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Amoco Production Co. v. Southern Ute Indian Tribe

Anita Starchman Bryant*

In accordance with the Indian Reorganization Act of 1934, the United States government granted land to Native American tribes. As a result, the Southern Ute Indian Tribe received title to land and the right to mine coal on privately owned territory. The United States gained this right pursuant to the Coal Lands Acts of 1909 and 1910 which enabled the government to issue land patents while still maintaining a public right to the coal contained in those lands. Today, technology enables coal miners to capture the gases released by coal and create valuable energy. In Amoco Production Co. v. Southern Ute Indian Tribe, the United States Supreme Court determined that upon enacting the Coal Lands Acts in 1909 and 1910, Congress intended to reserve the coal to the government, but not the released gases. Therefore, the Southern Ute Indian Tribe has no right to produce the energy from the gas. This Note describes the Supreme Court's analysis and discusses alternative methods of statutory interpretation. In particular, if the Court had interpreted the statute dynamically, it could have considered the statute in light of present circumstances, thus benefitting today's society.

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INTRODUCTION

The meaning of words is not static. While a particular phrase or word meant one thing ninety years ago, that same term may be interpreted quite differently today. This is especially true when present social circumstances engender scenarios that someone ninety years ago could never have considered. For example, an understanding of what basic medical care entailed in the early part of the century vastly differs from what is considered to be fundamental and necessary health care today. When such essential understandings change, particularly in the context of a statute, it seems natural that courts would interpret the law to reflect society's changes. Nonetheless, as Amoco Production Co. v. Southern Ute Indian Tribe\(^1\) demonstrates, when deciding cases presenting modern scenarios, courts often adhere to impractical interpretations of older statutes—continuing to interpret the statutes within the context of their original meanings and understandings. This approach resists an analysis that could possibly benefit today's society.

I

BACKGROUND

At the turn of the century, during the height of the Industrial Revolution, the United States government feared its coal supply in the western U.S. was in jeopardy.\(^2\) The country lacked the resources to adequately assess the amount of coal available in the largely unsettled West.\(^3\) Under the 1864 Coal Lands Act,\(^4\) Congress designated land deemed valuable for coal as public land exempted from the usual land grant system.\(^5\) In order to

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3. See Leeds, supra note 2, at 492.
4. 1864 Coal Lands Act, ch. 205, § 1, 13 Stat. 343.
5. In order to encourage development of the West, the United States
classify this land, the Department of the Interior relied upon the affidavits of entrymen who described the content of coal on their individual parcels of land.\footnote{See Watt v. Western Nuclear, Inc., 462 U.S. 36, 48 n.9 (1983).} If their land contained coal, the government reduced the size of the parcel and required the entryman to purchase the property at a minimum price.\footnote{See Leeds, \textit{supra} note 2, at 492; Callard, \textit{supra} note 2, at 915.} Pursuant to the terms of the 1864 Coal Lands Act, entrymen gained coal-endowed land in fee simple absolute without any reservation to the government.\footnote{See Leeds, \textit{supra} note 2, at 492.}

Abuse ran rampant within this system.\footnote{See id. see also Leeds, \textit{supra} note 2, at 492.} Railroads convinced entrymen to falsify their affidavits by indicating there was little or no coal on their land.\footnote{See C. MAYER & G. RILEY, \textsc{Public Domain, Private Dominion} 117-118 (1985).} This falsification enabled entrymen to escape public land classification and thus purchase larger tracts of land which they subsequently furnished to the railroad companies.\footnote{See 41 CONG. REC. 630 (1907).}

In response to what President Theodore Roosevelt feared was a coal shortage, the government, by executive order, withdrew from private ownership approximately 65 million acres of public land thought to contain coal.\footnote{Coal Lands Act of 1909, 30 U.S.C. § 81 (1909).} This action outraged the public; as a result, Congressional representatives proposed compromise bills that would sever the surface and general mineral estates of the land with only the latter being reserved to the U.S. government.\footnote{See 41 CONG. REC. 630 (1907).} The bills that finally passed, the Coal Lands Acts of 1909 and 1910, authorized the government to grant limited land patents subject only to "a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same."\footnote{Coal Lands Act of 1909, 30 U.S.C. § 81 (1909).}

1909 and 1910 formerly belonged to the Southern Ute Indian Tribe. In 1880, the Tribe had ceded the land to the government in return for other settlement property.\textsuperscript{15} Under the Coal Lands Act, the government continued to issue land patents, but reserved to the United States the rights to any coal found on that land.\textsuperscript{16} In accordance with the Indian Reorganization Act of 1934, the government granted equitable title of former reservation lands still held by the United States back to the Southern Ute Indian Tribe (approximately 200,000 acres).\textsuperscript{17} Since the Government still held the rights to the coal on land granted to homesteaders, the Tribe was granted title to this coal, even in lands already patented and held by private persons.\textsuperscript{18} Today, the Southern Ute Indian Tribe enjoys profits from mining coal on these lands.\textsuperscript{19}

The Tribe inherited the dangers of coal mining along with the benefits. One threat and constant nuisance to coal miners is coalbed methane gas (CBM), a product of the coalification process.\textsuperscript{20} The majority of CBM gas remains within the actual coal “micropores”; but, when coal is mined using typical methods, the coal is often fractured and methane gas leaks out into areas of less pressure.\textsuperscript{21} Besides its ability to asphyxiate humans, CBM is quite explosive and was historically disposed of to avoid accidental ignition.\textsuperscript{22} Although CBM continues to be a threat to the lives of coal miners, technological advances have lessened the danger it once posed.\textsuperscript{23}

Due to gains in technology and demands to find alternative fuel sources,\textsuperscript{24} developers discovered a way to convert the once

\begin{footnotes}
\item[16] See Leeds, supra note 2, at 493.
\item[18] See Leeds, supra note 2, at 494.
\item[19] See id.
\item[20] "CBM is a by-product of the 'coalification process.' Coalification is the biochemical and bacterial transformation of plant life, carbon dioxide, and water, which decay to form peat. The intermediate produce, peat, is converted into coal, methane, and other gaseous by-products through sedimentary pressure and the earth's temperature. Methane produced in this manner is known as coal bed methane or CBM." Callard, supra note 2, at 911.
\item[21] See Leeds, supra note 2, at 490.
\item[23] See Callard, supra note 2, at 913.
useless and dangerous CBM into a valuable energy source.\textsuperscript{25} During the energy crisis of the 1970's, researchers made great strides and successfully developed new techniques enabling the extraction and use of CBM gas for energy purposes. Additionally, as of 1996, it was estimated that within all the reserves in the United States there were approximately 90 trillion cubic feet of recoverable CBM.\textsuperscript{26} This supply is comparable to five years of natural gas production.\textsuperscript{27} The Southern Ute Indian Tribe coal reservation alone produced 82 percent of the nation's CBM gas (based on 1994 data),\textsuperscript{28} now valued conservatively at $200,000,000.\textsuperscript{29}

\section*{II
THE CASE

The recent development of CBM as a commodity for energy production has generated competing claims for ownership. One such conflict involved the Southern Ute Indian Tribe and Amoco Production Company.\textsuperscript{30} Amoco owned oil and gas interests on about 150,000 of the roughly 200,000 acres of coal that had previously been reserved to the United States under the Coal Lands Act and was now owned by the Southern Ute Indian Tribe.\textsuperscript{31} Amoco also operated just less than half of the oil and gas

\begin{footnotesize}
\begin{itemize}
\item[25.] See Leeds, supra note 2, at 492.
\item[26.] See id. at 489.
\item[27.] See id.
\item[28.] See McClanahan, supra note 22, at 474 n.24.
\item[30.] In state courts, there are several examples of such conflicts regarding conflicting CBM ownership rights. See United States Steel Corp. v. Hoge, 468 A.2d 1380, 1383 (Pa. Sup. Ct. 1983) (holding that absolute ownership of CBM gas, granted through a private deed, is vested in the coalbed owner when the CBM gas remains within the coal seam and once escaped from the coal, is no longer within the control of the coal owner); NCNB Texas Nat'l Bank v. West, 631 So. 2d 212, 224 (Ala. Sup. Ct. 1993) (holding that the holder of coal rights owns the CBM contained in the coal and the owner of all gas rights may capture the gas once it migrates from the coal); Carbon Co. v. Union Reserve Coal Co., 898 P.2d 680, 688-89 (Mont. Sup. Ct. 1995) (holding that while the court recognized the need and right of the coal owner to extract and capture the coal seam methane gas for safety purposes during the mining process as such an incidental mining right, the existence of that right does not, without specific grant, also encompass either actual title to the gas estate or the right to produce it for commercial purposes, and as such, owners of the gas estate which specifically provided for the mining of CBM, may mine for such gas within the coal seams).
\item[31.] See Leeds, supra note 2, at 495.
\end{itemize}
\end{footnotesize}
wells located on tribal land. In 1991, the Southern Ute Indian Tribe filed suit against Amoco, other oil companies, individual oil and gas lessees and lessors who asserted ownership interests in CBM, and federal agencies and officials responsible for the administration of lands held in trust for the Tribe. The Tribe sought a declaratory judgment holding that it owned the CBM contained in the coal found within its mineral estates. The district court granted summary judgement for the defendants and stated that the definition of coal was that of hard rock, not of gas; therefore, the CBM ownership was vested unambiguously in the Amoco defendants.

The Court of Appeals for the Tenth Circuit reversed the summary judgement and granted rehearing en banc on the issue of including CBM gas in the Tribe’s coal interests. The court reasoned that it could “not infer that Congress unambiguously intended to convey to the surface patent holder a component of coal which could not be severed at the time of the statutes’ enactment except in the process of mining the coal itself.” As a result, the Court applied the principle of statutory construction that resolves ambiguity in favor of the sovereign, and held that the CBM rights belonged to the Tribe. The U.S. Supreme Court granted certiorari to determine whether the word “coal” in the Coal Lands Acts of 1909 and 1910 could be interpreted to include CBM.

In a 7-1 decision, Justice Kennedy, writing for a majority that included Chief Justice Rehnquist, and Justices Stevens, O'Connor, Scalia, Souter, and Thomas, held that Congress had not intended to reserve rights to CBM along with coal rights.

32. See id.
34. See id. at 1255. In court, the oil company analogized coalbed methane to water—stating that coal was similar to a sponge. Although intimately associated, the two are separate and distinct. Conversely, the Tribe argued that coal was like a cookie and the coalbed methane similar to chocolate chips, and a chocolate chip cookie just is not the same without the chips. “To illustrate their point, they brought a large chocolate chip cookie to court. The trial judge rejected their argument, but jokingly asked if they had any more cookies to enter into evidence.” Patrick Crow, Southern Ute Case, 97 OIL & GAS J. 34 n.4 (1999).
37. Id. at 1266.
38. “We now hold... that those statutes are ambiguous. Under the longstanding principle that property grants are construed favorably to the sovereign, we conclude the reservation of coal to the U.S. in the 1909 and 1910 Acts must be construed to include the ownership of CBM.” Id. at 1256.
Justice Ginsburg filed a dissenting opinion, stating that the statutes are ambiguous; therefore, the canon requiring interpreting an ambiguous statute in favor of the sovereign must be applied here.40

The majority limited the issues in question as narrowly as possible. First, quoting Perrin v. United States, Justice Kennedy declared that "[u]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning’ at the time Congress enacted the statute."41 Second, the majority stated that "the question before us is not whether Congress [in the early part of the century] would have thought CBM gas had some fuel value, but whether Congress considered it part of the coal fuel."42 Third, the majority further limited the discussion to the question of ownership, avoiding discussions concerning damages or injuries.43

Justice Kennedy relied on dictionaries of the time44 to find that the "common conception of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country’s primary energy resource."45 Early twentieth century definitions referred to coal as a "mineral, solid, hard, opaque, black, or blackish, found in seams or strata in the earth, and largely used as fuel."46 Therefore, the majority determined that, at the time the Coal Lands Acts were passed, coal commonly referred solely to a solid substance and did not include CBM gas.47 The dictionaries the majority cited also supported the contention that CBM was considered a distinct substance apart from coal.48 Justice Kennedy stated that "dictionaries of the day defined CBM gas—then called 'marsh gas,' 'methane,' or 'firedamp'—as a distinct substance, a gas ‘contained in’ or ‘given off by’ coal, but not as coal itself."49

the consideration or decision of the case. See id. at 866; see also High Court Affirms Coalbed Methane Leases, OIL & GAS J., Jun. 14. 1999, available in 1999 WL 9724126.

41. Id. at 873 (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).
42. Id. at 877.
43. See id. at 879.
44. See id. at 874-75.
45. Id. at 874.
46. Id. (quoting 2 NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 529 (J. Murray ed. 1893)). The Court also quotes WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 424 (W. Harris & Allen eds. 1916) (defining coal as a “black, or brownish black, solid, combustible mineral substance”).
47. See id. at 874-75.
48. See id. at 875.
49. Id. at 874. The Court also referred to 3 CENTURY DICTIONARY AND CYCLOPEDIA
Next, the majority interpreted the Coal Lands Acts in light of conditions in the United States at the time the Acts were created and passed. Specifically, the majority considered the energy shortage the government faced at the time, early twentieth century conceptions of coalbed methane, early twentieth century mining practices, and the narrow scope of the statutes.

Justice Kennedy reported that in 1909 and 1910, coal was the country's primary fuel source. As such, the Court concluded that in passing the Coal Lands Act, the legislature intended to preserve this energy source from fraudulent misrepresentation and acquisition. Further, the Court emphasized that Congress sought to minimize the impact upon the homesteaders when the federal government seized lands containing coal. Thus, Congress limited the Coal Lands Acts only to the coal because the perceived energy crisis was the only reason for withdrawing the affected land from homesteading.

Additionally, the majority concluded that Congress had no reason to reserve CBM since, at the time the Coal Lands Acts were created, CBM was a useless by-product of coal. Justice Kennedy observed that coalbed methane posed a danger in 1909 and 1910. According to Justice Kennedy, at the time the Act was passed, coal companies made no attempt to capture methane. Rather, in order to maintain safe working environments for their miners, the companies did everything within their power to allow the methane to escape.

Furthermore, Justice Kennedy emphasized, the Coal Lands Acts of 1909 and 1910 were written very narrowly. He pointed out that before passing these Acts, Congress had rejected earlier

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2229 (1906) (defining "fire-damp" (methane) as "the gas contained in coal, often given off by it in large quantities, and exploding, on ignition, when mixed with atmospheric air"; noting that "fire-damp is a source of great danger to life in coal-mines."). Id.

50. See id. (stating "[p]ublic land statutes should be interpreted in light of the condition of the country when the acts were passed." (quoting Leo Sheep Co. v. United States, 440 U.S. 668, 682 [1979]).)

51. See id. at 875-76.

52. "In contrast to natural gas, which was not yet an important source of fuel at the turn of the century, coal was the primary energy for the Industrial Revolution." Id. at 875.

53. See id. at 876.

54. See id.

55. See id.

56. See id. at 867-81.

57. See id.

58. See id.

59. See id.

60. See id. at 877.
proposals of broad mineral reservations.\textsuperscript{61} In fact, later Acts reserving gas contained explicit language indicating that such fuel was reserved.\textsuperscript{62} Thus, the majority concluded, in the Coal Land Acts of 1909 and 1910, Congress desired only to reserve solid coal; no more, no less.\textsuperscript{63}

Lastly, Justice Kennedy addressed the Tribe's argument that splitting the estates was impractical. The Tribe argued that Congress did not consider CBM and coal separate because splitting the estate this way would be impractical due to the impact upon the coal owner of CBM mining, as well as the need to release CBM to mine the coal.\textsuperscript{64} If estates were split this way, owners of the CBM would require access to the actual coal in order to drill for the gas, thus intruding upon the coal holder's property.\textsuperscript{65} Conversely, the owner of the coal estate would necessarily vent valuable CBM into the atmosphere in order to mine the coal safely.\textsuperscript{66}

In response to this argument, Justice Kennedy reasoned that, in passing the Coal Lands Acts, Congress never considered the value of CBM; thus, it certainly would not have been concerned with splitting coal and CBM estates.\textsuperscript{67} Second, while acknowledging that the coal owner had a right to dissipate CBM, the majority ruled that this did not constitute a right to own the CBM.\textsuperscript{68} Third, the majority pointed out that, at the time of the Acts' passage, the common law was sufficiently developed to resolve such split estate disputes and reiterated that the issue at hand was not one of injury or damages, but one of ownership.\textsuperscript{69}

\textsuperscript{61.} See id. at 869; see, e.g., 41 CONG. REC. 630 (1907) (bill by Rep. Volstead); 41 CONG. REC. 1483-1484 (1907) (bill by Sen. La Follette); 41 CONG. REC. 1788 (1907) (bill by Sen. Nelson).


\textsuperscript{63.} See Amoco Prod. Co., 526 U.S. at 880.

\textsuperscript{64.} See id. at 878 (stating "[r]espondents contend that Congress did not reserve the solid coal but conveyed the CBM gas because the resulting split estate would be impractical and would make mining the coal difficult because the miners would have to capture and preserve the CBM gas that escaped during mining.").

\textsuperscript{65.} See Mcclanahan, supra note 22, at 475-76, 480-81 (providing more information regarding the extraction of coalbed methane and its impact on the solid coal).

\textsuperscript{66.} In fact, federal law requires coal mine ventilation pursuant to 30 U.S.C. § 863(a) (1994). See Peterson, supra note 24, at 1033; see also Mcclanahan, supra note 22, at 480.

\textsuperscript{67.} See Amoco Prod. Co., 526 U.S. at 878.

\textsuperscript{68.} See id. at 879.

\textsuperscript{69.} See id.
In summary, the majority held, "[b]ecause we conclude that the most natural interpretation of 'coal' as used in the 1909 and 1910 Acts does not encompass CBM gas, we need not consider the applicability of the canon that ambiguities in land grants are construed in favor of the sovereign..." 70

Justice Ginsburg, however, took the opposite position—asserting in her dissenting opinion that the statute is ambiguous and that the Court should have applied the canon favoring the sovereign when a statute is ambiguous. 71 Justice Ginsburg stated that she, "would affirm the judgement below substantially for the reasons stated by the Court of Appeals and the federal respondents." 72 Justice Ginsburg argued that since CBM was dangerous, the federal government had intended it to be the liability of the coal owner, rather than the surface owner. 73 As such, she found that it is not clear that the dominion over such a liability would shift upon CBM becoming a valuable commodity. 74

III
ANALYSIS: STATUTORY INTERPRETATION

A. Introduction

The majority decision in Amoco Production Co. is a convoluted opinion that uses both the textual and contextual statutory interpretation methods but avoids hard questions, such as what Congress might have intended had they passed the

70. Id. at 880.
71. See id. (citing Watt, 462 U.S. at 59, noting 'established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.').
72. Id. (citing Southern Ute Indian Tribe v. Amoco Prod. Co., 151 F.3d at 1256-67 and Brief for Federal Respondents 14-16). The Court of Appeals determined that the plain language did not indicate Congressional intent regarding CBM. The court examined Congress' intent at the time the statute was enacted and determined the following: the text of each Act made it clear that the coal was being reserved for subsequent mining and removal, there were alternative dictionary definitions regarding coal at the time, there was enough undisputed information about the unique nature of CBM that even if Congress intended only to reserve the solid rock it may have considered CBM to be part of the solid coal, and in 1909 there appears to have been no technology by which a patent holder could extract and capture CBM from coal without damaging and destroying the coal. Therefore, the court held that the Acts were ambiguous with respect to Congress' specific intent. See Southern Ute Indian Tribe v. Amoco Prod. Co., 151 F.3d at 1258-63.
73. See Amoco Prod. Co., 526 U.S. at 880.
74. See id.
Coal Lands Acts today. This question can be addressed, however, by using a method of statutory interpretation called dynamic interpretation. Dynamic interpretation uses current policies and societal conditions to interpret statutory text when the original expectations of the legislature have been overtaken by subsequent changes in society and the law. In utilizing the more traditional methods of interpretation, the majority demonstrated the current confusions concerning the application of interpretive tools. For example, the Court justified its rejection of one canon of statutory interpretation, interpreting ambiguity in favor of the sovereign, via another canon requiring interpretation of words within their common meaning at the time Congress enacted the statute. Furthermore, the Court applied both textualism and contextualism in its interpretation when one method alone would have sufficed. Amoco Production Co. is an example of an inappropriate application of traditional methods of interpretation. Congress passed the Coal Lands Acts to address circumstances that have changed over the last ninety years. Therefore, these laws should be analyzed using a method of dynamic statutory interpretation.

B. Manner in which Majority Interpreted the Coal Lands Acts in Amoco Production Co.

1. Introduction

Unraveling the decisionmaking process behind how a court chose to interpret a statute is an enigmatic, complex, and sometimes impossible task. In general, despite the availability of a vast array of interpretive principles from which to choose in making such decisions, there seems to be no apparent hierarchy of interpretive methods. The question often is not what method

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76. See Amoco Prod. Co., 526 U.S. at 874-75, 880.
77. In his article, Interpreting Statutes in the Regulatory State, Cass Sunstein proposes several interpretive principles and provides ranking of these principles in order to create some guidelines in instances of conflicts. For instance, presumptions in favor of decisions by politically accountable actors rank highest, while interpretive principles without any constitutional status place last in the hierarchy. Sunstein is also quick to point out, however, that creating a tidy hierarchical package is not an attainable, nor possibly desirable task because,

[ilievitably, statutory construction is an exercise of practical reason, in which text, history, and purpose interact with background understanding in the legal culture. In light of the dependence of outcomes on particular
did the court use to interpret the statute, but *how* did the court
determine that the chosen method was better than alternative
methods. An analysis of *Amoco Production Co.* exemplifies these
current issues within statutory interpretation. In *Amoco
Production Co.*, the majority clearly stated the manner in which it
tackled the statutory question. It is unclear, however, why the
majority decided to take that particular approach over another.
This case demonstrates the seemingly disorganized and
unrestrained manner in which courts interpret statutes.

2. Analysis

In the *Amoco Production Co.* decision, the majority
demonstrated the use of several statutory interpretation tools:
textualism, canons of construction, and contextualism. An
example of a rule within the textualism theory is that the
starting point for any statutory interpretation is the plain
meaning of the text. Justice Kennedy, the author of the *Amoco
Production Co.* majority opinion, is a strict adherent to
textualism. Justice Kennedy states that the role of the Court is
to utilize textualism unless doing so would result in an absurd
interpretation of the law that is completely contrary to the result
Congress had desired. Adherents of textualism believe that

contexts, a fully systematized approach to statutory construction would be
unmanageable. . . . Different judges and administrators will rank such
norms in different ways . . . .


78. See *Amoco Prod. Co.*, 526 U.S. at 880.
79. See ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY
INTERPRETATION AND THE LEGISLATIVE PROCESS 9 (1997); David L. Shapiro, *Continuity
80. See Public Citizen v. United States Dept’ of Justice, 491 U.S. 440, 470-71
(1989) (Kennedy, J., concurring) (stating “[w]here the language of a statute is clear in
its application, the normal rule is that we are bound by it. There is, of course, a
legitimate exception to this rule . . . [w]here the plain language of the statute would
lead to ‘patently absurd consequences’ . . . that ‘Congress could not possibly have
intended,’ we need not apply the language in such a fashion”).
81. See id.; see, e.g., Stephen A. Plass, *The Illusion and Allure of Textualism*, 40
VILL. L. REV. 93, 107 (1995). A strong argument in favor of textualism is that ours is
a democratic society that relies upon the elected legislature to create the law.
Therefore, the role of the Court, a non-elected body, is solely to interpret the law, and
nothing else, including interpreting intent or legislative history. See id. at 106.
Anything but the interpretation of the text could result in judicial abuse of power or
lead to more mistakes than if the judiciary were just confined to interpreting the text.
See Shapiro, supra note 79, at 932; Eric S. Lasky, *Perplexing Problems With Plain
Meaning*, 27 Hofstra L. REV. 891, 900 (1999). Additionally, the only access citizens
have to the law is through the statutory text. Therefore, the public relies upon the
statute’s text. See Sunstein, supra note 77, at 416. Nonetheless, opponents of
canons of construction are judge-created maxims for interpreting
the meaning of statutes. Because the practice still utilizes
the text as a guide, canons fit within the realm of modern
textualism.

When the text itself is not clear or where there is a conflict
between the plain meaning of the text and the apparent
expectations of Congress at the time the statute was enacted, the
contextual interpretive approach comes into play. This theory
involves determining Congress’ intent, expectations, and desired
purpose by utilizing sources of information beyond that of the
statutory text, such as the legislative history and surrounding
historical circumstances in the enactment of the statute.

Textualism state that words in a statute can never stand alone. Rather, the language
takes its meaning from the context and historical significance of the words used at
the time Congress enacted the statute. See id. at 417. In making this observation,
Sunstein refers to Learned Hand’s remarks in NLRB v. Federbusch Co., 121 F.2d 954,
957 (2d Cir. 1941), “[w]ords are not pebbles in alien juxtaposition; they have only a
communal existence; and not only does the meaning of each interpenetrate the other,
but all in their aggregate take their purport from the setting in which they are used.”
This is most clear when the circumstances surrounding the statute have changed, as
is the case in Amoco Production Co., where Congress never assumed or considered
that coalbed methane would have substantial value. See id. at 417 n.33.

82. See Bradford C. Mank, Textualism’s Selective Canons of Statutory
Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference
to Executive Agencies, 86 Ky. L.J. 527, 542-50 (1998); MIKVA & LANE, supra
note 79, at 23. Several examples of canons are: statutes should be read to avoid constitutional
questions; and, titles do not control meaning. See id. at 24-25. However, canons have
recently been subject to much criticism, including comments that “almost everybody
thinks that canons are bunk.” See id. at 25 (quoting William N. Eskridge, Jr. &
Philip P. Frickey, Cases and Materials on Legislation 630 (1988)). In particular,
canons cannot be found in one harmonious, neat package of law, but rather can be
conflicting and incoherent. For instance, Richard A. Posner has said that, “[t]he
usual criticism of canons . . . is that for every canon one might bring to bear on a
point there is an equal and opposite canon, so that the outcome of the interpretive
process depends on the choice between paired opposites—a choice the canons
themselves do not illuminate. You need a canon for choosing between competing
canons, and there isn’t any.” (quoting Richard A. Posner, Statutory
Interpretation—In the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 806
(1983)).

83. Additionally, modern supporters of textualism endorse traditional canons
because they minimize judicial discretion. See William D. Popkin, Statutes in Court
200 (1999).

84. See Eskridge, supra note 75, at 1483.

85. Proponents of the theory point to the fact that the contextual position
addresses the problems of the textual approach, that a statute must be interpreted
against its historical background. See Sunstein, supra note 77, at 424. Nonetheless,
problems also abound within this theory. For instance, although a statute may have
had several purposes, these may often conflict with one another, especially when
dealing with a multimember legislature. Furthermore, legislative history is arguably
unreliable and Justice Scalia suggests that the history is written by well-organized
interest groups and was never enacted and therefore should play no part in the
determination of statutory meaning. See Fritz Snyder, Legislative History and
In reaching its decision, the majority rejected the application of the canon of construction applied by the Court of Appeals and proposed by Justice Ginsburg in the dissent, that an ambiguous statute must be construed in favor of the sovereign. At the end of his opinion and without much discussion, Justice Kennedy concluded that the statute is not ambiguous; therefore, no such canon need or may be applied in the interpretation of the Coal Lands Acts.

Yet, the Acts are ambiguous because "coal" could refer solely to the rock, or to the rock and the gas. The district court found CBM to be separate and apart from the coal estate, and the Court of Appeals found the gas to be part of the coal estate. Nonetheless, Justice Kennedy side-steps the application of the canon by determining that the statute must be construed in light of the most natural interpretation of "coal" at the time the Acts were created. Thus, it naturally follows that although a statute is ambiguous in light of changed circumstances, if the statute is interpreted within its original context, those ambiguities disappear.

Nonetheless, what justification did Justice Kennedy have in limiting the interpretation of "coal" to the early 1900s? Justice Kennedy's blanket rule that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute," is itself an example of a canon of construction, or a common law canon of construction. See Statutory Interpretation: The Supreme Court and the Tenth Circuit, 49 OKLA. L. REV. 573, 576-84; Sunstein, supra note 77, at 429. Sunstein argues that "[e]xcept in rare cases of unintended irrationality or injustice, courts should not permit history to overcome statutory language; but they should also not ignore it, especially when the text is unclear." Sunstein, supra note 77, at 431. Nonetheless, one of the most glaring problems of the contextual perspective is the question of what good the theory is when the text is not clear and the original intentions and expectations of Congress are immaterial given changes in circumstances, technology, society and law. See Eskridge, supra note 75, at 1484.

86. See Amoco Prod. Co., 526 U.S. at 880.
87. See id.
90. Note that the Court also avoided the application of the canons which lead to statutory interpretation in favor of Native American interests. However, this canon may only be applied to statutes and treaties made originally for the benefit of the Tribes. See David M. Blumert, Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity, 16 ALA. L. REV. 37, 42 (1999). The Tribe made this argument at the district court level and the court held that the Coal Lands Acts were not federal Indian laws but public lands acts and thus the canon could not be applied. See McClanahan, supra note 22, at 505 (citing Southern Ute Indian Tribe v. Amoco Prod. Co., 874 F. Supp. 1142, 1159 (D. Colo. 1995)).
rule. Therefore, Justice Kennedy avoided using one canon by simply replacing it with another. As has been noted:

It has become commonplace to recognize that the canons are not a system or body of principles that provide the "correct reading," but are a grab bag of individual rules, from which a judge can choose to support his or her view of the case.\textsuperscript{92}

Consequently, the majority then used both the textualist and contextualist models in interpreting the Coal Lands Acts. Applying both of these models seems excessive and against general understandings regarding when a court may move beyond a textual approach into a contextual analysis.

The canon proposing to interpret the language at the time the statutes were created is a subset of the textualist approach; the focus is still upon the language of the text.\textsuperscript{93} Additionally, the fact that the majority examined the language of the text closely, even referring to dictionaries to determine the definition of the single word "coal," suggests a plain meaning approach to the interpretation.\textsuperscript{94} This is another method falling under the textualist model. Using only these textualist tools, the majority sufficiently answered the question before the Court. For instance, the dictionaries demonstrated that coal and methane were considered separate entities in the early 1900s,\textsuperscript{95} and the statutory language suggested that Congress drafted and passed the Coal Lands Acts as narrowly written statutes (reserving only coal).\textsuperscript{96}

Therefore, it is puzzling why the majority decided to continue by analyzing, contextually, the question presented. In past decisions, Justice Kennedy asserted that the role of the court is to apply the textualism tool unless doing so would result in an absurd interpretation of the law, completely contrary to the result Congress had desired.\textsuperscript{97} Furthermore, Justice Kennedy maintained, when the text itself is not clear, or where there is a conflict between the plain meaning of the text and the apparent expectations of Congress at the time the statute was enacted, the contextual interpretive approach comes into play.\textsuperscript{98} Had Justice Kennedy used only a strict textual viewpoint, he would have

\textsuperscript{92} MIKVA & LANE, supra note 79, at 25.
\textsuperscript{93} Because the practice still utilizes the text as a guide, canons fit within the realm of modern textualism. See POPKIN, supra note 83, at 200.
\textsuperscript{94} See Amoco Prod. Co., 526 U.S. at 874-75.
\textsuperscript{95} See id. at 874.
\textsuperscript{96} See id. at 877.
\textsuperscript{97} See Public Citizen, 491 U.S. at 470-71 (1989) (Kennedy, J., concurring).
\textsuperscript{98} See Eskridge, supra note 75, at 1483.
come to the same conclusion as he did when applying the contextual approach. This demonstrates that Justice Kennedy did not find the result absurd; therefore, he had no reason to delve into other statutory interpretation models. Nevertheless, after textually interpreting the Coal Lands Acts, the majority continues to examine the intent of Congress, the desired result to be gained by the passage of such a statute, and the historical background upon which the Acts were created—all of which are aspects inherent in a contextual analysis.\footnote{99}

The decision in \textit{Amoco Production Co.} demonstrates the Court's confusing application of statutory interpretation methods. Not only is it unclear how the majority decided one canon of interpretation was superior to another, but it is also unclear why the court applied two theories of analysis when it seems that only one was necessary. More importantly though, of those tools of interpretation that the Court used, not one addressed the question of what the Coal Lands Acts mean in the context of today's technical world where disputes arise concerning the ownership of mining and surface rights. Rather, the majority addressed the Coal Lands Acts interpretation in light of the circumstances at the turn of the century, while the parties before the Supreme Court seek resolution of issues created by today's technology and scientific understandings.

\textbf{C. Interpreting Amoco Production Co. Dynamically}

\begin{quote}
[\textit{W}hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

— Justice Holmes\footnote{100}
\end{quote}

1. \textit{Introduction}

Although the current judicial movement embraces the idea that only the text and historical context must be considered in

\footnote{99. As mentioned above in the reporting of the case, the court studied, at the time of the Acts' passage, the condition of the country, coal's prominent position as a fuel source in the industrial revolution, the dangerous characteristics of CBM, the purpose for which the Acts were created, the absence of desire by coal miners to capture CBM, and the characteristic of CBM as a natural gas rather than as coal. \textit{See Amoco Prod. Co.}, 526 U.S. at 874-79.}

\footnote{100. \textit{Missouri v. Holland}, 252 U.S. 416, 433 (1920).}
interpreting a statute,\textsuperscript{101} in the specific case of \textit{Amoco Production Co.}, the Supreme Court should have interpreted these statutes "dynamically." Dynamic interpretation allows courts to refer to \textit{current} policies and societal conditions to resolve unclear statutes.\textsuperscript{102} Dynamic interpretation is a response to one of the most glaring problems of the textual and contextual perspectives; these two theories are inadequate when the text is not clear and when the original intentions and expectations of Congress are irrelevant given changes in circumstances, technology, society, and law.\textsuperscript{103} Rather, dynamic interpretation allows a court to consider changed circumstances and present situations rather than analyzing a statute in an early 1900's vacuum,\textsuperscript{104} such as the majority opinion did in \textit{Amoco Production Co.} For example, consider a situation in which the legislature enacted a law in 1908 which imposes tort liability on a defendant for defective products only if there was negligence or privity of contract between the defendant and the victim. However, considering the vast amounts of products and purchasers in today's market, and considering that the majority of transactions do not involve contracts, such a law would not do justice in present society. Dynamic interpretation would enable the Court to consider the social policy of compensating victims for their injuries and would allow a modern interpretation of the statutes, such as easing the victim's burden of proof.\textsuperscript{105}

While dynamic interpretation is inappropriate for some issues, \textit{Amoco Production Co.} is an example of a situation that lends itself to a dynamic interpretation. Because the majority limited its analysis to a strict interpretation of the statutory language, in the light of the condition of the country when Congress passed the Acts, the majority missed a key opportunity to explore the statute in the context of the changed world.

2. Analysis

Laws are not created in a vacuum but against a particular background and history. The Coal Lands Acts, the subjects of \textit{Amoco Production Co.}, were passed at a time when there was little knowledge of the potential value of CBM and little consideration of the possible conflicts between gas and coal

\textsuperscript{101} See Eskridge, \textit{supra} note 75, at 1479.
\textsuperscript{102} See MIKVA & LANE, \textit{supra} note 79.
\textsuperscript{103} See Eskridge, \textit{supra} note 75, at 1484.
\textsuperscript{104} See id.
\textsuperscript{105} See id. at 1505.
estates. It appears Congress never thought anyone would want to own CBM. In 1909, CBM was considered a waste product, a hazard, and a nuisance. At the time, the general mining practice involved extracting CBM from coal-mines to decrease its potential for explosion. Not until the energy crisis of the 1970s was much effort made to explore the use of CBM as an alternative source of fuel. New technology has now made CBM valuable, leading to an intrusion on the rights of coal owners that Congress never anticipated.

The statutes should not, therefore, be interpreted solely by reference to the conditions surrounding the original enactment of the statute. When circumstances change, the role of the Court is not to strictly adhere to an out-of-date statute but to interpret it in light of relevant changes in order to serve the current needs of society.

By interpreting the statute solely according to its original meaning, the Court avoided addressing more difficult questions. For instance, the Court had not asked what the legislature would have done had it made its decision under present understandings and knowledge regarding CBM. The answer to this question could have led to a different result in this case. As explained in the opinion, facing an energy crisis, the sole purpose of the statute was to reserve fuel sources for the government. If the legislature had known, when it passed the Coal Lands Acts in 1909 and 1910, the potential value of CBM already embedded within the pores of coal, it likely would have reserved that fuel as well. However, the Court never gets a

106. See Peterson, supra note 24, at 1033.
107. See Amoco Prod. Co., 526 U.S. at 876 (noting that at the time the Acts were written, CBM was considered a dangerous waste product and that coal companies venting the gas to prevent explosions made no attempt to capture or preserve it). CBM is still considered a danger in coal mining, as deadly explosions caused by CBM occur each year. See Peterson, supra note 24, at 1033.
108. See Peterson, supra note 24, at 1034; McClanahan, supra note 22, at 473.
109. See POPKIN, supra note 83, at 225.
110. One may argue that judges should dodge hard questions. Nonetheless, the role of courts is most clear in instances such as Amoco Production Co., where Congress has little or no incentive to revisit the Coal Lands Acts of 1909 and 1910. Note that the Tribe's situation under the Acts of 1909 and 1910 is very fact specific, not necessarily deserving the attention of Congress. In such situations, courts may step in and interpret the law, where the gap between Congress' priorities and demand for the defining of a statute must be filled. Furthermore, this question can be countered with another question: is it up to Congress to revisit every statute and amend that statute when it must be interpreted in light of today's changed circumstances?
111. See Amoco Prod. Co., 526 U.S. at 876.
chance to consider this possibility as it would have if it had utilized dynamic interpretation.

The context in which Amoco Production Co. arose resolves the various arguments against dynamic interpretation. Some commentators argue that dynamic interpretation undermines legislative decisions. However, the valuable production of CBM was never considered by the legislature in 1909, so it is difficult to argue that the court would have subverted the legislature's intent by considering these new facts.

Another possible objection is that the legislature, and not the judiciary, is responsible for making political choices to update a particular statute. However, the legislature cannot be expected to amend a statute every time an event occurs which may affect the statute. Further, critics argue that legislative action is often marked by a "failure to enact or update public interest laws, avoidance of hard choices, and favoritism directed at power groups." The judiciary must rectify these biases, especially in cases such as this one, where it may be years before Congress amends the statute to address a specific problem regarding CBM ownership affected by the Coal Lands Acts of 1909 and 1910, if it ever addresses the issue at all.

Finally, one may argue that it is better to have a system in which the Court chooses from a closed list of interpreting tools when addressing a particular statute, rather than applying new, untested theories such as dynamic interpretation. For example, the Court could set forth a list of several interpretive tools, such as textualism and a list of canons. This list would define the hierarchical structure of the tools, identifying which to apply

112. See POPKIN, supra note 83, at 230.
113. See id.
114. See POPKIN, supra note 83, at 230: Karen M. Gebbia-Pinetti, Statutory Interpretation, Democratic Legitimacy and Legal-System Values, 21 SETON HALL LEGIS. J. 233, 336 (1997) (stating that dynamic interpretation "has been criticized for failing to explain clearly when the court should abandon social consensus in favor of emerging views of justice. It has also been criticized for putting too much faith in courts to identify social values and preserve horizontal coherence.").
115. See POPKIN, supra note 83, at 225.
116. See Eskridge, supra note 75, at 1530.
117. See id. at 1531 (stating "[c]ourts can counteract the effect of legislative inattention to general public interests by interpreting statutes dynamically as the statutes grow older"). Also note that courts interpreting treaties have traditionally given Native Americans more favorable treatment than statutes do because enacting Congresses were presumed to have been biased and to have taken advantage of their superior bargaining positions when dealing with Native Americans. See Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (demonstrating the need for and applying a clear statement of the rule to statutes and treaties concerning American Indians so that ambiguities are always interpreted in Indians' favor).
first and in what situations. Nevertheless, as demonstrated by the majority’s opinion in *Amoco Production Co.*, this is not the current situation. Until it is, other tools, such as dynamic interpretation, should be implemented in order to determine where such limits on interpretive instruments should be set.

CONCLUSION

*Amoco Production Co.* exemplifies two aspects of the justice system that require attention and revision. First, current statutory interpretation models are used inconsistently and in manners which best suit judges’ preferences and wills. While this may be desirable when the tools are wielded in a matter beneficial for society, *Amoco Production Co.* demonstrates how the models may be abused to avoid answering difficult, yet important and necessary questions, such as how this statute should be interpreted in light of relevant changes. Second, and related to the first aspect, this case reveals the need to utilize other statutory interpretation models beyond textualism and contextualism, especially when interpreting older statutes facing changed circumstances. Interpreting such statutes in the context of the time when they were written does not benefit today’s society. At the very least, the Court should consider what the original legislature would have done had it been presented with the facts before the Court today. This seems more productive and conducive to creating good law than the majority’s attempts in *Amoco Production Co.* to determine Congress’ intentions via thumbing through dictionaries and studying the antiquated practices of miners at the turn of the century.

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119. The Court recognized that there had been some effort, prior to the enactment of the Coal Lands Acts, to utilize CBM as a fuel, but dismisses this information, stating that Congress had still considered the CBM to be a natural gas, not the solid coal. See *Amoco Prod. Co.*, 526 U.S. at 876-77.