
JUDGING AS SOCCER: JURISPRUDENCE, LEGISPRUDENCE,
AND METAPHOR

BY: MATTHEW REID KRELL*

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* Ph.D. Candidate, Department of Political Science, The University of Alabama. B.A., The George Washington University, 2004; J.D., University of Alabama School of Law, 2009. I am indebted to David Anderson, William Blake, Paul Horwitz, and Joe Smith for commentary on various drafts of this piece; any remaining errors are my sole responsibility.

Much ink has been spilled in an attempt to determine what, exactly, can be drawn from the insistence that judges “call balls and strikes,” like an umpire. Much ink has also been spilled in an attempt to suggest that nothing should be drawn from that metaphor. This essay attempts to proffer something new: a critical analysis of major metaphors offered to explain judging through the lens of statutory interpretation. Instead of the artificial division between jurisprudence and legisprudence, this essay argues that they are, in fact, the same process viewed through different lenses. It concludes by offering an alternative metaphor to stand beside the baseball-umpire metaphor: that of the soccer referee. This piece makes two contributions to the scholarly literature: first, it presents a unified view of two types of legal theory previously regarded as unrelated; and second, it presents an alternative symbol for judging to expand the reach of legal theory into new arenas and new minds, and to prevent the reification of judging into baseball.

INTRODUCTION

The¹ use of metaphors for judging is plentiful. There are efforts to treat judges as referees or umpires,² theatre critics,³ mythical creatures,⁴ the Commissioners of Baseball,⁵ figure skating judges,⁶ as life’s “tiebreakers,”⁷ surgeons,⁸ as platoon leaders,⁹ (somewhat unbelievably) as

¹ Aside, *The Common-Law Origins of the Infield-Fly Rule*, 123 U. PA. L. REV. 1474, 1474 n.1 (1975).

² See generally Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 527–28 (2009); Mitchell N. Berman, *Let ‘Em Play: A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1329 (2011); William D. Blake, *Umpires as Legal Realists*, 45 PS: POL. SCI. & POL’Y 271 (2012) (analyzing the correlation between the roles of judges and baseball umpires); Kim McLane Wardlaw, *Umpires, Empathy and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1630–33 (2010); Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 42–46 (1994) (demonstrating the metaphor of judges as umpires).

³ See Milner S. Ball, *The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 82 (1975).

⁴ See RONALD DWORKIN, *LAW’S EMPIRE* 239–41, 245, 250, 263–64 (1986) (referencing Hercules as a metaphor for judges).

⁵ See Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 114–19 (2010).

⁶ See Chad M. Oldfather, *Of Umpires, Judges, and Metaphors: Adjudication in Aesthetic Sports and Its Implications for Law*, 25 MARQ. SPORTS L. REV. 271, 286–87 (2014).

⁷ See Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. CHI. L. REV. 1661, 1664–65 (2010).

⁸ See RICHARD H. KRAEMER ET AL., *ESSENTIALS OF TEXAS POLITICS* 185 (10th ed. 2008).

⁹ See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189–90, 200, 205 (1986).

oysters,¹⁰ and as color commentators.¹¹ It is not entirely clear that any of these metaphors are helpful in allowing us to understand either *what* judges do nor *how* they do it.¹² But still they persist. The power of metaphors, allowing us to abstract complex notions into a simple construct that is more easily understood, is one that is relatively straightforward—“[a]nalogies are not superfluous decoration to ornament our sentences; they form the basic structure of our understanding of the world.”¹³

While sustained criticism has come to bear on the inattentive use of metaphor in legal reasoning,¹⁴ metaphors still have defenders.¹⁵ The purpose of this essay is not to resolve the debate over metaphors or even to suggest a resolution. I am decidedly pro-metaphor; in fact, I intend to lay a new one on the table in this essay. The truth is that metaphors about judging should, if properly analyzed, tell us about three things: judging, the activity treated as metaphor, and the chooser of the analogy.¹⁶ I will limit my discussion of the third issue to note that there may be a gendered

¹⁰ See Stephanie Leonard Yarbrough, *The Jury Consultant—Friend or Foe of Justice*, 54 SMU L. REV. 1885, 1899 (2001).

¹¹ See Adam Benforado, *Color Commentators of the Bench*, 38 FLA. ST. U. L. REV. 451, 454, 460–61 (2011).

¹² See RICHARD A. POSNER, HOW JUDGES THINK 182–83 (2008) (criticizing the use of analogies in judicial context); Allen, *supra* note 2, at 544–46; Benforado, *supra* note 11, at 453, 457, 459; Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1035 (2006); Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1078–80 (2006); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 706–07 (2007). *But see* Blake, *supra* note 2, at 275 (arguing that the umpire analogy is useful for teaching the formalist-realist divide).

¹³ Benforado, *supra* note 11, at 455 (citing GEORGE LAKOFF & MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR (1989)).

¹⁴ See, e.g., Adam Arms, *Metaphor, Women, and Law*, 10 HASTINGS WOMEN’S L.J. 257, 274–76 (1999) (discussing how scholars have found that using sports metaphors can create a sexist analysis of the situation); *see also* Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN’S L.J. 225 (1995) (revealing how the use of metaphors affects the adversarial system). *See generally* Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053 (1989) (examining the use of metaphors in everyday life).

¹⁵ *See generally* Blake, *supra* note 2 (explaining the continued use of metaphors in the context of umpiring in baseball); Oldfather, *supra* note 2, at 42–46 (demonstrating the continued debate regarding metaphors).

¹⁶ *See generally* Benforado, *supra* note 11, at 455 (citing LAKOFF & TURNER, *supra* note 13, at xi) (discussing the creation of an analogy).

aspect to the choice of baseball metaphors.¹⁷ Instead, this essay will focus entirely on the first topic: what can the metaphors we choose tell us about judging?

Metaphors have different utilities.¹⁸ From the various metaphors used for judging and statutory interpretation, this essay derives principles that should inform our use of metaphors in legal analysis. From that, this essay evaluates the ways in which scholars have analogized judging to other forms of human activity, and finds these methods lacking overwhelmingly. Ultimately, the “baseball umpire” metaphor,¹⁹ employed most prominently by John Roberts in his confirmation hearings for the position of Chief Justice,²⁰ meets all of the requirements this essay defines. But this is not enough. One danger of the metaphor is the reification of the referent to the symbol.²¹ This refers to the assignment of characteristics of the symbol (in this case, the umpire) that are not appropriately attributable to the referent (judging or statutory interpretation).²² The accepted way to avoid reification is diversity of symbolism—using alternative metaphors to ensure that cognitive processing refers to the referent rather than to the symbol.²³ Thus, one purpose of this article is to demonstrate that an additional symbol can overcome the shortcomings of rejected alternatives, as well as the umpire metaphor.

¹⁷ See, e.g., Blake, *supra* note 2, at 272–75 (generally discussing metaphors in the context of baseball, limiting the discussion to men as umpires); Oldfather, *supra* note 2, at 36 (indicating that the oppression of women throughout history has been “nothing more than a naked quest for power,” explained in terms of “fair play.”); Yarbrough, *supra* note 10, at 1186 (commenting on how certain metaphors exclude women); see also Zelinsky, *supra* note 5, at 114–17 (discussing the changing nature of the judge-umpire analogy); Arms, *supra* note 14, at 274–76 (noting one critique of the baseball metaphor’s use, indicating that “feminist theories have found in sporting rhetoric ‘the very essence of patriarchal oppression.’”); Thornburg, *supra* note 14, at 267 (discussing the influence of gender-biased metaphors). But see Wardlaw, *supra* note 2, at 1643–44 (noting the judge-as-umpire construct in the context of ruling on the issue of whether a private company is obliged to treat pregnancy as other disabilities).

¹⁸ See Ross, *supra* note 14, at 1071.

¹⁹ See, e.g., Allen, *supra* note 2; Berman, *supra* note 2; Oldfather, *supra* note 2; Wardlaw, *supra* note 2 (all discussing the role of the umpire analogy). See generally Blake, *supra* note 2 (analyzing the correlation between the roles of judges and baseball umpires).

²⁰ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary U.S.S.*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

²¹ See LAKOFF & TURNER, *supra* note 13, at 67; Thornburg, *supra* note 14, at 228–29.

²² See Thornburg, *supra* note 14, at 237–40.

²³ See generally *id.* (discussing alternative metaphors).

As the legal profession and the law-school student body diversifies,²⁴ the metaphors that they rely on should similarly reflect the diversity of experiences. Even if baseball metaphors are superior to most others, the possibility that international students or attorneys—operating without baseball as a cultural touchstone—will be confused suggests that additional metaphors may be helpful. A second purpose of this essay is to argue that a soccer metaphor can serve as a heuristic for a population that would find a baseball metaphor confusing.

Finally, this essay suggests that we may be able to better discern the essential qualities of judging, both jurisprudentially and legisprudentially,²⁵ by employing the metaphor of the soccer referee. Like a judge, a soccer referee is essentially unchallengeable within the four corners of their domain.²⁶ Like judges, they are asked to render decisions not only based on the text of the rules that they enforce, but by the facts of the game being played before them; and like judges, they are human and thus err.²⁷ However, unlike judges, soccer referees literally cannot be reversed.²⁸ Thus, it may be possible that the use of baseball metaphors to illustrate the act and role of judging are inapt not because they are necessarily *bad* metaphors, but because they seem incomplete.

The rest of this essay will proceed as follows: Part I will address the distinction between jurisprudence and legisprudence and it will suggest that, at least within the realm of the utility of sports metaphors, the distinction is false. It will then briefly outline the five major theories of statutory interpretation and attempt to equate those five approaches to jurisprudential approaches, further illustrating the unity of jurisprudence and legisprudence. Part II will consider the utility of the major judging metaphors for explicating and illuminating each of these approaches. Part III will offer up how a soccer-referee metaphor can provide better and more complete illumination of judging.

²⁴ *Id.*

²⁵ See, e.g., Aaron-Andrew P. Bruhl & Ethan J. Lieb, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012) (analyzing the differences and distinguishing between jurisprudence and legisprudence).

²⁶ Federation Internationale de Football Association (FIFA), *Laws of the Game 2015-2016*, FIFA 25–29, Law 5 (The Referee), http://www.fifa.com/mm/Document/FootballDevelopment/Refereeing/02/36/01/11/Lawsofthegame_webEN_Neutral.pdf (last visited July 8, 2017).

²⁷ *Id.*

²⁸ *Id.*

I. THE DEBATE AS OLD AS *JARNDYCE*: JURISPRUDENCE V. LEGISPRUDENCE

In order to frame the discussion, consider two brief vignettes. On April 17, 2015, the Chicago Cubs played the San Diego Padres at Wrigley Field:

[I]n the bottom of the seventh, . . . [Cubs] outfielder Dexter Fowler hit a ball that lodged in the still-leafless vines in left-center field. Both [San Diego outfielders Wil] Myers and Justin Upton at first appeared to go for the ball, then remembered the rule that says that any ball caught in the vines is a ground-rule double and held up their arms, as player[s] are taught to do at Wrigley. Meanwhile, Fowler circled the bases. After the umpires conferred and then discussed it with the replay folks in New York, the call of double was upheld.²⁹

By way of comparison, consider the following story, as told by a United States Soccer Federation referee:

College men's D-3 game between two teams with a history of relatively clean play. Blue is in line for a play-off spot. #17 [for] Blue is acting odd on the field in the first ten minutes of the game. He is going in late but soft, he is being a minor league [d**k] to the referee, and he tried to bear hug an attacker as the attacker was transitioning from the defensive third to the middle third of the field. None of these interactions were serious. They made no sense. The referee had a brief word with the Blue captain, and the captain said the following: "*We have three games left and he has four cautions.*" The NCAA suspends soccer players for one game when they accumulate five cautions. Once the suspension is served, the card count is dropped back to zero. On the next odd play by #17, the referee cautions him. The play/called foul itself was super soft and in most college games it would not be considered a foul much less a card. The ref wrote it up as persistent infringement. As soon as the card came out, 17 smiled and said "*I'll start playing now . . .*" The game went swimmingly from there.³⁰

These two stories illustrate the real difference between the two sports' approach to the rules of the game.³¹ In the Cubs-Padres game,

²⁹ Al Yellon, *Umpires 5, Cubs 4: Bad Ball and Strike Calls Doom Cubs*, SBINATION (Apr. 17, 2015, 5:05 PM), <http://www.bleedcubbieblue.com/2015/4/17/8447787/cubs-padres-recap-kris-bryant-umpires-bad-calls-mlb-scores>. I attended this game with a friend, and the incident described here was, in essence, the impetus for this essay.

³⁰ David Anderson, *You're the Referee*, BALLOON JUICE (Oct. 21, 2015, 2:42 PM), <http://balloon-juice.com/2015/10/21/youre-the-referee>. Anderson has produced a variety of posts at *Balloon Juice* telling interesting and strange stories from his work as a soccer official; fair warning, some of them are not safe for work.

³¹ See generally Anderson, *supra* note 30; Yellon, *supra* note 29 (each demonstrating an approach to the rules of the game). In particular, these pieces demonstrate that baseball, as an institution, would sooner change the rules than change the refereeing, while in soccer the opposite impulse prevails.

“[t]he point of the rule is so that players don’t have to go searching for a baseball hidden in the ivy. But in April, there’s no ivy and the ball was visible.”³² In Anderson’s soccer story, as he finishes,

the referee was implicitly rewarding #17 for being a smart [aleck] rules lawyer. We should not reward smart [aleck] rules lawyering on the field. However, given the accumulation sit-out and the incentive structure of teams, the incentive is for smart [aleck] rules lawyering. I could see myself giving that card for player safety reasons as I don’t want #17 escalating contact levels until he levels an opponent in an attempt to draw a caution.³³

These two situations have similar outcomes but different complaints.³⁴ In the baseball example, the players engage in what Anderson describes as “smart [aleck] rules lawyering,”³⁵ the umpire rewards it (the hitter rounded the bases all the way to home, and the runner on first scored; both were called back to the bases, where they were stranded), and the response is “the rule needs to be changed.”³⁶ In the soccer example, the smart [aleck] rules lawyer gets what he wants, but the referee regards it as a safety issue intended to prevent the rules lawyer from continuing to escalate the situation.³⁷ At no point does Anderson suggest that the rule should change.³⁸

It is not uncommon to draw distinctions between jurisprudence, or theories about judging and legisprudence, or theories about legislation.³⁹ But when comparing William Blake’s work on the connection between umpiring and judging, it becomes relatively obvious that the distinctions between the two begin to overlap.⁴⁰ While legisprudence, writ large, is

³² Yellon, *supra* note 29.

³³ Anderson, *supra* note 30.

³⁴ See generally Anderson, *supra* note 30; Yellon, *supra* note 29 (both showing complaints arising from these situations).

³⁵ See generally Anderson, *supra* note 30; Yellon, *supra* note 29 (each providing further explanation of the baseball example).

³⁶ Yellon, *supra* note 29.

³⁷ See Anderson, *supra* note 30.

³⁸ See generally *id.* (illustrating that change is not suggested by the author).

³⁹ See Vlad Perju, *A Comment on “Legisprudence”*, 89 B.U.L. REV. 427, 434 (2009) (providing a brief discourse on the distinctions between the jurisprudence and legisprudence).

⁴⁰ Compare Blake, *supra* note 2 (arguing that the analogy of comparing the role of a judge to the role of a baseball umpire is formalistic and misconstrued), with William D. Blake, *Pine Tar and the Infield Fly Rule: An Umpire’s Perspective on the Hart-Dworkin Jurisprudential Debate*, SOC. SCI. RES. NETWORK 2 (Aug. 13, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644034 (analogizing the theory of legal jurisprudence with the judgment- and decision-making skillset of umpires).

concerned with the development of law through legislative mechanisms,⁴¹ when filtered through judging, it becomes statutory interpretation. In short, when the question of interest is *applied* jurisprudence, or how we discern law from legislative enactments, then theories of jurisprudence collapse into theories of statutory interpretation.⁴² This means that we can usefully equate jurisprudential schools to theories of statutory interpretation. Both sets of mechanisms give us lenses through which to view the act of judging: in one set, we are interested in judicial action in a world of common law judging,⁴³ while the other set focuses on judicial action in a civil-law arena.⁴⁴ But at the end of the day, the major schools of thought have parallels that render them functionally equivalent. Like the litigants in *Jarndyce and Jarndyce*, the never-ending estate case in Dickens' *Bleak House*, the interminable debate in jurisprudence leaves most non-participants bereft of care.⁴⁵ Instead, only those who get to bill for the legal-theory *Jarndyce*, *i.e.* legal scholars, derive any benefit.⁴⁶ By reunifying jurisprudence with jurisprudence, and thus with statutory interpretation, it is the (admittedly-ambitious) goal of this section to reinvigorate jurisprudential debates by reconnecting them to real issues in the law.

A. *The Great Divide: Form v. Function*

There is no hope that this essay can elucidate the entirety of jurisprudential thought.⁴⁷ However, it is fair to say that the great divide in statutory interpretation lies between textualism and various purposivist

⁴¹ See Perju, *supra* note 39, at 427–33.

⁴² *Id.* at 433–34.

⁴³ See generally OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881) (discussing the continuity of the development of law throughout eras of time).

⁴⁴ To discern whether federal judges fall into common-law or civil-law categories is well beyond the scope of this essay. Suffice it to say that even in common-law systems, that when judges interpret statutes, they are engaged in an enterprise that is comfortable and familiar to civil-law system actors. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3–47 (1997).

⁴⁵ See generally CHARLES DICKENS, *BLEAK HOUSE* (1853).

⁴⁶ *Id.* at 385–86.

⁴⁷ For an *extremely* brief diversion into the diversity of theories in the legal academy, see Timothy P. Terrell, *The Art of Legal Reasoning and the Angst of Judging: Of Balls, Strikes, and Moments of Truth*, 8 NW J.L. & SOC. POL'Y 37, 45–46 (2012).

approaches.⁴⁸ This is the divide that Blake suggests using when he suggests that umpires can be used to teach the formalist-realist divide.⁴⁹ “Textualists begin with the . . . proposition . . . that a statute’s authority comes from its enactment as law, and, thus, that [a] statutory provision does not change in meaning as the political culture changes. Textualists, however, fiercely reject the notion that judges should seek to determine legislative intent.”⁵⁰ Thus, textualists rely principally on the text of the law to “carry out the policy created by the enacting [legislature], even if later laws are in tension with the older ones, and even if the judge is convinced that the sitting [legislature] would amend the law were it to visit the subject anew.”⁵¹ Textualists use a group of techniques perhaps best described as “rhetorical legerdemain”⁵² to derive meaning from the text where it is ambiguous or otherwise problematic. Ambiguity, of course, lies where you find it, and it is not saying too much to say that textualism sacrifices nuance and accuracy for predictability.⁵³ To that extent, textualism (and indeed, any legal justification for a decision) can be seen as a mere mask for

⁴⁸ See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761–71 (2010) (indicating that some “believe that the inherent difficulty of interpreting statutory language means that judges will never be able to reach a consensus on a single, overarching methodological framework for all statutory cases.”).

⁴⁹ See Blake, *supra* note 2, at 271–75.

⁵⁰ Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1108 (2012).

⁵¹ Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL’Y 915, 916 (2010).

⁵² Yes, that term is mine. No, I don’t apologize for it. However, for authority on techniques employed by textualists, feel free to see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401–06 (1949).

⁵³ *But see* Kieran J. Healy, *Fuck Nuance*, 35 AM. SOC. ASS’N: SOC. THEORY 118 (2017) (asserting that the conceptual fascination of nuances in the field of sociology leads to unsupported sociological theories).

the expression of policy preferences.⁵⁴ However, these external criticisms of law⁵⁵ and judging render any internal approaches incoherent.

Textualists also insist that they have won the statutory interpretation debates, because even those who do not abide by textualism concede that statutory interpretation must begin with the text and then move to other methods of interpretation only if the text fails.⁵⁶ But this misinterprets purposivist schools of statutory interpretation, which begin from the notion that the fundamental legitimacy of law is not the *enactment*, but rather the democratic *choice* to enact.⁵⁷ In other words, purposivist approaches⁵⁸ interrogate the legislature rather than the text. While the text is a key element in purposivist approaches, the text's role is to illuminate the world as the legislature sought to make it.⁵⁹ "Judges should [interpret ambiguous statutes] in such a way as to advance the objectives which, in their judgment, the legislature sought to attain by the enactment of the legislation."⁶⁰

⁵⁴ This is another debate altogether, and is wildly beyond the scope of this essay. However, without going too far down the rabbit hole, an excellent introduction to this debate is in JEFFREY SEGAL & HOWARD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (discussing the debate regarding the impact of Justices' policy preferences on their decision-making processes). Compare MATTHEW BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* 47–63 (2011) (finding that a law-constrained court can be indistinguishable from a sincere expression of ideology), with Rachael Hinkle, *Legal Constraint in the US Courts of Appeals*, 77 J. OF POL. 721, 721 (2015) (suggesting that judges' ideology interacts with their use of persuasive precedent).

⁵⁵ See H.L.A. HART, *Formalism and Rule-Scepticism*, in *THE CONCEPT OF LAW* 124–54 (2d ed. 1994).

⁵⁶ See *Yates v. United States*, 135 S. Ct. 1074, 1077 (2015) ("Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words."); see also Gluck, *supra* note 48, at 1754 ("[T]extualist statutory interpretation has taken startlingly strong hold in some states . . ."); Vaughan R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207, 1210 (2012) ("Text, of course, is always the starting point of any judicial interpretation . . .").

⁵⁷ See generally John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 85–91 (2006) (describing the goals of purposivism in statutory interpretation).

⁵⁸ Which include explicit purposivism, but also include variations on that theme, including intentionalism, dynamic interpretation, contemporary meaning, and pragmatism. I'm sure I'm missing some; these are the ones I will focus on. See discussion *infra* Sections I.A, I.B, II.

⁵⁹ See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 214 (1994) (describing the importance of legislative intent in purposive statutory interpretation).

⁶⁰ *Id.* at 215.

Thus, purposivism sees text as one tool among many, while textualists see the text as the only legitimate tool.⁶¹

This seems remarkably parallel to the formalist and realist divide in broader jurisprudential approaches.⁶² Formalism is the assumption that judges should “apply in every case, according to the meanings, the legal norms he or she can derive textually, conceptually, or through precedent.”⁶³ It also “forbids judges from considering the norm’s purposes, the general policies underlying the legal order, or the extrajuristic preferences of the interpreter.”⁶⁴ This, in essence, boils down to the textualist approach to statutory interpretation. Like textualists, formalists expect the law to take place outside the judge.⁶⁵ For both groups, the appropriate sources of law are the minimal set that can be agreed upon as reliable.⁶⁶ Critics of both accuse them of fetishizing the past, while proponents insist that they are simply engaged in an enterprise that values predictability in legal results over other values.⁶⁷

Realists, on the other hand, are the intellectual descendants of Cardozo and Holmes.⁶⁸ They do not unmoor themselves from the past; instead, they acknowledge that:

[I]n the development of [legal] principles, history is likely to predominate over logic or pure reason [But a] residuum will be left where the personality of the judge, his taste, his training or his bent of mind, may prove the controlling factor.⁶⁹

⁶¹ See Manning, *supra* note 57, at 96 (discussing the distinction between the textualist and purposivist methods of statutory interpretation).

⁶² See, e.g., Blake, *supra* note 2, at 275 (utilizing the umpire-judge analogy to explain that legal realism approaches to statutory interpretation allow subjective judgment when necessary, while legal formalism does not consider the underlying utility of statutes that are otherwise indeterminate).

⁶³ Duncan Kennedy, *Legal Formalism*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 8634, 8634–35 (2001).

⁶⁴ Blake, *supra* note 2, at 272.

⁶⁵ See *id.*

⁶⁶ See Kennedy, *supra* note 63, at 8634 (discussing the formalistic techniques of legal interpretation).

⁶⁷ See *id.* at 8635 (discussing predictability and coherent interpretation as a goal of formalistic approaches).

⁶⁸ See generally Blake, *supra* note 2, at 272–75 (discussing the influence of Holmes and Cardozo on realism in statutory interpretation).

⁶⁹ BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 52–53 (BookCrafters, Inc. 1949) (1921).

Thus, while the tools of the formalists are important to realists, they claim that there are situations where that toolkit is insufficient.⁷⁰ This is purposivism in a nutshell. Again, purposivists and realists both acknowledge the utility of their opponents' tools; where they differ is in the demand that *only* those tools can be used. In both cases, the law is not an entity unto itself to be studied for its own sake; for both purposivists and realists, the only purpose of legal reasoning is to give us a mechanism to order the world. In both cases, *the world* is the object of study; legal reasoning is nothing more than the method.

This suggests that when Blake discusses the formalist-realist divide,⁷¹ he can just as easily be describing the textualist-purposivist divide in statutory interpretation. When Terrell uses Pinelli's call of the only perfect game ever pitched in the World Series to unpack the mechanisms of legal reasoning,⁷² we could just as easily use that call to develop a mechanism of statutory interpretation. When John Roberts says that the job of a judge is "to call balls and strikes,"⁷³ he is not just making a comment about his role as a judge broadly, but also about the tools he views as legitimate in analyzing cases and statutes. In all three cases, the use of a baseball analogy illuminates how the law accretes metaphor in an attempt to make the intangible concrete.⁷⁴ It demonstrates that regardless of whether the metaphor is used jurisprudentially or legisprudentially, we may consider its utility in analyzing statutory interpretation.

B. Baskin-Robbins in Legal Theory: The Many Flavors of Purposivism

On top of the formalist-realist divide lies a different, orthogonal divide: positivism and natural law.⁷⁵ Both of these approaches can be usefully mapped onto both sides of the formalist-realist divide, in that

⁷⁰ See, e.g., Blake, *supra* note 2, at 272 (illustrating a realist approach to statutory interpretation).

⁷¹ *Id.*

⁷² See Terrell, *supra* note 47, at 54–58.

⁷³ *Transcript: Day One of the Roberts Hearings*, WASH. POST (Sept. 13, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html>.

⁷⁴ See generally Terrell, *supra* note 47, at 54–58 (exemplifying the difficulty in interpreting the law).

⁷⁵ See Barney Reynolds, *Natural Law versus Positivism: The Fundamental Conflict*, 13 OXFORD J. OF LEGAL STUD. 441, 442 (1993).

positivism can be described as focusing on the law as it is actually practiced,⁷⁶ regardless of whether it is formalist or realist. Natural-law theories, on the other hand, can be said to refer to the actual relationship between “is” and “ought,” whether the focus of the relationship is on the forms of the relationship or its connections to lived realities. Thus, the Hart-Dworkin debate is, to some extent, irrelevant to the issue of statutory interpretation.

That extent does not extend to this essay, however. *Herbert Hart’s* approach to positivism, when considered in its broader context, appears to have some significant relationships to subsets of purposivism in statutory interpretation, specifically, dynamic statutory interpretation.⁷⁷ *Henry Hart’s* connection between jurisprudence and legisprudence is explicit; he is regarded as a leading figure in the legal process movement⁷⁸ and “pure” purposivism.⁷⁹ Pragmatic statutory interpretation, most clearly associated with Richard Posner,⁸⁰ appears strongly related to Edward Levi’s approach to rules, where he said that:

the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them.⁸¹

⁷⁶ See HART, *supra* note 55, at 17 (“[The purpose of the book] is to advance legal theory by providing an improved analysis of the distinctive nature of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena.”).

⁷⁷ *Id.* at 185–93.

⁷⁸ Indeed, the movement took its name from his book. See HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (2006).

⁷⁹ See ESKRIDGE, *supra* note 59. This piece will refer to Henry Hart’s purposivism as “Hartian” to distinguish it more broadly from approaches that look to the statute’s purpose, which will be referred to simply as “purposivism.” In addition, references to Herbert Hart will refer to H.L.A. Hart, while Henry Hart will simply be “Hart.”

⁸⁰ See generally RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) (arguing in favor of pragmatic jurisprudence, as in his opinion, laws are not abstract ideas).

⁸¹ EDWARD LEVI, *AN INTRODUCTION TO LEGAL REASONING* 3–4 (1949); see also HART, *supra* note 55, at 100–10 (explaining the rule of recognition which explains how society accepts rules).

Finally, Dworkin's interpretivism, because of its connection between law and contemporary morality, appears connected to Hillel Levin's "contemporary meaning and expectations" approach to statutory interpretation.⁸²

The key connection is that to some extent, *all* of these approaches are variants on legal realism. They all focus on using sources beyond the text before the judge, and the material between his or her ears to derive law, and each of them connect fairly easily to a purposivist approach to statutory interpretation.⁸³ The purpose of this lengthy digression is to demonstrate that even though metaphors for judging abound in both the jurisprudential and the legisprudential literature, that they are, to some extent, discussing the same thing. Thus, regardless of the forum where the metaphor is employed, we can usefully analyze its utility for understanding statutory interpretation. As the next section will demonstrate, no metaphor is perfect, but we can begin to see the scope of each metaphor's utility and each of their limits.

II. OTHER METAPHORS AND THEIR DISCONTENTS

One important criticism of the divisions between schools of thought is that it is not necessarily apparent what actual differences there are between them.⁸⁴ In particular, differences between pragmatism, dynamic statutory interpretation, and "contemporary meaning" interpretation are difficult to discern. It is easy (and therefore, attractive) to simply declare

⁸² See generally RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1978) (arguing against the philosophy of legal positivism and utilitarianism); DWORIN, *supra* note 4 (providing an explanation of the inner workings of the Anglo-American legal system and discussing the principles on which it rests).

⁸³ Left out of this analysis is intentionalism, or the search for the legislature's specific intent in the particular statutory provision being analyzed. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005). This underscores the difficulty of categorization in this realm—intentionalism can be seen as a separate purposivist approach to legislation. See Levin, *supra* note 50, at 1107–08. It can also be seen as an approach that can be executed in either a textual or a purposivist manner. See Manning, *supra* note 57, at 150. To some extent, the drawing of boundaries in this endeavor is arbitrary—judges use whatever tool they find most persuasive. Compare SEGAL & SPAETH, *supra* note 54 (arguing that the attitudinal model best explains the decision made by the Supreme Court), with Barry Friedman & Andrew Martin, *Looking for Law in All the Wrong Places: Some Suggestions for Modeling Legal Decision-Making*, in *WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, & WHAT'S AT STAKE* 143–72 (2011) (arguing that the current models used to study law are ineffective).

⁸⁴ See generally Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153, 173 (1986) (discussing the redundancy of realism).

all three of these schools of thought identical, and simple veneers of law for judges to disguise their enactment of policy preferences.⁸⁵ I find this criticism important, but ultimately wrong. Each of these schools locates the appropriate unit of analysis in statutory interpretation in a different location. Pragmatic statutory interpretation rests its analysis, ultimately, within the judge, who must determine each case based on their own understanding of the law.⁸⁶ Dynamic statutory interpretation rests its analysis with the *current* legislature, rather than the *enacting* legislature.⁸⁷ Finally, “contemporary meaning” statutory interpretation rests its analysis not with the law-making coalition, but rather with the “people” and the enforcing administrative state.⁸⁸ However, because these are relatively fine distinctions, and all of them rest on the assumption that the present determines the meaning of a statute rather than the past, I am willing to concede some ground. Thus, this section will evaluate metaphors first on the basis of their ability to distinguish between textualist and purposivist approaches to law, and if they pass that test, it will then examine their utility in describing the “flavors” of purposivism. An important caveat: this essay is not intended to exhaustively catalog every metaphor for judging that has ever been used. Instead, it is intended to criticize the most celebrated metaphors (most especially, the baseball-umpire metaphor), and offer an alternative (the soccer-referee metaphor).

A. Theatre Critics

Milner Ball argued that judges could be treated as theatre critics.⁸⁹ His argument amounted to the notion that similar to a dramatic performance, the oral presentation of a legal argument and its corresponding evidence is

⁸⁵ See SEGAL & SPAETH, *supra* note 54, at 86–96.

⁸⁶ See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 257–58 (2002); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 127–29 (1982).

⁸⁷ See, e.g., ESKRIDGE, *supra* note 59, at 111–204 (discussing how post-enactment issues arise that require the interpreter of the statute to go beyond the original intent).

⁸⁸ See Levin, *supra* note 50, at 1115–44.

⁸⁹ See Ball, *supra* note 3, at 100–02 (discussing the similarities between the role of a judge and theater critic).

an end unto itself, such that court proceedings can be viewed as “a type of theater (sic).”⁹⁰ Ball argues that mainstream approaches to legal reasoning deny the performative aspects of court, and thus, fail to acknowledge that legal proceedings share many characteristics with theatre.⁹¹ Specifically, he argues that there are four characteristics that legal proceedings share with theatre: a specified setting, an intended audience, the format of conflictual story-telling, and the use of metaphor.⁹² Judges, as the experts residing in the audience of law, thus fulfill the roles of theatre critics, and decide which legal theatre is fit to put before the lay audience of a jury.⁹³ Judges are also actors in the legal drama,⁹⁴ which, to some extent, renders the metaphor incoherent, even though Ball notes that some forms of theatre involve audience participation, which he characterizes as a “saturnalia, an extravagant entertainment or orgy which gives vent to passion and in which all are participants.”⁹⁵ Ball ultimately rejects the saturnalia as the play typified by the courtroom because “[o]rgies abandon limits and thus abandon play; court proceedings spring from play.”⁹⁶ And in truth, his description of saturnalia, if applied to the law, bears an uncanny resemblance to the “strange fruit” that typified early-twentieth-century race relations in the South.⁹⁷ Lynchings are sometimes described as “orgies” of violence, and were frequently described as events that the entire community would attend.⁹⁸ So, even on its own terms, Ball’s metaphor is, at best, limited.

When we turn to issues involving statutory interpretation, the metaphor becomes even more bewildering. There are no “rules” of theatre, no

⁹⁰ *Id.* at 82.

⁹¹ *Id.* at 83.

⁹² *Id.* at 83–92. This last element may leave readers scratching their heads. Don’t think too hard about it. It’s turtles all the way down.

⁹³ *Id.* at 107.

⁹⁴ *Id.* at 93–110.

⁹⁵ *Id.* at 99–100. Left unstated is how the producers of *Tony and Tina’s Wedding* feel about having their work described as an “orgy”—although, undoubtedly, the producers of *The Rocky Horror Picture Show* would be thrilled.

⁹⁶ *Id.* at 99.

⁹⁷ See generally Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 36–39 (1995) (explaining the significance of the idea of the South’s “strange fruit” during and after the Revolutionary War era).

⁹⁸ See Roberta Senechal de la Roche, *The Sociogenesis of Lynching*, in UNDER SENTENCE OF DEATH: A HISTORY OF LYNCHING IN THE SOUTH 48, 51 (2006).

matter how much some critics may wish there were. When we evaluate the performative aspects of law, there is no text to mull. While there is purpose to discern, that purpose is the narrow purpose of the parties before the court. But this failed analysis still teaches us something. We learn that for a metaphor to have meaning in the statutory interpretation sphere, we must have something that can supplant the *statute*. When judges act as theatre critics, they do not have anything identifiable that we can point to as the “text” or the “form” that matters. Thus, the use of the theatre-critic metaphor is a bridge too far in statutory interpretation. For a metaphor to make sense in statutory interpretation, there must be a rule in the metaphor that can be used as the statute.

B. *Platoon Leaders*

To be frank, Richard Posner’s use of metaphor could be a law review article, all of its own. That said, he would reject this essay’s equation of the formalist-realist divide in the common law to textualism-purposivism in statutory interpretation.⁹⁹ Posner goes so far as to say that “when [formalism and realism] are given a useful definition, it becomes apparent that they have no fruitful application to statutory . . . interpretation.”¹⁰⁰ In fact, Posner argues that “[t]he task of interpretation is fundamentally different from the tasks performed in formalist and realist analysis.”¹⁰¹ I respectfully disagree, except insofar as the act of interpretation as Posner does it certainly differs from formalism and realism.¹⁰² The act of re-defining terms, so as to eliminate objections to one’s argument, suggests a Lakatosian degeneracy.¹⁰³ Fully evaluating Posner’s preferred approach as a scientific endeavor is well beyond the scope of this essay—suffice it

⁹⁹ See Posner, *supra* note 9, at 180.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See discussion *supra*, notes 98–100 and accompanying text.

¹⁰³ See Imre Lakatos, *Falsification and the Methodology of Scientific Programmes*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 91, 119–20 (1970); see also John A. Vasquez, *The Realist Paradigm versus Progressive Research Programs: An Appraisal of Neotraditional Research on Waltz’s Balancing Proposition*, 91 AM. POL. SCI. REV. 899, 910 (1997). This is an appropriate place to note that this rhetorical tactic is accepted, and even encouraged, in legal reasoning. See, e.g., Siegel, *supra* note 12, at 708 n.29 (“Constitutional adjudication is ineluctably an interpretive practice, which means that it is non-falsifiable in the Popperian sense.”). The question becomes whether Judge Posner would regard his method of statutory interpretation as “non-falsifiable.” My instinct is that the answer is no. See generally POSNER, *supra* note 12 (examining a judges’ approach to statutory interpretation).

to say that this criticism, if true, provides more than enough reason to ignore Posner's distinction between common-law interpretation and statutory interpretation.

Luckily, not even Posner can complain about the use of his metaphor of "platoon leaders" to describe judges engaged in statutory interpretation, because he explicitly endorses it.¹⁰⁴ Posner argues that a statute can be analogized to the orders sent over a radio on a battlefield from high command.¹⁰⁵ The statute thus constitutes a clear command to do *something*, but what is actually being commanded may not be as clear.¹⁰⁶ Posner then empowers the platoon leader (i.e., the judge) to use his or her best judgment to perform what they *think* they are being commanded to do.¹⁰⁷ He goes on to argue that the inability to clearly communicate synchronously is common in both arenas, and that judges, like green lieutenants, must enact their best understanding of the commands given to them, which for judges include prior doctrine.¹⁰⁸

When we measure this analogy against the explicit theories of statutory interpretation, we find that it begins fairly well.¹⁰⁹ Experienced sergeants can tell stories of rule-citing and doctrine-following "ring-knocker"¹¹⁰ lieutenants who behave as if any situation not covered by Army doctrine simply cannot exist. These textualist platoon leaders are relatively obvious.¹¹¹ Equally as plausible is the slightly-more-experienced commander who has learned that doctrine should be used to discern how the Army *would* handle a situation that it faces. So in evaluating the textualist-purposivist divide, Posner's platoon-leader metaphor appears illuminative.¹¹²

¹⁰⁴ See generally Posner, *supra* note 9, at 205 (comparing a judges' role to a platoon leader).

¹⁰⁵ *Id.* at 189–90.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 199–200.

¹⁰⁹ See generally *id.* (describing statutory interpretation in an analogy between a platoon leader and a judge).

¹¹⁰ I am indebted to an anonymous staff sergeant in the United States Army for this evocative term for a new West Point graduate. Their use of the term does not represent Army policy, nor have I ever heard them use it or any other term without the appropriate respect due to the officer corps.

¹¹¹ See generally Posner, *supra* note 9, at 200 (describing the similarities between a platoon leader and a judge when examining text).

¹¹² See generally *id.* (describing how a judge and a platoon officer have to interpret when a doctrine does not provide clear information).

But when we dive into the different sub-types of purposivism, Posner's metaphor begins to collapse. Harthian "pure" purposivism matches up fairly well,¹¹³ but because of the nature of the Army's relationship to its own rules, other types of purposivism are indistinguishable from the Harthian path using Posner's metaphor.¹¹⁴ Dynamic statutory interpretation requires a judge to consider how the sitting Congress would interpret a statutory enactment.¹¹⁵ However, the Army does not distinguish between "old" doctrine and "new" doctrine—Army rules are routinely revised, and old versions are explicitly superseded.¹¹⁶ Thus, there is no such thing as an "obsolescent" statute in the Army. Pragmatism, Posner's preferred statutory interpretation mechanism, requires judges to use their best judgment in evaluating the situation before them in light of what they know of the rules, as well as doctrines governing the situation.¹¹⁷ Platoon leaders may be explicitly told that their best judgment is to be employed, which may lead scholars to believe that this metaphor may be used to accurately evaluate pragmatism. But in fact, as any soldier can explain, the cliché, "the right way, the wrong way, and the Army way," is a cliché because of the truth that it expresses. "Contemporary meaning's" insistence that the lived experience of the law *is* the law runs directly counter to the Army's position that when doctrine and reality conflict, reality is wrong.¹¹⁸

Again, while there is utility to be had in the platoon-leader metaphor, it does not give us the fullest possible picture of statutory interpretation. This may be because Posner does not care about the fine divisions between types of purposivism. Instead, he may be engaged in a different, but equally interesting enterprise: instead of providing a theory of how *judges* interpret statutes, he may be engaged in explicating a theory of how *Judge Posner* interprets statutes. This illustrates, again, the importance of the third category of information derived from metaphor—that of the

¹¹³ See William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332–39 (1989) (explaining Henry Hart's contribution to the "purposivist" theory approach of statutory interpretation).

¹¹⁴ See Posner, *supra* note 9, at 200 (explaining Posner's platoon-leader metaphor).

¹¹⁵ See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1478, 1506 (1987).

¹¹⁶ See generally Alfred C. Bowman, *Recodifying Army Law*, 28 MICH. ST. B.J. 21, 21 (1949) (describing how Army law supersedes previous Army law).

¹¹⁷ See Posner, *supra* note 9, at 189–90.

¹¹⁸ See generally *id.* at 200 (describing it is not the place of the platoon leader to find that the Army doctrine is wrong).

metaphor-maker.¹¹⁹ The lens through which these metaphors are viewed is intensely personal—and to the extent that a metaphor speaks to how we, personally, experience the referent, that symbol has meaning *for us*. However, expecting others to adopt it requires that the metaphor be universal.

C. *Figure Skating Judges*

“Many competitive games are played without an official scorer: notwithstanding their competing interests, the players succeed tolerably well in applying the scoring rule to particular cases; they usually agree in their judgments, and unresolved disputes may be few.”¹²⁰ In discussing this type of system, H.L.A. Hart analogized to a society where ordering had not yet reached the point of requiring formal law and judges.¹²¹ But, as he notes:

the addition to the game of secondary rules providing for the institution of a scorer whose rulings are final, brings into the system a new kind of internal statement; for unlike the players’ statements as to the score, the scorer’s determinations are given, by secondary rules, a status that renders them unchallengeable.¹²²

The conclusion that H.L.A. Hart reaches is that:

[t]he fact that isolated or exceptional official aberrations are tolerated does not mean that the game of cricket or baseball is not being played. On the other hand, if these aberrations are frequent, or if the scorer repudiates the scoring rule, there must come a point when either the players no longer accept the scorer’s aberrant rulings or, if they do, the game has changed.¹²³

It is this process of change that Oldfather concentrates on when he calls judges “aesthetic judges,” or, as I’ve metamorphosed it, “figure skating judges.”¹²⁴ “[T]he nature of the determinations that [aesthetic] judges make, and the content of the knowledge they draw on in doing so are, to a

¹¹⁹ See discussion *id.* at 200 (arguing that a judge’s position is similar to that of military subordinates in the context of a judge’s disagreement with legislative, constitutional, and judicial limitations, and a military subordinate’s disagreement with their superiors).

¹²⁰ HART, *supra* note 55, at 142.

¹²¹ See *id.* at 141–42.

¹²² *Id.* at 142.

¹²³ *Id.* at 144.

¹²⁴ See generally Oldfather, *supra* note 6, at 277–78 (discussing aesthetic sports and what judges look for when examining a sport). I should note that Oldfather does not limit his analysis to figure-skating judges; his work addresses judges in multiple aesthetic sports, which share the characteristics he identifies, including gymnastics, equestrianism, and snowboarding.

significant degree, products of the manner and circumstances of the judges' acculturation in the sport."¹²⁵ This means that judges have the power to *shape* the expectations for participants in aesthetic sports in a way that the referees in what Oldfather refers to as "purposive" sports¹²⁶ do not. "[T]here is great potential for the development of different schools of thought concerning what constitutes the proper or preferred way of skating, vaulting, or riding a horse through a series of jumps."¹²⁷ Turning to law, he concludes that this is a better analogy than any baseball analogy that has been offered.¹²⁸

Both sorts of judges shape rather than simply discover the standards by which they judge. And although the specific mechanisms differ—most obviously in that the aesthetic judge does not generate written opinions with precedential effect—both do so by resorting to and shaping the conventions on which those standards are based.¹²⁹

Oldfather also argues that the criticisms of aesthetic judges and law judges parallel.¹³⁰

If our figure skating judge turned to statutory interpretation, there would be some parallels, as these aesthetic sports do have texts that guide their standards.¹³¹ Thus, there would be room for textualist approaches to aesthetic judging, and the power to evolve the standards to better express the judge's belief of what the sport *should* be can appear to be a purposivist approach with its serial numbers filed off. When we consider the flavors of purposivism, we find something that we can pass off as the basic Harthian purposivism, even though its connection is weak.¹³² Pragmatism

¹²⁵ *Id.* at 279.

¹²⁶ *Id.* at 273. Pun completely unintended.

¹²⁷ *Id.* at 280.

¹²⁸ See *id.* at 271–73 (providing an analogy used by Chief Justice Roberts during his confirmation hearing that described the notion of judges being similar to baseball umpires).

¹²⁹ *Id.* at 290–91.

¹³⁰ *Id.* at 291.

¹³¹ See, e.g., *id.* at 277–78 (providing examples of aesthetic sports' standards).

¹³² See *id.* at 279 ("The performative ideal in an aesthetic sport does not exist independently of the judges' conception of it, and that conception is in turn tied to the ideal as understood in the sport more generally, *and more specifically as understood by the preceding cohort of judges.*") (emphasis added). It's as if, instead of purposivism looking to the legislature for purpose, it looked to "judges" as a category—which of course collapses into "contemporary meaning" interpretation.

and “contemporary meaning” interpretation are also present.¹³³ When a judge has the power to impose their own best judgment of how a standard ought to be interpreted, then one can see a pragmatic approach.¹³⁴ In addition, as noted above, the incentives for advancement force beginner judges to “mak[e] evaluations that are sufficiently consistent with those of other, longer serving judges.”¹³⁵ This way of developing the standard, that is, by resorting to what “everyone” thinks the standard is, is the definition of “contemporary meaning” statutory interpretation.¹³⁶

But with dynamic statutory interpretation, it is not clear that aesthetic judges offer anything. Part of the problem with these metaphors is that the standards-issuing body is more proactive than Congress. It is hardly a secret that asking a legislature to address every potential problem that may fall within the scope of a statute is unrealistic. “A statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.”¹³⁷ But while, in the case of Congress, “the [m]oving finger writes; and having writ, [m]oves on,”¹³⁸ rule-making bodies for sports are quickly responsive to creative attempts to game their systems, and can shut down the gamesmanship with a change in the governing rules.¹³⁹ Thus, in sports, it is, at least, arguable that dynamic statutory interpretation is *impossible*.¹⁴⁰ Nevertheless, Oldfather’s aesthetic judging metaphor brings an important element into focus—for

¹³³ See generally Levin, *supra* note 50, at 1111–13, 1116 (providing definitions and theoretical derivatives pertaining to the terms pragmatism and contemporary meaning).

¹³⁴ See generally *id.* at 1111–13 (explaining that under the pragmatism approach, judges can use open ended factors to determine what is best for society as a whole).

¹³⁵ Oldfather, *supra* note 6, at 279.

¹³⁶ See Levin, *supra* note 50, at 1105 (emphasis added).

¹³⁷ Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983).

¹³⁸ OMAR KHAYYAM, RUBAIYAT QUATRAIN 51 (Edward FitzGerald trans., photo. reprint 1862) (1859).

¹³⁹ See, e.g., Adam Kilgore, *NFL’s Post—Deflategate Rule Changes Undermine League’s Punishment of Tom Brady*, Sports, WASH. POST (July 27, 2015), <http://www.washingtonpost.com/news/sports/wp/2015/07/27/nfls-post-deflategate-rule-changes-undermine-leagues-punishment-of-tom-brady/> (describing changes the National Football League instituted to prevent a team from using underinflated balls, as the New England Patriots were accused of doing during the 2015 playoffs).

¹⁴⁰ *But see* discussion *infra* Section II.F (arguing that the dynamic statutory interpretation used in baseball is demonstrated by umpires, who use discretion in determining the strike zone).

the metaphor to work, the stand-in for judges has to be able to shape the standard that they are interpreting.¹⁴¹

D. *Color Commentators*

To convey accurately the work of a Supreme Court justice, it is essential for any analogy to capture the *process* of Supreme Court adjudication. It is this process that most notably distinguishes sitting as a Supreme Court Justice from legislating, serving as a trial court judge, or riding the bench in a foreign jurisdiction.¹⁴²

Already we can discern a problem with Benforado's "color commentators" metaphor for our purposes: he explicitly limits the use of his metaphor to the United States Supreme Court.¹⁴³ But if the reasons for his preference apply to statutory interpretation at all levels, then it may still be appropriate. The key element of the Supreme Court process that Benforado identifies as requiring a new analogy is three-fold:

(1) commentating on the actions and assessments of others without being directly involved in unfolding events; (2) creative interpretation that is facilitated through collaboration, constrained by precedent or existing knowledge, and initiated by a concrete real-world interaction, not a hypothetical situation or general concern; and (3) the construction of narratives that contextualize, explain, and connect, rather than simply declare a judgment.¹⁴⁴

So, the first question is whether judges other than Supreme Court justices engage in that three-fold process.

Benforado argues that the reason the color-commentator analogy is only appropriate for Supreme Court justices is that lower-court judges are better viewed as umpires who "influence the game as it unfolds, rather than after the fact."¹⁴⁵ As he points out, "[c]ontracts are written and broken, torts and murders are committed, and unconstitutional statutes are enacted and enforced all without the members of the Supreme Court lifting a finger, but without an umpire there is no official match."¹⁴⁶ This confuses the unit of analysis. While it is true that *litigation* cannot take place

¹⁴¹ See Oldfather, *supra* note 6, at 272–73.

¹⁴² Benforado, *supra* note 11, at 459.

¹⁴³ See *generally id.* (arguing that the commentator analogy is more accurate than "the umpire or commissioner alternatives in capturing the core aspects of *Supreme Court* adjudication") (emphasis added).

¹⁴⁴ *Id.* at 460.

¹⁴⁵ *Id.* at 462.

¹⁴⁶ See *id.* (citing the rules of baseball).

without a judge, and thus in that sense “there is no official match,”¹⁴⁷ the American system encourages private ordering.¹⁴⁸ Additionally, the *underlying conduct* that is the cause of a lawsuit occurs with no referee at all.¹⁴⁹ For Benforado’s assertion that lower-court judges are umpires, rather than commentators, to be true, we must envision a contract negotiated in the sight of the judge, not simply with their shadow cast over it.¹⁵⁰ In actual litigation, the match does not begin until the plaintiff has been actually wronged; and indeed, may never begin at all.¹⁵¹ Thus, Benforado’s distinction between judges and justices is not as strong as he would have it.

Beginning as we usually do, with the textualist-purposivist divide, a textualist endeavor certainly falls within the scope of color commentary as Benforado defines it.¹⁵² Textualist judges are (usually) not involved in the drafting of the statutes they are called on to interpret;¹⁵³ as Llewellyn noted, textualist interpretation, using the canons of statutory construction, is a fundamentally creative process of choosing which previously-accepted rules will be used to evaluate a real-world interaction;¹⁵⁴ and lower-court judges are still required to apply the law that they find to be relevant to the facts as they find them.¹⁵⁵ In short, a judge engaged in statutory interpretation, and using a textualist interpretation, can find a home in the color-commentator metaphor. Of course, color commentators also routinely discuss the purpose behind certain actions, such that a Harthian

¹⁴⁷ *Id.*

¹⁴⁸ See generally 9 U.S.C. §§ 1–307 (2012) (providing for judicial facilitation of private dispute resolution through arbitration).

¹⁴⁹ See generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC’Y REV. 631, 631–33 (1981) (discussing the emergence of disputes predicating lawsuits).

¹⁵⁰ Another metaphor!

¹⁵¹ See, e.g., Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 217 (2014) (summarizing a thirty-year game-theoretic debate over the selection effects of litigant choice); see also William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631 (1980).

¹⁵² See Benforado, *supra* note 11, at 451, 463.

¹⁵³ One can envision a case where a former legislator accedes to the bench, and is called upon to interpret a piece of legislation that they voted on or drafted during their time in the legislature. But those sorts of hard cases are rare at best; metaphors are intended to illuminate the mainstream of cases that fall within their ambit, not necessarily one-offs.

¹⁵⁴ See Llewellyn, *supra* note 52, at 400–01.

¹⁵⁵ See *id.* at 400.

purposivist approach to statutory interpretation could still fit into the press booth.

Color commentators can also be analogized to all of the flavors of purposivism.¹⁵⁶ Color commentators have been known to discuss differences in outcomes between historical approaches to the game and modern ones, which is considered the major touchstone of dynamic statutory interpretation.¹⁵⁷ They also argue that the way the game is played should color official responses,¹⁵⁸ which is a straightforward application of “contemporary meaning” statutory interpretation, which says that the lived experience of the law should inform its interpretation. Finally, color commentators are actually *expected* to interpose their judgment and to provide alternative accounts for what happens on the field,¹⁵⁹ which certainly *sounds* like Posnerian pragmatism.¹⁶⁰ Thus, it may appear that we have a winner!

Where the color-commentator analogy falls short, specifically, lies in the underlying confusion regarding levels of judicial authority. Benforado argues that justices, like color commentators, do not affect the outcome of the game before them.¹⁶¹ This seems to confuse, as discussed above, the *underlying conduct* for the *litigation*. Judges at every level of the judicial system profoundly affect the outcomes of every case that comes before them, and although litigants have the ability to make choices that may render judicial action irrelevant,¹⁶² if such litigants choose to be governed by judicial action, they are, indeed, *governed*. Thus, Benforado seeks to assert that justices cannot affect the *underlying conduct* that gives rise to litigation, which is true; but that lower-court judges can, which is not. Using a consistent level of analysis demonstrates that either *all* judges can affect outcomes, or *none* can, depending on how the judge frames the analysis. In the statutory interpretation context, the appropriate frame is not the underlying conduct; instead the litigation is the appropriate frame,

¹⁵⁶ See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113 (discussing what is meant by judicial purposivism).

¹⁵⁷ See Benforado, *supra* note 11, at 461–62.

¹⁵⁸ See Berman, *supra* note 2, at 1327.

¹⁵⁹ See Benforado, *supra* note 11, at 460–61.

¹⁶⁰ See generally Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996) (exploring what the pragmatic approach to judging entails).

¹⁶¹ See *id.* at 460–62.

¹⁶² See generally Klerman & Lee, *supra* note 151 (discussing the influence of the litigating parties on judicial action).

whereby each party urges the judge to adopt a particular view of the statute. Thus, we find that removing the agency that the color-commentator metaphor uses renders it problematic, and teaches us a new lesson: our metaphor should use a stand-in for the judge that allows them to affect the realm where they interpret the rules.

E. The Commissioner of Baseball

Kenesaw Mountain Landis was a bad mother[lover],

He was seventeen feet tall, he had a hundred and fifty wives.

He didn't do that much except he saved the game of baseball,

He put two and two together and he noticed it was four.¹⁶³

While the mythologized heroics of Jonathan Coulton's first Commissioner of Baseball (or "Commissioner") are astounding, the historical accomplishments of the Commissioner's office are no less influential over the game of baseball.¹⁶⁴ Landis, the first Commissioner and a former federal judge,¹⁶⁵ not only reinstated the "dignity of the game" after the Black Sox gambling scandal,¹⁶⁶ but he also singlehandedly prevented the integration of baseball.¹⁶⁷ Landis' successor, Albert Benjamin "Happy" Chandler, successfully integrated the major leagues.¹⁶⁸ Other commissioners

¹⁶³ Jonathan Coulton, *Kenesaw Mountain Landis*, YOUTUBE (June 5, 2012), <https://www.youtube.com/watch?v=J46f3HTmNDw>.

¹⁶⁴ See generally Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L. REV. 277, 278 (2005) (demonstrating the way in which Judge Kenesaw Mountain Landis employed common methodologies to legitimize the outcomes from his focus on pragmatism, transactional analyses, and principles of moral justice).

¹⁶⁵ See *id.* at 277.

¹⁶⁶ See ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 156 (2001) (discussing how Landis' decisiveness bolstered the legitimacy of baseball following the Black Sox gambling scandal).

¹⁶⁷ See LEONARD KOPPETT, *KOPPETT'S CONCISE HISTORY OF MAJOR LEAGUE BASEBALL* 222 (2004) ("The source of all the backstage pressure [against integration] was Landis. He was not only a bigot but a hypocrite . . .").

¹⁶⁸ See Samuel O. Regalado, 17 J. SPORT HIST. 92, 93 (1990) (reviewing ALBERT BENJAMIN CHANDLER & VANCE TRIMBLE, *HEROS, PLAINFOLKS, & SKUNKS: THE LIFE & TIMES OF HAPPY CHANDLER* (1989) ("Chandler's 'blessing' was not unimportant and, indeed, accelerated the eventual integration of blacks into the game.")). But see JULES TYGIEL, *BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON & HIS LEGACY* 82 (1983) (arguing that Chandler was a minor player in the events leading to integration).

have played consequential roles in how the game's history is recorded: Commissioner Angelo Bartlett "Bart" Giamatti eliminated the all-time leader in hits from Hall of Fame consideration for gambling;¹⁶⁹ Commissioner Gay Vincent changed the record books thirty-two years after the fact, converting Harvey Haddix's 1959 "perfect game" into a mere "perfect twelve innings," as Haddix gave up a hit in the thirteenth inning;¹⁷⁰ and Commissioner Allan H. "Bud" Selig deprived Armando Galarraga of a perfect game by refusing to overturn a call that even the umpire who made it said was wrong.¹⁷¹

In the same vein, Aaron Zelinsky has suggested that the appropriate analogy for Supreme Court justices is not umpires, who he claims were never supposed to be metaphors for any judge, other than trial judges,¹⁷² but rather the Commissioner of Baseball.¹⁷³ Zelinsky identifies nine functions that the Commissioner of Baseball and a Supreme Court justice share between their respective spheres.¹⁷⁴ However, he argues that only *four* are unique to Supreme Court justices—"providing guidance";¹⁷⁵ "examining issues over a protracted period of time before rendering a decision, allowing them to consider competing values and issues in a more careful and

¹⁶⁹ See Office of the Comm'r of Major League Baseball, Statement of A. Bartlett Giamatti (Aug. 24, 1989), *reprinted in* 68 MISS. L.J. 903 (1999).

¹⁷⁰ See Jerome Holtzman, *Finally, 30 Years Later, Maris Receives His Crown*, CHI. TRIB. (Sept. 5, 1991), http://articles.chicagotribune.com/1991-09-05/sports/9103060959_1_roger-maris-babe-ruth-maris-and-ruth.

¹⁷¹ See Jason Beck, *Missed Call Ends Galarraga's Perfect Bid*, MLB.COM (June 3, 2010, 1:34 AM), http://mlb.mlb.com/news/print.jsp?ymd=20100602&content_id=10727590; see also Larry Lage, *'I Just Cost That Kid a Perfect Game'*, SFGATE, (June 3, 2010, 4:00 AM), <http://www.sfgate.com/sports/article/I-just-cost-that-kid-a-perfect-game-3187008.php>; *Press Release: Major League Baseball Statement*, MLB.COM (June 3, 2010, 2:43 PM) (issued by Baseball Commissioner Allan H. "Bud" Selig), http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20100603&content_id=10760448&vkey=pr_mlb&fext=.jsp.

¹⁷² See Zelinsky, *supra* note 5, at 114–16 (depicting an example of an inappropriate analogy for Supreme Court justices).

¹⁷³ See Aaron S.J. Zelinsky, *The Supreme Court (of Baseball)*, 121 YALE L.J. ONLINE 143–44 (2011).

¹⁷⁴ See *id.* at 153–54. Zelinsky's nine areas include:

- (1) provid[ing] guidance,
- (2) refrain[ing] from error correction,
- (3) undertak[ing] rulemaking,
- (4) exercis[ing] countermajoritarian powers,
- (5) provid[ing] explanations for their decisions,
- (6) protect[ing] the fundamental values of their respective institutions,
- (7) employ[ing] special masters for fact-specific inquiry,
- (8) decid[ing] on statutes of limitations,
- (9) exercis[ing] finality.

Id.

¹⁷⁵ See Zelinsky, *supra* note 5, at 114, 119–20.

thorough manner”,¹⁷⁶ “tak[ing] countermajoritarian action”,¹⁷⁷ and “the province and duty . . . to say what the law is,”¹⁷⁸ or, in other words, to engage in rulemaking. Because Zelinsky limits his metaphor to Supreme Court justices, the first step in the analysis must be to determine if the specific functions he identifies as allowing the Commissioner of Baseball to serve as a stand-in are unique to Supreme Court justices.

Frankly, Zelinsky’s argument does not adequately distinguish between trial judges and Supreme Court justices.¹⁷⁹ In fact, with regard to “interpretive guidance” and “countermajoritarian action,” Zelinsky offers no argument whatsoever for excluding trial judges from his analogy.¹⁸⁰ For “deliberative decisionmaking,” the only argument he offers is that:

[a] trial judge must consider a bevy of objections to evidence and questioning, as well as manage discovery and pretrial requests. One can no more imagine a judge stopping a trial for weeks to consider objections to lines of questioning than one can imagine an umpire waiting weeks to make a strike call.¹⁸¹

This statement ignores the trial practice of motions *in limine*, which are expressly intended to allow trial judges the deliberative distance Zelinsky claims they lack when considering “objections to lines of questioning.”¹⁸² In addition, the practice of pre-trial orders and trial briefs allow judges to know, prior to trial, the issues that are likely to arise, and to familiarize themselves with the appropriate legal authority.¹⁸³ Finally, a tremendous increase in pre-trial disposition allows judges to weigh issues without time pressures.¹⁸⁴ On rulemaking, Zelinsky’s argument is an assertion that “[b]oth Supreme Court justices and Baseball Commissioners

¹⁷⁶ *Id.* at 120–21.

¹⁷⁷ *Id.* at 121–23.

¹⁷⁸ *Id.* at 123–24 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁷⁹ *See generally id.* (describing the various roles and duties of trial court judges versus Supreme Court justices).

¹⁸⁰ *Id.* at 119–23.

¹⁸¹ *Id.* at 120.

¹⁸² *Id.*

¹⁸³ *See generally* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (discussing the pretrial process and how it benefits judges).

¹⁸⁴ *See id.*

exercise rulemaking authority that trial judges and umpires lack.”¹⁸⁵ But this assertion boils down to a claim that Supreme Court justices behave as legislators in order to rationally enact their policy preferences.¹⁸⁶ It is well-known that lower-court judges are less likely to engage in policymaking than are high-court judges.¹⁸⁷ So, Zelinsky’s metaphor does not add anything to our understanding of judicial rulemaking—and it is wrong, nevertheless. Trial judges make rules regarding their courtroom conduct, and almost every rulemaking decision made by the Supreme Court began its life in a trial judge’s courtroom.

So some of the Commissioner’s functions can be assigned to trial judges; and of the remaining Justice-Commissioner functions Zelinsky identifies, only two of them are truly unique to the Supreme Court: the ability to avoid error correction,¹⁸⁸ and the ability to exercise finality.¹⁸⁹ While lower-court judges enter final judgments, the right to seek review

¹⁸⁵ Zelinsky, *supra* note 5, at 123 (citing Oldfather, *supra* note 2, at 36; *contra* Oldfather, *supra* note 2, at 36. (“[C]ourts, in addition to legislatures, are empowered to create or reshape the rules.”)).

¹⁸⁶ SEGAL & SPAETH, *supra* note 54, at 6; *see also* Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 9 (2006) (“[T]he higher judges, as well as doing their job of calling balls and strikes, are changing the rules.”). *But see* BAILEY & MALTZMAN, *supra* note 54, at 15–16 (arguing that the Supreme Court is in fact constrained by the rules in existence).

¹⁸⁷ *See, e.g.*, Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007) (examining why lower courts defy and comply with higher court rulings); Rachael Hinkle, *Legal Constraint in the US Courts of Appeals*, 77 J. POL. 721 (2015) (showing that circuit court precedent can be used to provide insight into when and how the law constrains judicial decisions); Valerie Hoekstra, *Competing Constraints: State-Court Responses to Supreme Court Decisions and Legislation on Wages and Hours*, 58 POL. RES. QUAR. 317 (2005) (arguing that state courts are constrained by both state and federal actors); Robert Howard et al., *State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties*, 40 L. & SOC. REV. 845 (2006) (arguing that state courts should fill the void if the Supreme Court refrains on federalism grounds); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation for Lower Court Compliance*, 37 L. & SOC. REV. 579 (2003) (arguing that fear of reversal is not the only reason a circuit court refuses to decide a case in the same way it thinks the Supreme Court will); Christopher Zorn & Jennifer Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. POL. 1212 (2010) (discussing various factors that influence judicial decision-making at different levels of the judicial hierarchy).

¹⁸⁸ Although even that is questionable. *See, e.g.*, Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence of Administrative Law*, 31 J.L. STUD. 61 (2002) (arguing that judges choose administrative review vehicles strategically to preserve their rulings from higher review).

¹⁸⁹ *See* Aaron-Andrew P. Bruhl, *When is Finality. . . Final? Rehearing and Resurrection in the Supreme Court*, 12 J. APP. PRAC. & PROC. 1, 2 (2011).

means that the decision of whether to accept the finality of a lower-court judgment lies with the litigants.¹⁹⁰ However, lower-court judges routinely explain their decisions, employ special masters (particularly since the development of the United States Magistrate Judge Program), and decide statutes of limitation.¹⁹¹ Zelinsky's implication that trial judges do not "protect the fundamental values of their respective institutions"¹⁹² is an extraordinary claim; his equation of that behavior with substantive due process¹⁹³ is insufficient to exclude trial judges, who routinely rule on issues of substantive due process.

Lower-court judges exercise the Commissioner's power, as well. To that extent, the metaphor has the power to describe judging in general. But when the metaphor turns to statutory interpretation, it unravels. While a "purposivist" Commissioner is relatively easy to envision, in that they would make extensive use of the "Best Interests Clause"¹⁹⁴ that both Commissioners Landis and Giamatti used in banning gamblers from the sport, it is less clear what a textualist Commissioner would do. The Commissioner's plenary rulemaking power seems to make that office more like Congress than like any judge. While it *is* true that judges have the power to set aside Congressional action if it is inconsistent with the exercise of popular sovereignty embodied in the Constitution,¹⁹⁵ this power is not, as Posner would say, limited to "changes . . . dictated by the unambiguous texts of authoritative documents . . ."¹⁹⁶ So, our metaphor for statutory interpretation must not be an actor with plenary power—to the extent that the actor has discretion, it must be cabined by the decisions of individuals

¹⁹⁰ See, e.g., Klerman & Lee, *supra* note 151 (arguing that there are more reasons than previously thought as to why plaintiffs win as often as they do at trial, including the role that settlement plays in a plaintiff's rate of success); see also Charles C. Cameron & Lewis Kornhauser, *Appeals Mechanisms, Litigant Selection, and the Structure of Judicial Hierarchies*, in *INSTITUTIONAL GAMES AND THE SUPREME COURT* 177–78 (Jon Bond et al., eds., 2005).

¹⁹¹ See Zelinsky, *supra* note 173, at 153–54.

¹⁹² *Id.* at 154.

¹⁹³ See *id.* at 164–66.

¹⁹⁴ For a discussion on the "Best Interests Clause," see Richard Justice, *'Best interests of baseball' a wide-ranging power*, MLB.COM (Aug. 1, 2013), <http://m.mlb.com/news/article/55523182/>.

¹⁹⁵ See generally JASON FRANK, *CONSTITUENT MOMENTS: ENACTING THE PEOPLE IN POST-REVOLUTIONARY AMERICA* 57 (2009) (claiming that the notion of 'the people' is a powerful concept within the politic of the United States); Zelinsky, *supra* note 5, at 123–24 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (asserting that both umpires and judges have the authority to say "what the law is.")).

¹⁹⁶ Posner, *supra* note 186, at 9.

higher up in the hierarchy. Even Supreme Court justices answer to The People—whatever that may mean.¹⁹⁷

F. *Baseball Umpires*

“Small forests” have been “demolished”¹⁹⁸ in the process of scholars use of their academic freedom¹⁹⁹ to connect their hobbies to their research agendas, and baseball fans in the academy are no different. My purpose here is not to bury Caesar, but to praise him—these attempts to link real-world endeavors to the abstruse concepts in legal theory is laudable, and they are a useful teaching tool.²⁰⁰ While sports-referee analogies abound,²⁰¹ they appear to boil down to two types: baseball-umpire analogies and “everything else.” Setting aside the “everything else” analogy, as such analogies tend to be relatively rare in the literature, this section interrogates the use of the baseball umpire for illuminating statutory interpretation.

Umpire metaphors tend to fall into two camps in legal scholarship: either the writer notes the technocratic vision of umpiring, suggesting that umpires merely “call balls and strikes,” and that judges follow this pattern by mechanically applying well-settled law to facts.²⁰² Alternatively, writers also focus on the indeterminacy of such rules as the strike zone, the

¹⁹⁷ FRANK, *supra* note 195; *see* Blake, *supra* note 2, at 275 (“[T]he ultimate source of baseball authority is the Commissioner of Baseball, but the ultimate source [of] constitutional legitimacy is not the Supreme Court, but rather ‘We the People.’”).

¹⁹⁸ Blake, *supra* note 2, at 272; *see* BRIAN TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 2–3* (2009).

¹⁹⁹ *See* Matthew R. Krell, *The Ivory Tower Under Siege: A Constitutional Rationale for Academic Freedom*, 21 *GEO. MASON C.R.L.J.* 251 (2011).

²⁰⁰ *See* Blake, *supra* note 2, at 275.

²⁰¹ *See id.*; Diarmuid O’ Scannlainn, *The Role of the Federal Judge Under the Constitution: Some Perspectives from the Ninth Circuit*, 33 *HARV. J.L. & PUB. POL’Y* 963, 964–65 (2010) (referencing football); Eric Segall, *Justices, Referees, and Umpires: The Role of Discretion in Sports and Supreme Court Decisions*, *DORF ON LAW* (Jan. 5, 2015), <http://www.dorfonlaw.org/2015/01/justices-referees-and-umpires-role-of.html> (referencing basketball).

²⁰² *See* Transcript, *supra* note 73; Posner, *supra* note 186, at 8; Theodore McKee, *Judges as Umpires*, 35 *HOFSTRA L. REV.* 1709 (2007); Wardlaw, *supra* note 2, at 1630; *see also* Zelinsky, *supra* note 5 (arguing that the better analogy for the work of a Supreme Court justice is not an umpire, but a baseball commissioner).

infield fly rule, or the “neighborhood rule,”²⁰³ suggesting that umpires exercise a tremendous amount of discretion and engage in a fundamentally political endeavor. From this, the conclusion follows that the relationship between judges and umpires lies in how both groups exercise that discretion to “protect the fundamental values of their respective institutions.”²⁰⁴ Regardless of whether the commentator in question praises or criticizes the umpiring metaphor, commentators fall into one of these two camps—and they invariably criticize the *other* conception of umpiring as inapt.²⁰⁵

Here, the purpose of the comparison between the two umpire metaphors is more limited. When considering umpires as interpreters of a statutory text, do they exhibit the different approaches to statutory interpretation that we see in judges? Blake argues that we see evidence of at least three different approaches to statutory interpretation, although he approaches it as a jurist.²⁰⁶ Blake further argues that most textualist conceptions of umpiring are insufficient to capture the varieties of approaches that umpires take.²⁰⁷ While umpires are certainly engaged in textualist interpretation of the rules when they declare a playable ball stuck in Wrigley Field’s dead ivy a “ground rule double,”²⁰⁸ there is no doubt that the infield fly rule, which calls a batter out if their fly ball could be caught through “the effort that a fielder of average skill at a position in that league or classification of leagues should exhibit on a play, with due consideration to the condition of the field and weather conditions,”²⁰⁹ is a morass of purposivism begging umpires to exercise discernment. And, of course, the stories about strike-zone interpretation are legion.²¹⁰ Blake

²⁰³ Where the second baseman or shortstop, turning a double play need not actually touch the bag to get the out at second base, but need merely be in the “neighborhood,” out of player safety concerns. See Blake, *supra* note 2, at 274–75.

²⁰⁴ See Allen, *supra* note 2; Aside, *supra* note 1, at 1479–80; Blake, *supra* note 2, at 271; Douglas O. Linder, *Strict Constructionism and the Strike Zone*, 56 UMKC L. REV. 117, 119–20 (1987); Terrell, *supra* note 47, at 87–88; Zelinsky, *supra* note 173, at 154.

²⁰⁵ Compare Zelinsky, *supra* note 173 (arguing that umpires lack discretion, which makes them an inapt comparison), with Blake, *supra* note 2, at 275 (arguing that umpires possess discretion, which makes it an apt comparison). For an additional comparison, compare Posner, *supra* note 186, at 8–9 (arguing that umpires lack discretion, which makes them an apt comparison), with McKee, *supra* note 203 (arguing that umpires lack discretion, which makes them an inapt comparison).

²⁰⁶ Blake, *supra* note 2, at 271.

²⁰⁷ *Id.*

²⁰⁸ Yellon, *supra* note 29, at 3.

²⁰⁹ Blake, *supra* note 40, at 3–4.

²¹⁰ See Linder, *supra* note 205, at 119–20.

also argues that we see “contemporary meaning” interpretation in stories like his tale of the “teenaged Jim Abbott,” against whom he called a balk when no one else at the game would have done so.²¹¹

Terrell makes a similar point in describing Pinelli’s call of the only perfect game ever pitched in the World Series—i.e., *given the particular circumstances* of that game, the twenty-seventh batter had a moral obligation to swing at a close pitch.²¹² So we see dynamic purposive statutory interpretation as well.²¹³ Blake also identifies an example of pragmatic statutory interpretation when discussing the “pine tar” game.²¹⁴ In that game, George Brett of the Kansas City Royals was called out, and a lead-taking home run taken away, because his bat had too much pine tar on it.²¹⁵ When the game was reviewed after the Royals protested, the American League president ruled that Brett was not out because “[his] violation of the pine tar rule did not constitute unfair play.”²¹⁶ Note that the decision was not that Brett had not violated the rules; it was that the remedy, calling him out, was excessive due to the lack of unfairness in his actions.²¹⁷

Allen argues that in addition to the decisional similarities between umpires and judges, several non-decisional factors are also shared between them.²¹⁸ Some of these non-decisional aspects have been previously discussed—specifically, the need for judges to be participants rather than observers.²¹⁹ However, Allen also notes that umpires and judges both require an adversarial contest to invoke their power,²²⁰ and that the state of the “game,” “in particular the positions of the other participants, provides the necessary context for the judgments of those charged with decision

²¹¹ Blake, *supra* note 40, at 7–12.

²¹² Terrell, *supra* note 47, at 39–40.

²¹³ Dynamic statutory interpretation is not, however, a perfect fit, as it assumes that the rules change over time, rather than assuming changes based on the circumstances capable of recurring.

²¹⁴ Blake, *supra* note 40, at 6–7.

²¹⁵ See Jared Tobin Finkelstein, *In Re Brett: The Sticky Problems of Statutory Construction*, 52 *FORDHAM L. REV.* 430 (1984).

²¹⁶ Blake, *supra* note 40, at 6–7.

²¹⁷ The rule that required Brett to be called out has since been stricken from the rulebook. See Finkelstein, *supra* note 216, at 431. Note also that the decision *the umpire made* was a textualist decision, but the decision to *overrule the umpire* was a pragmatic decision.

²¹⁸ Allen, *supra* note 2, at 531.

²¹⁹ *Id.* at 531–32.

²²⁰ *Id.* at 534–35.

making authority.”²²¹ All of these play a role in statutory interpretation, although some of them may be trivially obvious. Thus, the need for an adversarial contest is a concept that is beaten into every first-year law student,²²² and the notion that procedural posture may determine the case outcome is apparent to any litigator who has won a motion to dismiss, only to lose on summary judgment.

So, if umpiring can be used to demonstrate the full panoply of theories of statutory construction, why use anything else? Benforado argues that umpiring lacks a foundation to allow for creative expression in rulings²²³ while Zelinsky argues that the umpiring metaphor is ahistorical,²²⁴ however, neither argument is sufficient. Blake and Terrell have demonstrated decisively that there *is* room for creativity and development, while Zelinsky’s critique ignores any suggestion that the judicial system is dynamic; and suggests instead that judges are high priests to a dead god.²²⁵ This is *contrary* to Zelinsky’s own point that judges engage in dynamic reinterpretation of the rules that they operate under.²²⁶ Could it be, in the long way round, that we’ve demonstrated that the umpire analogy is really the best one?

III. “PLAY ON!”: THE NEW SOCCER-REFEREE METAPHOR

It is now clear what we are searching for when we search for metaphors for statutory interpretation. We want our metaphor to have rules, but not perfect clarity in them. We want our judge stand-in to be able to change the rules as they interpret the rules over time. We want them to be involved in the process, such that their errors and choices *can* be outcome-determinative—but not for them to have total control over the rules they interpret, and to be answerable to some sort of higher authority. And of course, to the extent that the metaphor is being used for statutory interpretation, we want it to explicate as many different approaches to statutes as it can.

²²¹ *Id.* at 535.

²²² I also beat this concept into my Introduction to American Politics students—metaphorically speaking. No beatings *actually* take place.

²²³ See Benforado, *supra* note 11, at 453–54.

²²⁴ See Zelinsky, *supra* note 5, at 114–17.

²²⁵ *Id.*

²²⁶ *Id.*

Baseball umpires seem to meet all of these criteria. We can see umpires engaged in every type of approach to the rules that we see judges take with statutes. Umpires are close to the action, but they are not direct participants, such that their decisions have consequences—just like judges engaging with statutes.²²⁷ While, the decisions of umpires, like those of judges, are subject to override, such override is rare. The rules of baseball provide plenty of opportunities for umpires to exercise judgment where they are resolving ambiguity.²²⁸ So why offer an alternative?

The purpose of identifying alternatives to existing metaphors is to “prevent the reification” of the existing analogies—i.e. to ensure that thought does not become anchored to a particular symbol.²²⁹ Instead of accepting the use of a metaphor without question or challenge, and forcing it to fit situations that it was never intended to describe, we can ensure that “a judgment on likeness that seems constitutive of thought actually depends on contestable substantive arguments”²³⁰ Thus, it would not have been enough to simply criticize existing metaphors and then (metaphorically) throw up one’s hands and declare the search for metaphor a fool’s errand. Nor would it be sufficient to uncritically accept any metaphor. It is necessary to offer one’s own alternative.

In addition, cultural competencies demand a metaphor with wider appeal. Trends in sports are difficult to measure—depending on one’s metric, one can conclude that various sports are either dying or thriving.²³¹ But, it is fair to say that American culture is approaching a period where soccer is at least as likely as baseball to be a salient activity for students—either as participants or spectators.²³² And of course, international

²²⁷ See generally Siegel, *supra* note 12 (discussing the similarities between umpires calling balls and strikes, and Supreme Court Justices’ statutory interpretation).

²²⁸ See generally Allen, *supra* note 2 (discussing how the rules of baseball grant an umpire sole discretion to make judgment calls).

²²⁹ See Benforado, *supra* note 11, at 459.

²³⁰ Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 749 (1993).

²³¹ See generally Craig Calcaterra, *Baseball is Dying? Nonsense: The Case for Baseball’s Vitality*, NBC SPORTS (Sep. 9, 2014) <http://mlb.nbcsports.com/2014/09/09/baseball-is-dying-nonsense-the-case-for-baseballs-vitality/> (discussing how the vitality of the sport differs depending on the metric used).

²³² See Ryan Wallerson, *Youth Participation Weakens in Basketball, Football, Baseball, Soccer*, WALL ST. J. (Jan. 31, 2014), <http://www.wsj.com/articles/SB10001424052702303519404579350892629229918> (noting that youth baseball

audiences are vastly more likely to be familiar with soccer (or “football”) than with baseball.²³³ Having a soccer metaphor to stand side-by-side with the baseball-umpire metaphor will enable us to expand the reach of our efforts to explain statutory interpretation—an important endeavor in ensuring the continued democratic legitimacy of the counter-majoritarian judicial system.²³⁴

Consider the opening vignette from this essay. David Anderson tells a story of a player pushing for a caution (a “yellow card”) so that he can serve a one-game suspension that is imposed regardless of the reason for the caution—a clear example of textualism in the officiating.²³⁵ Anderson says that while the caution is marginal based on that player’s conduct, “I could see myself give that card for player safety reasons”²³⁶ This suggests that referees look beyond the text to purpose—indeed, they take pragmatic issues into consideration, as Anderson does when he says, “I don’t want #17 escalating contact levels until he levels an opponent in an attempt to draw a caution.”²³⁷ Anderson also displays “contemporary meaning” interpretation, as he argues that the foul that drew the caution “in most college games . . . would not be considered a foul much less a card.”²³⁸ In another story, Anderson also tells a tale that shows dynamic interpretation when a referee was forced to confront a female spectator engaged in sexually explicit conduct in the stands as part of heckling the

participation declined by 7% from 2008 to 2012, while non-school youth soccer participation was flat and school-based soccer participation grew over the same period).

²³³ See Terrell, *supra* note 47, at 40 n.10 (“I should also acknowledge that to some readers, . . . baseball references . . . may not be comprehensible. Indeed, this became evident in [a] law school class For example, one student from the Bahamas complained that while she understood cricket, baseball was a mystery.”).

²³⁴ See Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986) (explaining the fluctuating levels of public confidence in the Supreme Court and possible reasons for the variance); see also Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. OF POL. SCI. 635 (1992) (examining the causes of varying support for the Supreme Court and the interconnectedness of policy and support in the Court context).

²³⁵ See David Anderson, *You Be the Referee*, BALLOON JUICE (Oct. 28, 2015), <http://www.balloon-juice.com/2015/10/28/you-be-the-referee-3>.

²³⁶ *Id.* See generally Anderson, *supra* note 30; Yellon, *supra* note 29 (both discussing cautionary calls).

²³⁷ Mayhew, *supra* note 237.

²³⁸ *Id.*

opposing men's team.²³⁹ It is certainly not a situation that is covered by the rules, but the referee resolved it by

watching for 10-15 seconds silently. She then stopped it by mocking the [spectator]'s technique while getting all of the players on the field laughing She also informed the visiting coach that no more . . . toys will be seen in the stands or the game will be played in an empty stadium.²⁴⁰

This approach would have been more likely to backfire had the referee been male, had the players been female, or had the players been part of a league comprised of church members, rather than college students.

The rules of soccer, as well, like the rules of baseball, allow for significant leeway on the part of the referee. To take just one example that turns up in nearly every game, the rule for declaring a player offside states that a player commits an offside offense by a) being in an offside position,²⁴¹ and b) "if, at the moment the ball is touched or is played by one of his team, he is, in the opinion of the referee, involved in active play by: 1) interfering with play; 2) interfering with an opponent; or 3) gaining an advantage by being in that position."²⁴² While this is a relatively straightforward call when the player in offside position receives a pass, it becomes much less clear when an offside player is away from the active play around the ball.²⁴³ For example, if the offside player has "crashed the box,"²⁴⁴ or moved close to the goal, are they interfering with the keeper? If the offside player is available as a pass recipient from the player in possession, and the keeper has been drawn off the attacker's angle, in order to position themselves to deal with a pass to the offside player, has the offside player gained an advantage, even if the play never actually runs through them?

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ See FIFA, *supra* note 26, at 36 (discussing what is necessary for offside to be called).

²⁴² *Id.*

²⁴³ See *generally id.* at 110–18 (discussing and illustrating different and complex situations of when a player is and is not offside).

²⁴⁴ "The box" or the "penalty area" is the term used to describe the space defined by a box defined by moving eighteen yards in all directions from the edges of the goal. "The box" thus occupies a rectangle forty-four yards long parallel to the goal (eighteen yards on either side of the goal and the eight-yard width of the goal itself), and eighteen yards deep into the pitch. FIFA, *supra* note 26 at 35. "Crashing the box" is when an attacking player enters the penalty area when they are not in possession of the ball; it is intended to force the defense to respond to both the potential for a shot on goal and a pass.

These are questions that referees not only have to be able to answer as they arise, but answer in a split-second decision.²⁴⁵ And this is hardly the only such occasion. Referees in soccer matches are empowered to stop play “temporarily for any reason not mentioned elsewhere in the Laws of the Game.”²⁴⁶ This empowers referees with the ability to control the game for any reason, including corrupt reasons.²⁴⁷ When considering whether to send off a player (a “red card”) for denying an obvious goal-scoring opportunity, FIFA directs referees to consider a five-part test.²⁴⁸ While this is not as complicated as baseball’s “triskaedeka-partite test” for determining whether a pitcher has committed a balk,²⁴⁹ referees evaluating this must do so at a sprint, in a split second, and may be forty to fifty yards away if play has moved down the field quickly.²⁵⁰ In the same manner, judges must sometimes make decisions they do not feel prepared to make.²⁵¹

It should be clear by now that soccer referees are *at least* as good a metaphor for judges engaged in statutory interpretation as baseball umpires. Judges do not do anything in statutory interpretation that soccer referees do not. Moreover, the institutional role of these players is similar. The purpose of this essay is not to bury the umpireal metaphor—in fact, of the major metaphors offered to date, the umpire seems to be the best fit for what judges actually do. The purpose of this essay should be seen as offering an *additional* alternative to the baseball-umpire metaphor, one that opens the door of statutory interpretation and, thus, jurisprudence to a larger and more diverse audience.

²⁴⁵ See Zelinsky, *supra* note 5, at 120–21.

²⁴⁶ FIFA, *supra* note 26, at 32.

²⁴⁷ See generally Declan Hill & Jere Longman, *Fixed Soccer Matches Cast Shadow Over World Cup*, N.Y. TIMES (June 1, 2014), <https://www.nytimes.com/2014/06/01/sports/soccer/fixed-matches-cast-shadow-over-world-cup.html> (detailing various game-control mechanisms used by referees who have accepted bribes).

²⁴⁸ See FIFA, *supra* note 26, at 132 (discussing the five-part test used by referees during this situation).

²⁴⁹ See Blake, *supra* note 40, at 8 (stating that a triskaedeka-partite test is used by umpires in baseball to define a balk).

²⁵⁰ See Allen, *supra* note 2, at 535–38 (arguing that positioning is important for judges and umpires).

²⁵¹ See Zelinsky, *supra* note 5, at 120–21.

CONCLUSION

No metaphor is perfect. The perfect metaphor for judging is the judge sitting in court, which is tautological. But metaphors are illuminative. The more a metaphor illuminates, the better it is. While some metaphors used for judges have offered minimal explication of judging, others have had significant utility.²⁵² The ubiquity and longevity of the umpire metaphor is due to its ability to shine light onto many facets of judging, from the technocratic to the idiosyncratic.²⁵³ Other metaphors have fallen away either because they do not fairly offer a concept that maps onto judging, or because they fail to map onto some *parts* of judging.

But the use of the proper metaphor is only the beginning of this argument. As I have demonstrated, the real utility of metaphor for legal theorists is that it helps to demonstrate that all theories are in fact describing different facets of the same behavior. Through the use of metaphor, students and scholars can begin to ascertain that judges engaged in statutory interpretation are also engaged in the same debate that H.L.A. Hart and Robert Dworkin were engaged in—and indeed, judges are in the same debate that Holmes fought with the European formalists.²⁵⁴ This makes metaphor a powerful tool for uniting formerly-distinct theoretical approaches.

Mark Graber, self-described as the “true founder of the law and sports officiating movement,”²⁵⁵ described the relationship between law and sports-officiating metaphors as “misunderstood and justly-neglected.”²⁵⁶ This essay should demonstrate that while the relationship may be misunderstood, any neglect that it has suffered is hardly fair. It *is* important to not let metaphors ossify one’s thinking about the law, as it appears many commentators worry. But by using diverse metaphors and recognizing their limitations, we make our concepts concrete in ways that are not available to those thinking in pure theory.

²⁵² See Benforado, *supra* note 11, at 452–59.

²⁵³ See *supra* Section II.F.

²⁵⁴ See *supra* Section I.B. See generally Blake, *supra* note 40 (discussing the Hart-Dworkin debate in greater detail).

²⁵⁵ Mark Graber, *Law and Sports Officiating: A Misunderstood and Justly-Neglected Relationship*, 16 CONST. COMM. 293, 313 (1999); see HART, *supra* note 55, 142–47 (discussing the game of “scorer’s discretion”).

²⁵⁶ See generally Graber, *supra* note 255 (discussing how the relationship between law and sports-officiating metaphors are misconstrued and ignored).