

# Statutes

Kevin J.S. Zollman

University of California, Irvine

Nature of Law

## Two remaining interpretations

- ⑤ One is entitled to compensation only if the outcome was foreseeable.
  - ⑥ Number (5), except when the compensation would impose a cost radically out of proportions with the moral wrong.
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- Interpretations (5) and (6) cannot be decided on the basis of past decisions.
  - Even if we expand our view, we cannot decide between the two.
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## Dworkin's response

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  - "When these intentions differ somewhat from one another, how are they to be combined in the overall, composite institutional intention?"
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# Who counts?

## Dworkin

Every member of the Congress that enacted it, including those who voted against? Are the thoughts of some – for example, those who spoke, or spoke most often, in the debates – more important than the thoughts of others? What about the executive officials and assistants who prepared the initial drafts? What about the president who signed the bill and made it law? Should his intentions not count more than any single senator's? What about private citizens who wrote letters to their congressmen or promised or threatened to vote for or against them, or to make or withhold campaign contributions, depending on how they voted? What about the various lobbies and action groups who played their now-normal role? (318)

# How do we answer?

- More important than the answers, is how do we decide?
- One answer to one of these questions is not obviously the “right” answer to the question.
- Instead, this is an interpretive question.
- Hermes will answer it on the basis of what he thinks puts the legal process in the best light.

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## How are these intentions combined?

- Suppose we decide that only the congressional representatives and senators who voted for the bill count.
- Among them there will be differing intentions.
  - Some might want the ESA to include the snail darter, others not.
- How do they combine?

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# Options

- **Majority**

- Sometimes there isn't a majority view.

- **Plurality**

- What if the total number of people who don't want the statute is greater than the number who do?

- **Average legislator**

- How do I think the average legislator would vote?

- **Again, these are decided by interpretation.**

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Suppose Smith, who believes that the ESA will be interpreted to include the Snail Darter, but hopes it won't be.

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- What if she votes for an act, but hopes it won't ever be enforced?

- Expectations

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# An odd circularity

Hermes says:

- The law says what the senator thinks judges will interpret it to mean.
- I'm a judge.
- So, I need to figure out what the senator would think I will interpret the law to say.
- But I think that the law says what the senator thinks judges will interpret it to mean.
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# Instead...

- We look at her convictions.
- What view of the ESA follows most naturally from Smith's convictions?
- What if she has inconsistent convictions?
- This means Hermes might ignore explicit statements by Smith in an attempt to be true to her convictions.
- This looks a lot like Hercules.

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# Hercules method

- Look at the law as a text that must be interpreted and expanded (chain novel).
- Construct the best interpretation of past decisions and statutes.
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## Objectivity again

- Suppose Hercules decides that both interpretations of the ESA fit equally well.
- Suppose he wants to save the snail darter.
- Does he just get to decide on his own what is to be done?
- Isn't this undemocratic?

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# What of the legislative process

- Hercules will not do whatever he wants.
- Hercules realizes that democracy is fair, and so the best interpretation is to respect the majority's rule.
- He then must uncover the intentions of the people.
- To do that he will look at legislative history.

But how, because he wants to know the intentions of the majority?

By looking at what the majority of Americans would want.

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