What's a Judge To Do?

Thomas A. Balmer

Follow this and additional works at: http://digitalcommons.law.yale.edu/yjlh
Part of the History Commons, and the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/yjlh/vol18/iss1/4

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Law & the Humanities by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Book Review

What's a Judge To Do?


Thomas A. Balmer*

Holmes famously declared, "[I]f my fellow citizens want to go to Hell, I will help them. It's my job."¹ In this, as in many of his pithy aphorisms, Holmes exaggerated for effect, and few judges would describe their role in quite those terms. But Holmes’s meaning was plain: A judge’s role is not to implement his or her own vision, but rather to permit the implementation, consistent with constitutional limitations, of the public’s agenda as expressed through democratic political institutions, even if the judge believes that agenda is foolish. And it was, of course, Holmes’s

* Associate Justice, Oregon Supreme Court. A.B., Oberlin College, 1974; J.D., University of Chicago, 1977. I am indebted to Jack Landau for his helpful comments on an earlier draft.

willingness to uphold social legislation despite his private doubts about its efficacy or wisdom that helped establish his place in American history.

Aharon Barak has a different take on the judge’s role. In his view, “the role of the judge is to help bridge the gap between law and society’s changing needs . . . .”2 When interpreting a statute, a judge is to look for the “purpose” of the statute, which, Barak asserts, will be determined by the “fundamental values of the system and fundamental human rights” (p. 171).3 “[T]he judge should give a statute the meaning that responds to society’s needs and protects democracy” (p. 285). In the many aspects of the judge’s role in which, according to Barak, the judge may exercise discretion, he or she should “choose the solution that seems best to him or her,” and, in his view, “that solution is the one that the judge thinks is just” (p. 212). These passages, like the quote from Holmes, exaggerate the more nuanced view of the judicial role that emerges from Barak’s new book, Purposive Interpretation in Law. Yet they clearly point to a theory of judging that is far more expansive and unconstrained than most American judges would recognize—or that they or the public likely would accept.

Barak, the President of the Supreme Court of Israel, has previously reached an American legal audience with an earlier book, Judicial Discretion (1989), and the Foreword to the Harvard Law Review’s Supreme Court survey in 2002,4 among other academic works. Barak’s work stands in contrast to the ex cathedra efforts of American judges who, with the notable exception of Richard Posner, tend to favor slim volumes based on lectures they have delivered, such as Justice Antonin Scalia’s A Matter of Interpretation: Federal Courts and the Law (1997) and Justice Stephen Breyer’s Active Justice (2005). Dense and closely argued, with hundreds of citations to scholarly writings in five languages and from as many continents, Purposive Interpretation demonstrates Barak’s impressive depth of learning as well as his broad experience as an appellate judge.

Barak calls this ambitious and thoughtful, if ultimately unpersuasive, book “an original attempt to construct a comprehensive theory of interpretation applicable to all legal texts (will, contract, statute, constitution, and everything in between)” (p. xi). His purpose is not to describe what courts do in fact,5 but rather to set out what he argues is a “superior” approach to legal interpretation (pp. xi-xii). To evaluate his

2. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 236 (Sari Bashi trans., Princeton Univ. Press 2005) [hereinafter cited in the main text by page number].
theory, then, one asks not whether it accurately describes what courts do when they interpret legal texts, but rather whether it provides useful guidelines to judges who are given the task of interpreting legal texts and is consistent with the role that a particular society gives its judges. Examined in that light, it is apparent that *Purposive Interpretation* asks the right questions, debunks many of the generalizations about interpretation that judges offer in opinions (and commentators in journals), and provides a number of useful answers, both theoretical and practical, about how best to interpret legal texts. Yet the theory fails to make good on its central claim of providing satisfactory guidance on the most difficult interpretive issues. More significantly, as the passages quoted above imply, Barak’s emphasis on judicial discretion in the interpretation of legal texts and his argument that judges should interpret ambiguous statutory and constitutional texts in a way that “actualizes” unwritten and abstract social values suggest a wide-ranging judicial role that raises serious concerns about the role of the judiciary in a representative democracy.

I.

*Purposive Interpretation* begins with a useful review of what is and is not legal interpretation. Although legal interpretation has attributes in common with literary interpretation, it is fundamentally a different exercise. For example, “[a]n interpretation of *Hamlet*, even if correct, is not binding. In contrast, there must be a binding interpretation of a constitution, statute, contract, or will. The interpreter of *Hamlet* seeks to uncover the text’s many meanings. The interpreter of a legal text must resolve the ambiguity of those meanings” (p. 59). Similarly, when a court determines, through interpretation, that a legal text is silent on a particular issue, the court may or may not have the authority to fill that gap—it is likely to in the case of a will or contract, but not in the case of a statute or constitutional provision—but that “gap filling” is not an interpretive exercise (pp. 66-74). Courts routinely apply statutory and common law doctrines to legal texts to fill gaps, resolve inconsistencies, and correct mistakes. In most of those cases, the process of identifying the gap, inconsistency, or mistake requires interpretation, but the identified problem cannot be resolved by interpretation. Interpretation is limited to determining the meaning of legal texts.

Barak then outlines, in sometimes mind-numbing detail, the contours of “purposive interpretation.” The first step in that process is to determine the semantic meaning of the text, which is the meaning or range of meanings that the words of the text will bear. The legal meaning, determined at the end of the interpretive process, cannot go beyond the bounds of the semantic meaning; but there may well be permissible semantic meanings
of a text that would not be permissible legal meanings (pp. 97-109). Nothing here is particularly novel, but Barak helpfully reminds us, for example, that while a dictionary can assist a court in determining "the range of semantic possibilities" of a text, it cannot determine the legal meaning (pp. 106-07). That act requires the court to decide, from sources other than the dictionary, which of the permissible semantic interpretations is the correct legal interpretation.

The centerpiece of Barak's purposive interpretation is the interplay between what he calls "subjective" purpose and "objective" purpose to arrive at the "ultimate" purpose of a legal text. For Barak, the subjective purpose is what the author intended the text to mean at the time it was written, an inquiry that encompasses both the words the author used and other historical information, such as, in the case of a statute, legislative history (pp. 120-47). The objective purpose of the text is the intent of a reasonable author of the text (not the actual intent of the actual author) (pp. 148-81). Determining that purpose involves consideration of both what a reasonable author at the time the text was written would have intended with respect to the specific legal question at issue (pp. 150, 154), as well as what a later reasonable author would have intended given the "values and principles at the time of interpretation" (p. 154). In interpreting a legal text, Barak asserts, the goal is to "synthesize and integrate" the subjective purpose and the objective purpose to arrive at "the ultimate purpose of the text," which is then applied as the "legal meaning" (p. 182).

In many cases, Barak notes, the subjective and objective purposes of a text will be apparent from the text itself and will be consistent with one another. If Rebecca and Paul write a contract in which Rebecca agrees to sell Paul her iPod for $100, a court will have little trouble determining that the subjective intent of the parties in writing the contract—that Rebecca would transfer the iPod to Paul in exchange for receiving $100 from him—and the objective intent of the text of the contract as it would be interpreted by a reasonable person are identical. But in the more difficult cases, the subjective and objective purposes will not necessarily point in the same direction. We may not be able to determine the actual intent of the author of a text—a problem that mushrooms as the number of "authors" grows, as in the case of statutes passed by a legislative body, statutory measures adopted through a vote of the people, or constitutional provisions proposed by a convention but adopted by state legislatures or a

---

6. See also Barak, supra note 2, at 155 ("The question is not what 'liberty' or 'equality' meant at the time the constitutional text was written, but rather what they mean at the time of interpretation.").
vote of the people. As to measures passed by a vote of the people, Barak simply throws up his hands, saying that it is "impossible to know the intent of the text's author, as in the case of a referendum. How can we know the intent of all the voters?" (p. 119). Yet this problem is different only in scope, and not in kind, from Barak's willingness to find the "intend" of a legislative body. And, for those of us who often are called upon to interpret voter-passed measures, there are materials ranging from the ballot's description of the measure to official voters' pamphlet statements to aid in determining what the people intended when they voted for a particular measure. See Lipscomb v. State ex rel. State Bd. of Higher Educ., 753 P.2d 939 (Or. 1988) (relying upon various historical materials to determine the voters' intent in adopting a constitutional amendment by initiative); Jack L. Landau, Interpreting Statutes Enacted by Initiative: An Assessment of Proposals To Apply Specialized Interpretive Rules, 34 WILLAMETTE L. REV. 487 (1998). Barak's difficulty with determining subjective intent in voter-approved measures should, instead, make him more skeptical about determining actual subjective authorial intent in general.
interpret the same text according to the intention of the system” (p. 191).8 It is one thing to argue with Barak's assertion that “[o]bsolete social perspectives should not hold contemporary society hostage” (p. 192). It is quite another thing to suggest, as he does, that as time passes a judge may reject what the legislature intended a particular statute to mean in favor of the judge’s view of a meaning that “fits society’s contemporary fundamental values” (p. 192). To be fair, Barak emphasizes that the subjective purposive is never discarded; it always is considered, but, in his view, its influence declines as the text ages, while the judge is increasingly justified in favoring an interpretation that is more consistent with contemporary values.9 Moreover, the potential open-endedness of Barak's theory also is limited by the fact that the only permissible legal interpretations are those that are within the semantic limits of the text.

Applying Barak’s presumptions raises the obvious question of the role of judicial discretion. Barak confronts the issue directly, and it is a critical part of his theory. Judges do not have completely unfettered discretion in Barak’s world—he believes that they should be constrained not only by the semantic meaning of the legal text they are interpreting but also by their institutional role and various professional norms (pp. 210-12). Moreover, they may exercise discretion only “when the purpose of the text does not point to a single, unique legal meaning” (p. 207). But, as Barak outlines it, purposive interpretation appears to grant judges broad discretion at virtually every stage in the interpretive process: The judge exercises discretion in establishing the range of semantic meanings that a text will accommodate (pp. 214-15), determining subjective purpose (p. 215), determining objective purpose (pp. 215-16), and determining ultimate purpose (pp. 216-17). And even the principles according to which that discretion will be exercised seem broad and variable. In distinguishing

8. Barak’s discussion draws on Professor Eskridge’s argument for dynamic statutory interpretation. Eskridge asserts that original legislative intent “should not always control statutory meaning,” particularly “when the statute is old and generally phrased and the societal or legal context of the statute has changed in material ways.” William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479, 1481 (1984).

9. For a contemporary example of an effort to apply such a view, consider Judge Guido Calabresi’s separate opinion in Quill v. Vacco, 80 F.3d 716, 732-35 (2d Cir. 1996) (Calabresi, J., concurring in the result), rev’d, 521 U.S. 793 (1997). The issue was whether statutes making it a crime to assist someone in committing suicide would be constitutional as applied to a doctor who aided a terminally ill patient in taking his or her own life. The majority held that the statutes violated the Equal Protection Clause. Judge Calabresi concurred in the result, but based his opinion on the advanced age of the statutes, the lack of enforcement in situations of a terminally ill patient seeking to end his or her own life, and the apparent intent of the statutes to criminalize the aiding or abetting of conduct that once had been a crime (attempted suicide) but that had long since been de-criminalized. Id. He believed the statutes, as applied to the facts before him, were unconstitutional, but left open the possibility that they might pass constitutional muster if the legislature reenacted them and expressed its reasons for doing so. Id. at 743. The Supreme Court reversed the equal protection holding in Quill and did not reach the issue of Judge Calabresi’s interpretation of the statute prohibiting assisting in suicide. See 521 U.S. at 808-09.

http://digitalcommons.law.yale.edu/yjlh/vol18/iss1/4
his own view from that of pragmatists such as Posner, Barak writes that he exercises his discretion not to achieve the best or most reasonable solution to a problem of interpretation, but the "just" solution (although he doesn’t explain whether, when, or how his just solution would differ from the "best" or "most reasonable" solution) (p. 214).

This simplified description of Barak’s theory shows the importance of keeping his labels straight, particularly his understanding of "subjective" and "objective" purpose. Like judges who consider themselves “textualists,” Barak focuses on the words of the text. Yet he stands in sharp contrast to Justice Scalia, who also gives primacy to the text. Scalia wants to understand what Barak would call the “objective” purpose of the text, not the actual subjective intent of the drafter. However, as an originalist, Scalia is concerned with that objective purpose as it would have been understood by a reasonable person at the time the text was written. Barak gives weight both to the subjective intent of the drafter at the time of drafting (determined by the text and any other useful historical information) and to the objective purpose of the text. But for Barak, the “objective” purpose of the text is determined at the time of the interpretation, and may well be very different from the actual subjective purpose of the author(s), or even from the objective purpose at a different point in time. Barak sees his theory as sharing aspects of interpretive models offered by Scalia, Posner, William Eskridge, and many (many) others. However, with his argument that judges should implement fundamental moral values—including justice, fairness, and procedural due process—that change over time, purposive interpretation may have most in common with Ronald Dworkin, whose work Barak relies upon throughout the book (e.g., pp. xvi, 239-40, 290-97).

II.

It should be apparent from this brief summary that Barak’s theory of purposive interpretation is an elaborate, carefully constructed effort to align judges with the evolving moral, political, and social values of society. This approach reflects a commitment to using the law as a tool for addressing and shaping the values that guide the community’s commitment to political morality.

10. For example, in Barak’s nomenclature, an interpreter seeking to understand the subjective intent of the author by looking only at the text is engaged in an “objective” inquiry, because that approach “objectifies” authorial intent and arrives at a hypothetical intent, rather than the author’s actual subjective intent. See BARAK, supra note 2, at 35, 265-66.

Explain how interpretation should be used to advance a number of laudable goals. I will discuss several of Barak's useful insights into judicial decisionmaking and then consider some of the shortcomings the theory poses as a method for American judges to approach their work.

First, although Barak tends to view judges as operating with far more autonomy than most of us think we have, his focus on the role of the judge in interpreting and applying legal texts is an important reminder that, in the real world, judges are required to make choices and that those choices matter. Barak recognizes that, particularly in the interpretation of statutes and constitutional provisions, the judge is rarely acting as the "agent" of the author of the text, "channeling" the author's actual intent about how a case should be decided into a judgment in a particular case. In most cases, the purpose of the legislature in enacting a statute was not to tell a later court how to decide the case of *Rebecca v. Paul*, but to achieve a particular social policy goal by enacting a law of general applicability. The legislature understood that the application of the law to specific factual situations would be accomplished through the actions of individuals and institutions and, if necessary, enforced by the courts. For that reason, at one or more levels, the judge acts—and the legislature intended that the judge inevitably act—with some degree of discretion and choice in applying the statute to a particular set of real world facts.

Barak's view of the centrality of the judicial role may come from the rabbinical tradition, and he quotes a charming story about disagreeing rabbis to illustrate his point that texts, even sacred texts, need to be interpreted and applied by authorized interpreters (rabbis or judges) to particular situations in the contemporary world (pp. 156-57). In the story, a group of Talmudic sages are discussing the correct interpretation of a religious law. Rabbi Eliezer tries to convince the others that his interpretation is correct by calling forth various supernatural signs: A stream flows backward at his request, for example. When his colleagues remain unconvinced, he calls on heaven, and a heavenly voice cries out, "Why do you dispute with Rabbi Eliezer seeing that in all matters [religious law] agrees with him?" But one of the other rabbis responds that the answer to disputed interpretation is no longer in heaven. The Torah, he says, "had already been given at Mount Sinai," and "we pay no attention to a Heavenly voice, because thou hast long since written in the Torah at Mount Sinai. After the majority [of the rabbis] must one incline" (p. 156). The rabbi's role is not to interpret the Torah as God or Moses would have understood it or as it would have been understood by the earliest communities to which it was revealed, but to interpret the Torah in

---

a way that is faithful to God and to the text and that applies it and makes sense of it at the time and in the circumstances that the interpretation is offered. As Barak puts it, the story he tells illustrates "the distinction between the divine intent of the author and the meaning an interpreter gives to the work, a meaning that is disconnected from the author's intent and may even conflict with it" (p. 157). Again, Barak's insistence that a judge may interpret a statute in a way that is "disconnected" from or in conflict with the author's intent may well strike the reader as giving the judge too much power, but it reminds us that legal texts, even quite old ones, have their impact only because a judge in the present day engages in the act of interpretation and applies the text in a particular case.

Barak is also helpful in recasting a number of widely used and sometimes contradictory interpretive "rules" as presumptions (e.g., pp. 90-91). For example, rather than articulate as a "rule" the axiom that a statute should be interpreted, if possible, in a way that is consistent with the constitution or that different provisions of the same statute should be interpreted not to conflict with each other, as courts often do, Barak restates these rules of construction as "presumptions" (e.g., p. 358). The virtue of this approach, which seems at least as descriptive as it is prescriptive, is that it forces judges to confront more directly the task in which they engage when interpreting a legal text. Just as a court's reliance on a dictionary to interpret a word in a statute may allow the judge to avoid explaining why he or she chose one of several possible definitions, so too a court's resort to the "rule" of interpreting a statute so as not to conflict with the constitution can short-circuit what perhaps should be a more considered review of the text and context of the statute and the legislative intent behind it. Perhaps the legislature's intent in passing the statute actually was inconsistent with the constitution, and the court, rather than offering a strained but constitutional interpretation, should simply hold the statute unconstitutional. By stating these common interpretive canons as presumptions, Barak reminds judges that, in particular cases, they may be rebutted by contrary information.

Another strength of Barak's approach is his recognition that purposive presumptions "apply always and immediately" (p. 91). By that, he means that, in statutory interpretation, the judge can begin with the legislative history or with the text of the statute; the final interpretive result should be the same. That is because purposive interpretation presumes that the purpose of the statute as revealed by its text is the subjective purpose of the legislature in enacting the statute (pp. 93-94). That presumption, however, may be rebutted by legislative history clearly demonstrating that the legislature did not have the purpose that the text appears to support. Thus, for Barak, legislative history is always relevant and always a permissible source when interpreting a statute, but reliance on legislative
history to rebut a different tentative purpose determined by examining the text itself is permitted only if the purpose as demonstrated by the legislative history is so compelling that it overcomes the presumption in favor of the text-derived purpose. This aspect of Barak’s theory echoes the legal realists and seems more useful than the often-expressed view that legislative history is admissible only if the statutory language is ambiguous.\(^1\) By stating the rule in favor of (what most of us would call) an objective reading of the text as a presumption, Barak preserves the primacy of the statute’s text, but allows consideration of other relevant information about its meaning.

III.

While I have mentioned a few of the ways in which *Purposive Interpretation* usefully reconceptualizes the interpretation of legal texts—and there are others—most of the attention this book is likely to attract will focus on Barak’s call for judges to base their rulings, in many of the most difficult cases, on unwritten, abstract social values. Barak, of course, recognizes the principle of legislative supremacy (p. 238), and he agrees that every legal interpretation must be encompassed within the semantic boundaries of the text. Yet, as the earlier discussion of discretion suggests, Barak’s view of the permissible range of judicial decisions in a particular case—and of the sources to which a judge may look in making those decisions—is breathtaking. For Barak, the “general purpose of every normative provision contained in a will, contract, statute, or constitution is to guarantee equality, fairness, and just results” (p. 149). In his view, interpretation should be guided by principles of “equality, justice, and morality” (p. 164). “Judges should . . . give expression to the social consensus that reflects the basic principles, ‘deep’ values, and national credo of their society” (p. 167). Barak is less than clear about how judges are to distinguish “their own subjective perspectives about the basic values,” which are to be avoided (p. 165), from their objective determination of the “social consensus that has crystallized in their

---

13. *Compare* Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143, 1146 (Or. 1993) (“If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history to inform the court’s inquiry into legislative intent.”), *with* BARAK, *supra* note 2, at 349 (“Legislative history is admissible whether or not the statute seems clear on a first reading.”). But, as is often the case in this book, Barak takes what appears to be a reasonable idea one step beyond reasonableness, and without any obvious limiting principle:

All credible evidence—whether internal or external to the text—is admissible. There is no distinction between a clear text and an unclear text. No text is clear until the conclusion of the interpretive process. And every text is clear—for the purposes of the interpretive problem to be adjudicated—once the interpretive process concludes.

BARAK, *supra* note 2, at 231.
systems" (p. 165). He is, however, confident that judges are "well placed to ignore passing trends and to express society's deep values" (p. 168).

It should be apparent that Barak's perspective goes far beyond the insight of the legal realists that judges do not operate in a vacuum, but rather bring diverse, real world experiences to their jobs and make decisions that inevitably reflect the social context in which they work. He writes:

Social consensus around fundamental and basic viewpoints should guide judges in their judicial work, both in infusing new basic values into the system, and in removing basic values that have become obsolete. This principle of canonizing values over which there is consensus is itself a basic value of the legal system.

Judges should operate within society's established central framework, not the occasional temporary structures it may build. They need not give expression to the passing trends of a society that is not being true to itself.

(p. 167).

The problems with Barak's approach are myriad—and they have not gone unnoticed. In reviewing decisions of the Supreme Court of Israel under Barak's leadership, Robert Bork described the court as "simply the most activist, most antidemocratic court in the world." Other observers of the Supreme Court of Israel have criticized Barak's view that judges should identify and implement abstract social values inherent in a constitutional text in the course of overturning legislative choices. Gary Jeffrey Jacobsohn notes that Barak's "[r]eliance on a high level of abstraction to achieve a unified view may indeed fuel the anxiety of powerful constituencies that the 'enlightened' opinion from which guidance in values is to be found is likely to be a liberal, generally secular intellectual elite, widely perceived as unrepresentative of Israeli public opinion." And he quotes one of Barak's predecessors on the court, Moshe Landau, who warned that "[i]f questions of great political import are left to be finally decided by the Supreme Court of Israel, it will lead to the politicization of the Court . . . ." Commentators approaching Barak's views of the judicial role from a more theoretical perspective have pointed out that he takes only the most limited account of the institutional role that

courts, as opposed to legislatures, should play in a democracy.\textsuperscript{17}

Why should an opinion by a judge deciding a legal dispute between two parties—rather than a statute enacted by the legislature or a constitutional provision adopted by the people—be the source of “infusing new basic values into the system” and “removing” “obsolete” basic values? Indeed, Barak’s willingness to have judges pour new values into statutes and constitutional provisions raises the question of whether what he calls interpretation actually is more like legislation.\textsuperscript{18}

Certainly, we want judges who are just and sensitive to the values of fairness and equality and who understand that they are deciding cases against a legal background that includes not just democratic political institutions, but also traditions of free expression and respect for minority rights. We want them to justly and wisely interpret the statutes and constitutional provisions relevant to any particular case, and we understand that some of the most important constitutional provisions are phrased in broad and general terms that are given more specific content in judicial decisions. But most of us (judges included) do not view judges as having been selected, by appointment or election, because they are uniquely qualified to distinguish “the passing trends of a society that is not being true to itself” from the unwritten “deep,” fundamental values that accurately reflect our “social consensus.”

It sometimes seems as if Barak has taken too much to heart the story of the rabbis interpreting an ancient, sacred text. Recall that Barak offers the story as “a wonderful expression of the distinction between the divine intent of the author and the meaning an interpreter gives to the work, a meaning that is disconnected from the author’s intent and may even conflict with it” (p. 157). However, in a democracy, judges are not interpreting sacred texts—they are interpreting statutes enacted by democratically elected legislatures or constitutional provisions that we deem the people to have agreed upon as their fundamental law. And a judge deciding a legal case is not a rabbi teaching a community of believers how they should live in accordance with divine law. At the most fundamental level, law and the state are not a religion.

Barak’s theory also falters because it assumes that there is social

\textsuperscript{17} See, e.g., Cass Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885, 933 n.160 (2003).

\textsuperscript{18} See Richard Posner, The Supreme Court, 2004 Term—Foreword: A Political Court, 119 Harv. L. Rev. 31, 40 (2005) (“The older and vaguer the provision at issue, the harder it is for judges to decide the case by a process reasonably described as interpretation rather than legislation.”) Posner describes the United States Supreme Court’s constitutional cases as exhibiting the same kind of broad, value-laden decisionmaking that Barak advocates. However, while Barak embraces that role for judges generally, Posner distinguishes the Supreme Court’s political role from the way other judges and courts decide cases, id. at 40, 45-46, and advocates a “modest” approach to the Court’s “political judging in constitutional cases” that is far removed from Barak’s view, id. at 54-60.
consensus on certain fundamental values, including democracy and human rights. Yet, once one moves beyond the most abstract level—a level rarely useful to a judge deciding a particular case—it seems that the social consensus he wants judges to rely upon often is absent. On the contrary, Western democracies in general, and the United States in particular, are highly diverse, pluralistic societies with multiple views as to what, in practice, is "just," "fair," or "democratic." Holmes again is apropos: "[A constitution] is made for people of fundamentally differing views . . . ." And a good argument can be made that judges (and members of the public) often can agree on the result in a particular case, when they might well disagree on general philosophical or jurisprudential principles.

Even if one were to accept the institutional aspect of Barak's view—that we should entrust judges with the task of expressing society's consensus about "deep values"—one is left with the question of how judges are to perform that task. Presumably, they are not to rely upon public opinion polls, which generally measure the "passing trends" that Barak wants to avoid. Similarly, legislation cannot be the source of these fundamental values, since much of Barak's purpose is to explain when judges are permitted to reject statutes in favor of inconsistent, but more fundamental constitutional values. Barak writes that judges are to "derive" the legal system's fundamental values from "the core documents of the legal system, the democratic nature of the regime, the status of the individual as a free person, the social consensus, and the case law of the courts" (p. 356). But exactly (or even generally) how that "derivation" should take place is mysterious.

Putting the members of the United States Supreme Court to one side, most American judges simply go about the business of deciding cases as best they can, interpreting legal texts in ways guided by constitutional and statutory provisions, decisions from higher courts, prior cases, and the common law tradition. We are skeptical of prescriptive meta-theories such as that offered by Barak. We are more interested in the nitty gritty of what the words of, say, a workers' compensation statute, securities fraud

20. Cass Sunstein makes this point:
The distinctly legal solution to the problem of pluralism is to produce agreement on particulars, with the thought that often people who are puzzled by general principles or who disagree on them can agree on individual cases. When we disagree on the relatively abstract, we can often find agreement by moving to lower levels of generality.
CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 47 (1996). Interestingly, Sunstein applies the same thought to disagreements about theories of interpretation. Different judges on the same court may have different theories of interpretation, they may apply different theories in different areas of the law, and they may not adhere to consistent, well-articulated theories at all. Yet that disarray may assist, rather than hinder, their ability to agree upon decisions in particular cases. See generally id. at 167-90.
prohibition, or criminal sentencing guideline mean for a particular case. Barak accurately describes, in part, the process by which we consider the words of the relevant text, its context, and what its author(s) intended. In the rare case in which American judges (again, other than those on the Supreme Court) have plausible interpretive choices that would require reliance on fundamental social values such as “democracy” or “human rights”—as opposed to applying a constitutional or statutory text in light of prior interpretations—Barak provides little guidance.

At a more mundane and technical level, *Purposive Interpretation* suffers from some defects that could have been avoided. Princeton University Press should be commended for putting the footnotes at the bottom of the page, rather than at the end of the volume. Yet in other ways, the publisher has done little to ease the reader’s burden. The book could have used a strong-willed editor and a more careful proofreader. Taking the old brief-writing saw of “explaining what you’re going to explain; explaining it; and then explaining what you explained” one step further, Barak explains his theory in one chapter; devotes five successive chapters to further explaining discrete aspects of the theory; explains the theory again as he provides an (additional?) “theoretical basis” for it; explains it again as he compares it with other theories of interpretation; and, finally, explains it by applying the theory to the four types of legal texts—wills, contracts, statutes, and constitutional provisions—that he introduced at the outset. Moreover, particularly in the chapters explaining the parts of the theory and in those describing the application of the theory, he repeats the substance of the text in dozens of quotations from his opinions for the Supreme Court of Israel (e.g., pp. 141, 143, 149, 155, 157, 160, 329, 333, 349, 361).\(^{21}\) And there are other minor irritants, such as the indexer, who thinks H.L.A. Hart and Henry M. Hart, Jr. must be the same person.

IV.

There is much to admire in Barak’s view of the just society. Protection of human rights, formal and substantive democracy, equality, fairness: These are fundamental values that a society should protect. Where Barak is on shaky ground is in placing so much faith in judges to identify society’s “consensus” on these values; to articulate that consensus with sufficient particularity that it can be useful in deciding cases; and then to

\(^{21}\) Perhaps the editors simply skipped over Barak’s quotations from his own opinions. That would explain, for example, one quotation from a Barak opinion about the “environment” of a statute—“[i]n addition to the immediate legislative context, this environment includes wider circles of accepted principles, fundamental objectives, and basic standards,” Barak, *supra* note 2, at 152—that simply repeats word for word a sentence that appears, although not as a quotation from an opinion, three pages earlier, see Barak, *supra* note 2, at 149.
interpret legal texts in light of that consensus. If a “consensus” emerges on certain social values, it can—and often should—be implemented through legislation, as with statutes prohibiting discrimination in employment and housing on the basis of race, gender, or disability. The very generality of values such as “democracy” and “human rights” makes it difficult to translate those concepts into actual policies, other than through the give and take of the political process. Judges, of course, do have an important role to play, interpreting constitutional provisions from free speech to equal protection, and even a judge and scholar as far removed from Barak’s way of thinking as Posner acknowledges that some of those decisions, particularly at the Supreme Court level, inevitably turn, in important part, on values and policy choices. Yet Barak never convincingly makes the case for allowing judges to exercise the broad discretion he advocates in the face of contrary policies adopted by democratic political institutions, nor does he articulate a workable limit on the range of that discretion. Barak’s well-intentioned judge seeking to advance democracy and human rights would be a better judge, more attuned to representative political institutions, if he or she recalled Holmes’s comment about helping his fellow citizens go to Hell, if that’s what they want—or at least Learned Hand’s more gentle reminder that “the spirit of liberty is the spirit which is not too sure that it is right.”
