



**GEORGE
MASON**
UNIVERSITY

School of Law

THE SECRET MEANING OF INTENT

**Ross E. Davies,
George Mason University School of Law**

**George Mason University Law and Economics
Research Paper Series**

11-10

This paper can be downloaded without charge from the Social Science
Research Network at http://ssrn.com/abstract_id=1763370

THE SECRET MEANING OF INTENT

At the Supreme Court (and elsewhere) there has long been a wide range of views about the proper way to go about interpreting statutes. From time to time, some of those views are blessed with knowledgeable, articulate, and outgoing proponents. These days the debate is perhaps most vigorous, and certainly most entertaining, between Justice Antonin “Plain Meaning” Scalia and Justice Stephen “Legislative Intent” Breyer.

With respect to vigor, consider, for example:

Breyer, in his book *Making Our Democracy Work*: “[A] statute’s language may be vague, and the scope of its coverage may be uncertain. But it does not help us understand a vague statement to pretend that someone else ‘in ordinary life’ made the statement. How often would it help us understand, say, a difficult point in a university lecture to pretend that the lecturer is not a lecturer but a journalist? Similarly, how often does it help us to understand a statute’s vague or ambiguous language to pretend that its congressional authors were engaged in any activity other than the one they were engaged in, namely, writing a statute?”¹

Scalia, concurring in *Conroy v. Aniskoff*: “I confess that I have not personally investigated the entire legislative history The excerpts I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task. The other Justices have, in the aggregate, many more law clerks than I, and it is quite possible that if they all were unleashed upon this enterprise they would discover . . . many faces friendly to the Court’s holding. Whether they would or not makes no difference to me -- and evidently makes no difference to the Court, which gives lipservice to legislative history but does not trouble to set forth and discuss the foregoing material that others found so persuasive. In my view, that is as it should be, except for the lipservice. The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it.”²

With respect to entertainment, consider, for example, this exchange during the November 8 oral argument in *Costco v. Omega*, a case involving questions about the proper interpretation of section 602 of the Copyright Act:³

JUSTICE BREYER: My question really wasn’t to argue with you. My question was: Where in the legislative history does it say that the point of 602 is to prevent a foreign publisher from selling copies to a distributor and then that distributor resells them to the United States? I’m not saying it doesn’t; it’s just that I didn’t focus on those particular words directly.

MR. ENGLERT: And Justice Breyer, to be fair about what the legislative history says, it is statements by witnesses. It is not statements by committee, so it’s a little bit hard to tell where they’re drawing the line.

¹ STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 90 (2010).

² *Conroy v. Aniskoff*, 507 U.S. 511, 527-28 (1993) (Scalia, J., concurring in the judgment).

³ 17 U.S.C. § 602.

JUSTICE BREYER: Oh. In other words, somebody wanted that. I understand the industry wanted it. But -- but I -- is there anything in there that suggests that this is what Congress wanted to do, members of Congress? Even I draw the line somewhere.

(Laughter.)

MR. ENGLERT: Yes. Yes.

JUSTICE SCALIA: Let me write that down.

(Laughter.)⁴

All of which suggests that smart and reasonable people can and do reasonably disagree sharply about the proper process for statutory interpretation.

But who is correct?

The odds that Breyer et al. will convert Scalia et al. or vice versa seem long, very long. So, as a practical matter, the answer in any particular case will be found in the applied wisdom of Justice William Brennan in a perhaps apocryphal anecdote (“Five votes can do anything around here”⁵) and Justice Robert Jackson in *Brown v. Allen* (“We are not final because we are infallible, but we are infallible only because we are final”⁶): a majority vote based on a plain meaning analysis in Case A means that plain meaning is the correct approach to statutory interpretation in Case A; a majority vote based on an analysis of legislative history in Case B means that legislative intent is the correct approach to statutory interpretation in Case B. And so on, alphabetically ad infinitum.

As personal matter, however, the legislator whose name is attached to a statute surely must get some satisfaction from seeing a majority of the Justices interpret that statute as he or she had hoped they would. That is what happened to Representative James R. Mann (R-IL)⁷ with the “White-Slave Traffic Act of 1910” (aka the “Mann Act”).⁸

In January 1917, in one of the more famous plain-meaning-versus-legislative-intent cases, *Caminetti v. United States*, Justice William R. Day spoke for the plain-meaning majority, ruling that the Mann Act -- under which “any person who shall knowingly transport . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . shall be deemed guilty of a felony” -- criminalized extramarital affairs involving interstate travel, as well as sex-for-hire. Justice Joseph McKenna spoke for the three legislative-intent dissenters, noting that a congressional report on the statute indicated that the law was supposed to cover only commercial sex.⁹

On January 29, Mann wrote to Day:

My dear Mr. Justice Day:--

I hope it is entirely proper for me to congratulate you upon your opinion and the decision of the Supreme Court in the white slave cases. While I have never thought that the writer of that Act was the one best qualified to construe the meaning of the Act and hence have refrained from any expression of opinion concerning my intent and thought when I wrote the language of the white slave law, yet you have construed the law the way I intended when I very carefully considered and wrote it, and while I think there probably was no public statement to that effect, yet in private statements made on the floor of the

⁴ *Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423, Oral Argument, Nov. 8, 2010, transcript at 20.

⁵ JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 54 (1995).

⁶ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., opinion concurring in result).

⁷ *Mann, James Robert*, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS*, bioguide.congress.gov/scripts/bio-display.pl?index=M000104 (vis. Nov. 16, 2010).

⁸ 18 U.S.C. § 2421 (as amended).

⁹ *Caminetti v. United States*, 242 U.S. 470 (1917) (emphasis added).

House before the bill was passed, I explained to a good many Members the bill was going fully as far as is stated in your valuable opinion.

Yours very sincerely,
James R. Mann¹⁰

Day replied the next day:

My dear Mr. Mann:

I beg to thank you for your kind note of the 29th instant, received this morning.

I think it is not improper for me to express to you the appreciation that I have of your view of the recent opinion of the Supreme Court in construing the so-called "White Slave Act". While of course we could not know, except from the language used, the purpose and intent of the framers of the law, the confirmation which you give the construction of the act is very gratifying indeed. It was very good of you to send me your kind letter.

With best wishes, I am, with high regard,
Very sincerely yours,
William R. Day¹¹

For Day, Scalia, and other devotees of plain-meaning interpretation, this exchange would be at most a small source of gratification. It would be irrelevant to the interpretation of the Mann Act, always and forever. But what might it mean to a devotee of legislative intent? Is there such a thing as secret legislative history? If there is, and a secret is revealed, may it be considered when settling the meaning of statutory language enacted in the shadow of that secret?¹²

Alas, we probably will never know whether Mann's congratulatory exposé might matter. The essential plain-or-not words interpreted in *Caminetti* -- "or for any other immoral purpose" -- were amended out of the statute by Congress long ago.¹³

Ross Davies is editor-in-chief of the *Green Bag* and a law professor at George Mason University. Copyright © 2010 Ross E. Davies. An abbreviated version of this paper appeared in the *National Law Journal's* online newsletter, the *Supreme Court Insider*, on November 23, 2010.

¹⁰ Letter from James R. Mann to William R. Day, Jan. 29, 1917, in Papers of William R. Day, Library of Congress, Manuscript Division, box 32.

¹¹ Letter from William R. Day to James R. Mann, Jan. 30, 1917, in Papers of William R. Day, Library of Congress, Manuscript Division, box 4.

¹² Cf. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2837 n.28 (2008) (Stevens, J., dissenting) (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part)).

¹³ Public Law 99-628, 100 Stat. 3510 (Nov. 7, 1986).

JAMES R. MANN,
MEMBER OF CONGRESS.

UNITED STATES HOUSE OF REPRESENTATIVES,
OFFICE OF REPUBLICAN LEADER,
CAPITOL BUILDING,
WASHINGTON, D. C.

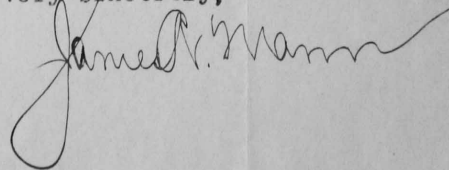
January 29, 1917.

Mr. Justice Day,
1301 Clifton Street,
Washington, D.C.

My dear Mr. Justice Day:--

I hope it is entirely proper for me to congratulate you upon your opinion and the decision of the Supreme Court in the white slave cases. While I have never thought that the writer of that Act was the one best qualified to construe the meaning of the Act and hence have refrained from any expression of opinion concerning my intent and thought when I wrote the language in the white slave law, yet you have construed the law the way I intended when I very carefully considered and wrote it, and while I think there probably was no public statement to that effect, yet in private statements made on the floor of the House before the bill was passed, I explained to a good many Members the bill as going fully as far as is stated in your valuable opinion.

Yours very sincerely,



January 20th, 1917.

Hon. James R. Mann,
House of Representatives,
Washington.

My dear Mr. Mann:

I beg to thank you for your kind note of the 20th instant, received this morning.

I think it is not improper for me to express to you the appreciation that I have of your view of the recent opinion of the Supreme Court in construing the so-called "White Slave Act". While of course we could not know, except from the language used, the purpose and intent of the framers of the law, the confirmation which you give the construction of the act is very gratifying indeed. It was very good of you to send me your kind letter.

With best wishes, I am, with high regard,

Very sincerely, yours,

William C. Clegg