

## Principles, Not Fictions

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How are courts to interpret statutory enactments? A time-honored answer is that they should do so by reference to one simple thing: the statutory “text.” Despite its salutary recognition of legislative supremacy on these matters, the answer will not suffice. The meaning of any “text” is a function not of the bare words, but of its context and the relevant culture. Because of the context, words sometimes have a meaning quite different from what might be found in *Webster’s* or the *Oxford English Dictionary*. Courts do not and should not “make a fortress out of the dictionary.”<sup>1</sup> Even more important, the culture furnishes the interpretive principles that courts and other interpreters use in order to give meaning to any “text.” Legal words are never susceptible to interpretation standing by themselves, and in any case they never stand by themselves.

The actual and appropriate role of interpretive principles in legal interpretation remains one of the great unresolved areas of the law. But this much seems clear: some such principles are not subject to change or even to evaluation. They are simply part of what it means to be a lawyer, or even to speak the English language; they serve as conventions that determine meaning. Thus, for example, the notion that “animals” do not include inanimate objects, that Congress is (usually) not joking, that things that do not move are not “vehicles,” and that interpreters should not construe statutes to mean whatever (they think) a good statute would say are taken as axioms, and rightly so.<sup>2</sup> But some interpretive principles conspicuously reflect deliberation and choice.

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<sup>1</sup> This aphorism is Learned Hand’s. See *Cabell v Markham*, 148 F2d 737, 739 (2d Cir 1945).

<sup>2</sup> To use a classic illustration, a provision barring vehicles from a park would be construed not to apply to a statue of a tank. Indeed, a statute barring animals would not require public officials or private citizens to eliminate rodents. See text at notes 10-16, discussing statutory ambiguity.

Some of these principles are not, however, simply part of what English words mean. The idea that courts should not understand a statute to accomplish whatever they want it

Consider, for example, the following ideas: courts will not generally infer private rights of action from silent statutes; judicial review is presumed available; courts will defer to agency interpretations of law; statutes will be construed generously toward Indian tribes; a clear congressional statement is necessary to support displacement of state law.<sup>3</sup> These are simply a few examples of the dozens of interpretive principles that can be found in even a casual reading of any two or three volumes of the United States Reports or the Federal Reporter. All of these principles reflect substantive judgments, and all of these judgments should be brought out into the open and evaluated.

In an earlier essay on this subject, I attempted to outline the actual and appropriate place of the conventional sources of interpretation, to describe the role of interpretive principles in statutory construction, to catalogue various kinds of principles, and to propose principles to be used in interpreting regulatory statutes.<sup>4</sup> In their stimulating and thoughtful response,<sup>5</sup> Eben Moglen and Richard Pierce assemble three principal objections to my proposed approach. First, they argue that my approach would confer excessive power on the federal judiciary. Second, they claim that my approach suffers, even more than the alternative positions, from incompleteness and indeterminacy. Third, and perhaps most provocatively, they object that any interpretive system rests on "fictions" and that I use the wrong criterion to evaluate the competing fictions. I am grateful to Moglen and Pierce for their valuable reactions. In this reply, I discuss their objections in turn.

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to requires an argument rather than a language lesson. In a democracy, however, the argument is so straightforward that it need not be reconsidered or assessed very often. The problem with conventionalist approaches to interpretation is that they assimilate all interpretive principles to the category of conventions, and thus treat practices that require justification as simply parts of language. See, for example, Stanley Fish, *Doing What Comes Naturally* (Duke, 1989). In their use of the notion of "fictions," Moglen and Pierce's approach appears to bear some resemblance to conventionalism. See Eben Moglen and Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U Chi L Rev 1203 (1990).

<sup>3</sup> See, for example, *Karahalios v National Federation of Federal Employees, Local 1263*, 489 US 527 (1989) (implied causes of action); *Johnson v Robison*, 415 US 361 (1974) (judicial review presumed available); *Chevron U.S.A., Inc. v Natural Resources Defense Council*, 467 US 837 (1984) (deference to agencies); *Montana v Blackfeet Tribe*, 471 US 759 (1985) (statute and treaties construed favorably to Indians); *Puerto Rico Dept. of Consumer Affairs v Isla Petroleum Corp.*, 485 US 495 (1988) (preemption of state law).

<sup>4</sup> Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405 (1989). The analysis is extended and put in the context of a broader discussion of the aspirations and failures of the regulatory state in Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard, 1990).

<sup>5</sup> Moglen and Pierce, 57 U Chi L Rev at 1203 (cited in note 2).

## I. THE PROBLEM OF THE JUDICIAL ROLE

With respect to the role of the courts in statutory construction, I do not believe that there are fundamental differences between my approach and that suggested by Moglen and Pierce. I agree that courts must give full scope to the unambiguous meaning of statutory words. It follows that courts may not invoke contestable or controversial interpretive principles when there is no ambiguity.<sup>6</sup> In this respect, courts should indeed be faithful agents of the legislature, subject to the (practically unimportant) qualification that the interpretive principles that make unambiguous statutes unambiguous will sometimes be, at least in part, a judicial creation.<sup>7</sup> I agree that Congress may displace judicially created interpretive principles if it chooses to do so.<sup>8</sup> I agree that courts should defer to administrative interpretations where Congress has told courts to defer. In the event that Congress has not expressly addressed the issue of deference, I agree with Moglen and Pierce that courts should generally defer where distinctive administrative policymaking and factfinding competence is relevant. In this latter respect, I agree that *Chevron* was entirely correct. Indeed—and this is an important point—the interpretive principles I propose are directed in the first instance at regulatory agencies, not at the courts.<sup>9</sup> In the modern administrative state, it would be highly incongruous to direct a set of interpretive principles solely to the judges who review agency decisions, and not to the administrators themselves. Where we disagree is on two questions that are not exactly fundamental, but that do have some practical importance—the category of statutory ambiguity and the precise degree of deference to agency interpretations.

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<sup>6</sup> See Sunstein, 103 Harv L Rev at 464-66 (cited in note 4).

<sup>7</sup> The fact of clarity reflects agreement or consensus about the governing interpretive principles. When things are clear, it is not as if no such principle is “there”; rather, the principle is simply taken so much for granted as to be invisible. In such cases there is usually no need for interpreters to consider the source of the governing principle. The key point is that everyone accepts the principle and therefore there is no interpretive doubt.

The possibility of consensus suggests that the agency theory of the judicial role contains a large truth; indeed, it is in significant part correct. The problems are that in some cases the instructions of the principal are unclear, and in many cases courts should press unclear statutes in certain directions.

<sup>8</sup> In some rare cases there might be constitutional obstacles here. Consider, for example, an effort by Congress to eliminate clear statement principles calling for express legislative deliberation on certain issues, as exemplified in the principle that ambiguities in the area of foreign affairs will be understood not to intrude on presidential power. See *Dames & Moore v Regan*, 453 US 654 (1981). But this situation will be unusual.

<sup>9</sup> Sunstein, 103 Harv L Rev at 504 (cited in note 4); Sunstein, *After the Rights Revolution* at 161-62, 232 (cited in note 4).

### A. Ambiguity

I would find ambiguity in some cases in which Moglen and Pierce think that Congress has spoken clearly. For example, Congress enacted the Delaney Clause in 1955, and thereby banned the approval of any color additives that “induce cancer when ingested by man or animal.”<sup>10</sup> When Congress enacted the Clause, few carcinogens were detectable, and those carcinogens that could be detected were extremely dangerous. By 1989, thousands of carcinogens could be detected, and many of them posed trivial risks. In light of the changed circumstances, the consequence of a literal reading of the Delaney Clause was actually to increase, not to decrease, health risks.<sup>11</sup>

In these circumstances, the FDA found an ambiguity in the 1955 enactment. Taken in its context, that enactment simply did not speak to the question whether *de minimis* cancer risks should be regulated—especially in light of the principle, deeply engrained in common sense, ordinary language, and law, that a literal prohibition on an activity need not foreclose exceedingly trivial transgressions. (I tell my housesitter to make sure not to get any dust on the piano. What exactly do I mean by this? Must he cover the piano with a sheet? The state of California bans the drinking of alcoholic beverages on college campuses. Does this mean that bottled water with some alcohol content must be removed from Stanford?) I wonder whether it can be argued with any seriousness that the FDA’s invocation of the very old principle “*de minimis non curat lex*”—a principle that would actually have saved lives here—would have violated some congressional instruction. I wonder too whether it might not instead be thought that the FDA’s decision was entirely consistent with congressional instructions, indeed more consistent than a “literal” interpretation of the Delaney Clause.

Moglen and Pierce also invoke the *Benzene* case, in which a plurality of the Court found an implicit “significant risk” requirement in the OSHA statute.<sup>12</sup> The literal reading apparently favored by Moglen and Pierce would have required OSHA to regulate *any* risk posed by *any* toxic substance, no matter how trivial the risk and no matter how high the costs. A fifty billion dollar

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<sup>10</sup> 21 USC § 348(c)(3)(A) (1982).

<sup>11</sup> For a more detailed explanation, see Sunstein, *After the Rights Revolution* at 88-89, 198-99 (cited in note 4); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U Chi L Rev 407, 418-19 (1990).

<sup>12</sup> *Industrial Union Dept. v American Petroleum Institute*, 448 US 607 (1980).

expenditure to save one life per decade would be legally mandated. The consequence would be grotesque overregulation of some risks and predictable underregulation of others.<sup>13</sup> I doubt that Moglen and Pierce really believe that a court that so held would be following some actual congressional instruction.

In both of these cases, Moglen and Pierce understate the interpretive problem posed by generality, which can indeed produce ambiguity. In a famous passage, Wittgenstein made the point: "Someone says to me: 'Shew the children a game.' I teach them gaming with dice, and the other says, 'I didn't mean that sort of game.' Must the exclusion of the game with dice have come before his mind when he gave me the order?"<sup>14</sup> The example reveals that adherence to dictionary definitions can produce poor interpretations. In the law, the point is an old one, long predating Wittgenstein. Indeed, many cases reflect the same principle.<sup>15</sup> My support for the outcome in *Benzene* and my criticism of the Delaney Clause case are thus nothing new.

I should reiterate that I do not believe that our disagreement on these matters goes to anything fundamental. Where there is no ambiguity, courts must defer. To say that generality creates ambiguity is not really to repose an "extraordinary degree of policy-making power"<sup>16</sup> in the federal judiciary. It hardly allows courts to refashion statutes however they wish. It simply acknowledges that generality can produce an interpretive problem.

## B. Deference to Agency Interpretations

Moglen and Pierce would give greater scope than I would to the principle that courts should defer to administrative interpretations of laws. They do not say exactly how far they believe this principle extends, but if we disagree, it must be because they think that that principle should apply (a) even in the face of countervailing principles and (b) even in cases involving pure questions of law in which agency bias or self-dealing is involved. In both of these categories of cases, I believe that the principle of deference is inappropriate.

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<sup>13</sup> For an explanation, see Sunstein, *After the Rights Revolution* at 91-92, 106 (cited in note 4); Sunstein, 57 U Chi L Rev at 418-19 (cited in note 11).

<sup>14</sup> Ludwig Wittgenstein (G.E.M. Anscombe, trans), *Philosophical Investigations* 33 (Basil Blackwell, 1953).

<sup>15</sup> For examples, see Sunstein, 103 Harv L Rev at 420 nn 44-47 (cited in note 4).

<sup>16</sup> Moglen and Pierce, 57 U Chi L Rev at 1223 (cited in note 2).

The first point here is that the principle of deference, stated most prominently in *Chevron*, is one of a large number of interpretive principles. Under current law, and under any reasonable system of interpretation, it does not stand by itself, or even at the top of the list. Suppose, for example, that an agency's interpretation of an ambiguous statute raises serious constitutional doubts, or ensures that its own decisions are unreviewable, or preempts state law, or unfavorably affects the Indian tribes. It is implausible to think that the agency's view would or should prevail in all such cases. In cases before and after *Chevron*, the rule of deference has not been applied in at least some contexts in which competing interpretive principles argue against the agency's view.<sup>17</sup>

Second, the key question on the problem of deference is whether Congress has instructed courts to defer. Sometimes Congress will not have answered that question directly, and when this is so, courts must reconstruct legislative instructions on the basis of an assessment of judicial and administrative capacities. In cases involving agency bias or self-dealing with respect to pure questions of law, it seems unlikely that Congress would want courts to defer to agencies. Suppose, for example, that the question is whether the agency is under an affirmative obligation to take action against pollutants shown to cause serious harms. In view of Congress's constant effort to force agencies to take action in this area, it seems difficult to sustain the idea that agencies should be able to decide whether their own duties are mandatory.<sup>18</sup> Or suppose that the question has to do with the extent of an agency's own jurisdiction. When Congress has not spoken on the matter, ought courts to assume that agencies have the authority to decide on the extent of their own legal authority?

Whether or not my conclusions are correct on these points, it hardly seems right to suggest that exceptions to the rule of deference—for countervailing interpretive principles or agency bias in cases of pure questions of law—would produce anything but a modest increase in judicial power over administrative processes. These exceptions ought to be regarded not as an effort to increase the authority of the judges, but as a natural outgrowth of the fundamental idea that the authority of the administrators is subordinate to that of Congress.

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<sup>17</sup> See generally Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum L Rev — (forthcoming December 1990), and cases cited therein.

<sup>18</sup> For a more detailed and precise discussion of these and related issues, see generally *id.*

## II. PROBLEMS OF ADMINISTRABILITY

Moglen and Pierce believe that the system of interpretation that I propose is too complex for judicial adoption. In their view, some of the suggested norms are unjustified, or at least controversial (with "less than universal acceptance"<sup>19</sup>); the system contains too many norms; and some of the relevant norms are highly general and subject to conflicting interpretations. All in all, Moglen and Pierce conclude, the system fails because of its unmanageability. Let me take up these claims in sequence.

Some of the norms that I propose are certainly controversial. This is true, for example, of the norm in favor of narrow construction of statutes endangering property rights and the norm in favor of aggressive construction of statutes protecting the environment and endangered species. But the fact that a norm is controversial does not by itself count as a good argument against it. Surely some norms that are widely accepted within the existing legal culture ought on reflection to be abandoned; surely some norms now unsupported by a consensus ought to be accepted soon. The phenomenon of rejecting old norms and importing new ones has of course occurred during nearly every decade of American law. The category of interpretive principles is not static but is instead a product of a continuous process of evaluation and choice.

Whether interpretive norms are acceptable depends not on consensus but on the reasons that can be marshaled on their behalf.<sup>20</sup> In all likelihood the reasons I have offered for the many norms I discuss are frequently too thin, and in any case it would be surprising if every one of the norms for which I have argued can be supported by reasons that should ultimately be found persuasive. But this is not a question on which Moglen and Pierce spend much of their time, and surely there is considerable room for further thought here.

Moglen and Pierce are correct in suggesting that many of the norms I propose are not self-interpreting and that there is a serious potential for conflict among the norms.<sup>21</sup> But it is important to

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<sup>19</sup> Moglen and Pierce, 57 *U Chi L Rev* at 1227 (cited in note 2). Moglen and Pierce also ask whether the category of norms is intended to be closed or exhaustive. *Id.* at 1233-34. Although the enumeration of syntactic norms is designed only to be illustrative, the institutional and substantive norms I develop are in fact intended to be complete, though it would be most surprising if, on reflection, additional norms did not appear justified.

<sup>20</sup> Note here that I am discussing norms with substantive foundations, and not syntactic norms, which are founded on the rules of grammar. Of course, a decision to reject an established norm or to bring about a new one must be based on reasons.

<sup>21</sup> Moglen and Pierce, 57 *U Chi L Rev* at 1233-45 (cited in note 2); see Sunstein, 103 *Harv L Rev* at 443, 497-98 (cited in note 4).

understand that my effort to propose norms for the regulatory state is descriptive as well as normative. All of my proposed norms have some basis in current law. Almost all of them have been explicitly recognized as such in the cases.<sup>22</sup> In view of the fact that some version of this system is already in place, and indeed has been in place for many years, Moglen and Pierce's claim of lack of administrability seems at least overstated.

More broadly, almost any approach to interpretation will contain norms that are on occasion susceptible to competing interpretations and in potential conflict with one another. This is true in ordinary linguistic practice as well as in law. The fact that an approach to interpretation (normative or positive) contains a multiplicity of norms, some of them necessarily stated at a high level of generality, does not count as a powerful argument against it. At most, that fact is a reminder, salutary to be sure, of the inherent limitations of any effort to describe the "principles" of interpretation in a systemic or mechanical way.<sup>23</sup>

The only way to reduce the risk of conflicting interpretive principles is to produce a system with one or very few such principles—as in, for example, the idea that agency interpretations will *always* prevail, or that ambiguous statutes will always be interpreted favorably to the plaintiff, or that courts will resolve hard cases unfavorably to those whose names begin with the letter falling first in the alphabet. But the dangers of simplicity in this setting should be self-evident. Any simple system will contain an unacceptably high potential for an unacceptably large number of errors. And one might make this point while agreeing, with Moglen and Pierce, that one goal of a system of interpretation is to reduce the complexity, unpredictability, and cost associated with interpretation.<sup>24</sup> It is of course possible that the system I propose is either too simple or too complex for descriptive or normative purposes, and that some alternative system would have a better level of complexity. But this would call for a long discussion.

One final point. We should think of the process of statutory interpretation as an exercise of practical reason, not as mechanical

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<sup>22</sup> See, for example, cases cited in note 3. The exceptions include the norms in favor of generous construction of antidiscrimination measures and against exemptions from welfare programs.

<sup>23</sup> Sunstein, 103 Harv L Rev at 497-98 (cited in note 4).

<sup>24</sup> See also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum L Rev 1093, 1117-29 (1987).



or deductive.<sup>25</sup> Since statutory interpretation requires practical reason, it is inevitable, and no cause for embarrassment, that the operative principles, stated at a certain level of generality, are themselves subject to interpretation and in potential conflict with one another. To outline the relevant principles and to provide some sense of their relationship is indispensable for descriptive or normative purposes. These steps structure inquiry. They foreclose some routes and open others. But they do not decide concrete cases. An outline of the principles and their general operation is the beginning, not the end, of the process of interpreting any particular statute in any particular context. The applications have to be discussed and thought through; here there will be room for disagreement and uncertainty.

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<sup>25</sup> See Sunstein, 103 Harv L Rev at 497-98 (cited in note 4); see also William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan L Rev 321, 322 (1990); Richard A. Posner, *The Problems of Jurisprudence* (Harvard, 1990). For an especially helpful treatment outside of the legal context, see Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* ch 10 (Cambridge, 1986).

I do not have space to explore all of the (extremely interesting) cases discussed by Moglen and Pierce, but it might be helpful, as an illustration, to say a few words about the question whether the Environmental Protection Agency (EPA) can or must avoid "scrubbing" strategies for utilities emitting sulfur dioxides. See Moglen and Pierce, 57 U Chi L Rev at 1235-38 (cited in note 2).

I believe that the EPA is unquestionably authorized to reject scrubbing strategies if it can show (as it can, and to some extent did in *Sierra Club v Costle*, 657 F2d 298 (DC Cir 1981)) that other approaches can produce equal or greater environmental protection at lower cost. This conclusion is a natural product of (a) the norm in favor of considering systemic effects, which argues powerfully against scrubbing strategies (such strategies perpetuate the life of old, especially dirty plants and impair technological innovation), see Sunstein, 103 Harv L Rev at 480; (b) the norm in favor of avoiding interest group transfers—of which scrubbing strategies, benefitting eastern coal without improving the environment, are an egregious example, id at 486-87; (c) the norm in favor of giving the statutory text priority over the legislative history, id at 474-75; (d) the norm in favor of according deference to the policymaking competence of the agency, id at 475; and (e) the presumption against irrationality, id at 482-83. The norm in favor of aggressive construction of statutes protecting the environment does not argue against this result, since scrubbing strategies do not protect the environment more than the alternatives, other things being equal.

While the question is a bit closer, I also believe that a universal scrubbing strategy, or something like it, would be unlawful even if the EPA endorsed that strategy. The only difference is that norm (d) would argue in the other direction, but I do not believe that the agency view should be accorded deference in this setting, where the outcome would not be compelled by the statutory text, would be irrational, and would conspicuously reflect interest group pressures rather than sensible efforts to protect the environment. For more discussion, see Sunstein, *After the Rights Revolution* at 85 (cited in note 4); Bruce A. Ackerman and William T. Hassler, *Clean Coal/Dirty Air* (Yale, 1981). A particularized analysis of this sort, deploying the norms in a reasoned rather than mechanical way, would be necessary to resolve the various cases that Moglen and Pierce discuss.

The risk of uncertainty and the need to attend to particulars do not count as a criticism of a system of interpretation that embodies such a set of principles. To demand more is to demand something that such a system simply cannot provide, and that it should not attempt to provide even if it could do so.

### III. FICTIONS AND PRINCIPLES

Moglen and Pierce's broadest claim is that I fail "to recognize the necessarily . . . fictive nature of the enterprise of interpreting texts."<sup>26</sup> For them, interpretive fictions help make "communication comprehensible" and "generate rules for understanding speech."<sup>27</sup> Indeed, the source of canons of construction "remains fiction."<sup>28</sup> Moglen and Pierce attempt to support this claim by reference to past and present legal fictions and to a range of conventional ideas about statutory interpretation that they deem "fictional": collective intent on the part of the legislature, legislative history, the assumption that legislators are reasonable people acting reasonably, and the principle of deference itself. For Moglen and Pierce, statutory interpretation is, in these and other contexts, filled with fictions. For anyone to challenge a principle as fictional, as I do on occasion, seems no argument at all in these circumstances.

Here there is a genuine disagreement between us. At least in the context of statutory interpretation, and indeed in the law generally, I believe that interpretive fictions are unhelpful and in fact harmful to legal reasoning and results. Fictions are not indispensable. The law would be better off without any of them. Indeed, an important contribution of twentieth-century jurisprudence has been a measure of self-consciousness about the existence of legal fictions, and an understanding that they are obstacles to thought. We do not need interpretive fictions. Instead we need interpretive principles—ones that can be defended in substantive or institutional terms.

In each of Moglen and Pierce's illustrations, it is possible to restate what they call a fiction in a way that identifies a principle, and one that, once identified as such, merits evaluation. If, for example, the principle of deference to agency interpretations is justified on the ground that Congress intends to give law-interpreting power to the agencies, it is—just as Moglen and Pierce sug-

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<sup>26</sup> Moglen and Pierce, 57 U Chi L Rev at 1205-06 (cited in note 2).

<sup>27</sup> Id at 1208, 1209.

<sup>28</sup> Id at 1209.

gest—based on a fiction. And if this is all that can be said for the principle of deference, it is wrong precisely because its foundation is fictional. If the notion of deference to agency interpretations is acceptable, in the absence of legislative instructions, it is for reasons that call up the comparative advantages of the agency—the capacity to respond to changed circumstances, administrative accountability and expertise, and other reasons nicely discussed by Moglen and Pierce themselves.<sup>29</sup> To make these arguments persuasively, there is no need to refer to fictions.

Or consider the notion that interpreters should assume that legislators are reasonable people acting reasonably. If this assumption is justified on the ground that it accurately captures the legislative process in every case, then its core is fiction. Surely it cannot be justified in that way at all. But if this premise is defended, in principle, as a means of improving the legal system by assuming and thus helping to produce reasonableness and sense rather than chaos and nonsense, then it seems sound.<sup>30</sup> And in that event, the assumption of reasonableness is not rooted in fictions at all.

So too, if we continue to rely at all on legislative intent and legislative history, this reliance cannot be because there is in all cases a unitary collective “intent” or because the legislators know and consult the legislative history. As Moglen and Pierce suggest, these ideas are fictions. Fictions, I repeat, cannot justify interpretive practices. If reliance on intent and history is to be continued, it is because in the face of textual ambiguity, courts should attempt, as part of their interpretive activity, to use whatever evidence is available on the (highly relevant) question of how the words were understood at the time of enactment and, more particularly, on what some or many of the people who enacted the text thought that it meant. It is altogether unnecessary to advert to fictions in order to make this claim.

All this suggests a broader point. Legal fictions are usually founded on some substantive ground; the problem with the fiction is that it buries that ground. The way to handle fictions is to uncover them as such and to translate them into principles so that they can be evaluated. When evaluated, and treated as the normatively-laden devices that they are, some of these principles will be accepted and others will be rejected. A legal system that yields to the inevitability of “fictions” will be disabled from carrying out this indispensable task.

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<sup>29</sup> *Id.* at 1212-14.

<sup>30</sup> See Sunstein, 103 *Harv L Rev* at 435 (cited in note 4).

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I conclude by reiterating that some or even many of my proposed principles might ultimately be found unacceptable and that the proposed framework may err in the direction of undue complexity or undue simplicity. But whether this is so depends on the reasons offered for and against the relevant principles and on whether an alternative system can produce a better mix of good outcomes, predictability, and low decision costs. I hope that it is to those concerns, and not to the matter of fictions, that future descriptive and normative work on statutory construction will be devoted.