better for it.



## ENDNOTES

- 1 I thank Bradford R. Clark and John Goldberg for valuable comments.
- 2 Justices Breyer, Kennedy, and Scalia also took the course. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 27 (1993).

- 3 HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).
- 4 *Id.*
- 5 *Id.* at 1374.
- 6 See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 698-99 (1987).
- 7 HART & SACKS, *supra* note 3, at 1375.
- 8 *Id.*
- 9 *Id.* at 1376.
- 10 *Id.* at 1194.
- 11 310 U.S. 534, 542 (1940).
- 12 See, e.g., *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 452-54 (1989); *United Steelworkers v. Weber*, 443 U.S. 193, 201-02 (1979); *Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976).
- 13 See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 894 (1997) (summarizing the tenets of modern textualism).
- 14 543 U.S. 50 (2004).
- 15 See 15 U.S.C. §§ 1631-1632, 1635, 1637-1639.
- 16 See *Riggs v. Government Emp. Financial Corp.*, 623 F.2d 68, 71 (9th Cir. 1980).
- 17 15 U.S.C. § 1640(a) (1976 ed.).
- 18 See *Nigh*, 543 U.S. at 55-56.
- 19 Compare [http://www.investorwords.com/892/closed\\_end\\_credit.html](http://www.investorwords.com/892/closed_end_credit.html) (closed-end credit), with [http://www.investorwords.com/3434/open\\_end\\_credit.html](http://www.investorwords.com/3434/open_end_credit.html) (open-end credit).
- 20 15 U.S.C. § 1640(a).
- 21 *Nigh*, 543 U.S. at 63 (discussing the legislative history of the 1995 amendment).
- 22 *Id.* (“It would be passing strange to read the statute to cap recovery in connection with a closed-end, real-property-secured loan at an amount substantially lower than the recovery available when a violation occurs in the context of a personal-property-secured loan or an open-end, real-property-secured loan.”).



- 23 *Nigh*, 543 U.S. at 60 (quoting HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, HLC No. 104-1, p. 24 (1995)).
- 24 *Nigh*, 543 U.S. at 72 (Scalia, J., dissenting).
- 25 *Id.* at 65 (Stevens, J., joined by Breyer, J., concurring).
- 26 *Id.*
- 27 *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).