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Judges and Statutory Construction: Judicial Zombism or Contextual Acts?

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JUDGES AND STATUTORY CONSTRUCTION: *JUDICIAL ZOMBISM OR CONTEXTUAL ACTIVISM?*

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I. INTRODUCTION

Joe Amicable resides in the City of Talks, where Lisa Low-Pride manages the federally insured Talks Commercial Bank. Joe is a well-liked, wealthy businessman, who, in addition to contributing enormously to the Talks economy, has always been a law-abiding citizen, doing all of his businesses "by the books." Joe is a charismatic individual whose smooth-talking ability always got him whatever he asked for. Some time ago, he met with Lisa Low-Pride to go over his application for a business loan. He knew that Ms. Low-Pride loved the pretentious side of life. He decided, therefore, to aid his otherwise impeccable application by being overly polite to her. He told her that she was the second (to Mrs. Amicable, that is) most beautiful and attractive woman in Talks.

Intending to influence Ms. Low-Pride's disposition towards the loan application, Joe disregarded the fact that three months prior to the meeting he had voted Ms. Low-Pride as the least attractive woman among twenty-five contestants in Talks's annual beauty contest. He thought, however, that by now she had forgotten the beauty contest. He was mistaken. He also did not know about the federal statute that made it a crime for "anyone to knowingly make *any false statement* for the purpose of influencing in *any way* the action of an FDIC-insured bank upon any application for business loan." Additionally, Joe did not know that this offense attracted a mandatory five-year incarceration at the federal penitentiary, and a lifetime ban from loan applications. Ms. Low-Pride contacted the appropriate federal authorities. Joe was subsequently convicted, and has appealed to your court. As a judge, would you, under the circumstances, affirm his conviction and send him to prison (or ban him from seeking loans from banks)? Or would you excuse such flattery as not relevant to a loan application? Your choice, indeed, depends on how you interpret the statute in question.

Would you interpret it to prohibit such an irrelevant false statement?

If you were Justice Keen of the Supreme Court of Newgarth in Lon Fuller's illustrative case of the Speluncean Explorers, you would abide by the statute's text and send Joe to prison for five years.[1] As with the Speluncean explorers, the language of the statute in Joe's case appears plain and unambiguous. Joe's situation seems to be covered by the statute. There is also no doubt that Joe's flattery of the bank manager is a false statement,[2] or that Joe intended to influence the consideration of his loan application. Similar to the Speluncean explorers, Joe must face the five-year mandate of the federal statute.[3] But, is this the right result? Does the statute actually cover *all* false statements, including those not material to the loan application? Is Joe's flattering statement equally a false statement as, say, if he had lied to the loan officer about owning a beach-front property in Ocean City, Maryland? What if, with a view to winning more favors, he had falsely bragged to her at a cocktail party that he had uncovered the recipe for Coke? Must he be punished because she happens to be the loan officer who is reviewing his loan application? Is it not an understatement to say that such irrelevant false statements, although juvenile, are not within the coverage of the statute in question? Yet the language of the statute prohibits *all* false statements. Indeed, this is precisely the debate driving the current controversy in statutory construction, especially in the United States Supreme Court.

Like Justice Foster of Newgarth, Justice Stevens would reverse Joe's conviction. To Justice Stevens, such a federal statute does not cover all false statements; it covers only statements that are material to the loan application. Thus, the government must prove the materiality of falsehood as a separate element of the crime of making a punishable false statement. In contrast, Justice Souter, like Justice Keen of Newgarth, would find that the federal statute plainly does not require any proof of materiality as a separate element of the crime.

In *United States v. Wells*,[4] the issue before the Supreme Court was the construction of § 1014 of the United States Code.[5] In contest was whether the federal

[1] *See* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949): In the case of the Speluncean explorers, Roger Whetmore, with his fellow members of the Speluncean Society (an organization interested in cave-exploration), went on an expedition. As they explored a certain cave, the cave's entrance gave way and closed them in; they were trapped. They tried diligently to escape, but were unsuccessful. It became eventually apparent that they were to stay in the cave for far longer than they had bargained. Although a rescue team was sent after them, the team failed to get them out on time. They spent 32 days in the cave. To avoid starving to death during those days, they killed and ate Roger Whetmore, who initially suggested that they resort to such survival tactics. Upon their rescue, they were charged with murder, and subsequently convicted and sentenced to hang. An appeal reached the highest court of the land, on which sat Justices Keen, Tatting, Foster, Handy, and Chief Justice Truepenny. The issue was the interpretation of the criminal statute, which read: "Whoever shall willfully take the life of another shall be punished by death." Should the Court affirm the explorers' death sentences? Chief Justice Truepenny affirmed, but admonished the governor to commute the sentences, since the statute applied unfairly to this excusable situation. Justice Keen would simply affirm, without any consideration of the excuses, since the statutory text was plain. Justice Foster considered the statute's purpose and other extratextual factors, and voted for reversal. Justice Tatting chided Justice Foster for not limiting his decision to the text, but nevertheless abstained from deciding, because he found no way out of his dilemma. Justice Handy dwelt on public opinion, and voted for reversal. Because the votes were evenly divided the explorers' sentences were affirmed. This hypothetical naration by Professor Fuller is a classic illustration of the arguments surrounding the theories of statutory construction.

[2] 2. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 692 (3d ed. 1990) (defining flattery as excessive, insincere or *false* praises that are often used to win favors).

[3] Joe's situation is sharply different from that of the Speluncean explorers. I would not have reversed the explorers' sentences, because their act was not only atrocious, but also met any definition of murder one relies on.

[4] 117 S. Ct. 921 (1997).

[5] *See id.* at 924. In *Wells*, the defendants were owners of a business venture, which leased office copiers for a monthly fee that covered the use and maintenance of such copiers. *See id.* In an attempt to raise money, they assigned their financial interests in various lease agreements to certain banks. *See id.* As part of the contracting process with the banks, they furnished the banks with false information. *See id.* First, they gave the banks versions of the lease agreements that falsely indicated that the monthly leasing fees they charged their customers did not include the

statute required the Government to prove separately that the "false statement" charged under the statute concerned a fact of consequence to a loan application.[6] The statute's language was similar to that quoted in Joe's situation.[7] Both the trial court and the intermediate court construed it as requiring a culpable false statement to relate to a material fact.[8] The Supreme Court rejected that construction.[9] Justice Souter, writing for the majority, looked primarily to the text of the statute.[10] The text, according to him, was plain and unambiguous, and proscribed "any" false statement that satisfied the other elements of the statute.[11] This is especially so, Justice Souter noted, as "[n]owhere does [the statute] further say that a material fact must be the subject of the false statement or so much as mention materiality."[12]

The majority's interpretation of the statute in *Wells* exposes the need for a closer look at the principles of statutory construction. While the holding in *Wells* may be correct in that circumstance, the Court's reading of the statute lacks judicial prudence. Although it is hard to argue that the defendants in *Wells* were not culpable, even with materiality as an element of the offense, the problem is the Court's approach to the statutory issue. Because the Court paid more attention to the statute's text than its overall substance and practicality,[13] *Wells* reasoning is flawed. More specifically, it shows why jurisprudential wisdom in statutory construction must go beyond the passive decipherment of legislative grammar.

In contrast to the majority's construction of the statute in *Wells*, Justice Stevens presented a similar hypothetical to Joe's situation above to show the fallacy of a hard-nosed adherence to statutory text.[14] The issue is whether courts and legal practitioners ought to pay more attention to jurisprudential absurdity as a symptom of statutory ambiguity. This Article projects that viewpoint - the so-called "golden rule" of statutory construction. Without such an approach, a flattery-mongering loan applicant as hypothetical Joe faces a five-year prison term. But, as Justice Stevens correctly observed in his dissenting opinion in *Wells*, "the 'unusual' nature of trivial statements provides scant justification for reaching the conclusion that Congress intended such peccadillos to constitute a felony."[15]

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copiers' maintenance costs, but that the customers were separately responsible for such costs. *See id.* According to the government, had the banks known that the defendants already charged their customers for maintenance and were responsible for servicing the copiers, the banks might have required the defendants to maintain a cash-flow reserve account. *See id.* In addition to this misrepresentation, the defendants forged their wives' signatures in the personal guaranties to the banks. *See id.* They were subsequently convicted for knowingly making a false statement to federally-insured banks. *See id.*

[6] *See id.*

[7] *See* 18 U.S.C. § 1014 (1976):

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

[8] *See* Wells, 117 S. Ct. at 924-25.

[9] *See id.* at 925.

[10] *See id.* at 926-27.

[11] *See id.*

[12] *Id.* at 927. Although Justice Souter also reviewed the statute's history, his interpretation was driven by the text.

[13] Even the Court's discussion of the statute's legislative history, *see id.* at 928, is an inadequate attempt at justifying its oversimplification of the statutory text.

[14] *See* Wells, 117 S. Ct. at 938.

[15] *Id.* at 938 (Stevens, J., dissenting).

This debate between the *Wells* majority and Justice Stevens illustrates the main controversy in statutory construction. While some argue that courts should limit the consideration of a statute to the statute's text,[16] others advocate the employment of such sources as the statute's legislative history, purpose, and structure.[17] The Supreme Court itself has not been especially consistent in its approach.[18] This inconsistency buttresses the point that statutory construction is a judicial art, and courts may find it useful to vary their approaches according to the individual circumstances. An adherence to a one-sided approach, therefore, is an uncritical, if not a myopic, exercise.

This Article rejects as incomplete an exercise in construction that relies unwisely on a statute's text. As illustrated with hypothetical Joe above, and also developed below, this author disagrees with the view that textual plainness is the only barometer for measuring textual ambiguity. To be unambiguous, a statute must be capable of a judicious, intelligible, and not an absurd application. This Article, however, also rejects, as an unnecessary usurpation of legislative authority, the unbounded resort to legislative history, especially where a statute's meaning is starkly apparent from the text.

The author views statutory construction as a comprehensive act, which requires courts and legal practitioners to employ a combination of those interpretative tools that can render a statute judiciously intelligible. Part II of this article provides necessary background materials with which to understand this argument. Part III examines the common approaches to statutory construction. Part IV presents a case-note example of the Supreme Court's "passive" approach to construction, with a specific critique of Justice Scalia's textualism. Part V discusses a better approach to interpretation, using the Court of Appeals of Maryland as an example.

II. BACKGROUND

A. The Case-Law Syndrome

With the dominance of the case-law method in law-school instruction,[19] it is easy for law graduates to underestimate the ubiquity of statutory analysis in legal practice. The case-law method, which is epitomized by the Socratic method, thrives on the premise that students are better taught to think like lawyers by learning how older lawyers and judges have thought before them.[20] This Socratic journey begins usually in the first week of law school, when students are taught the valuable lesson of case-briefing. To succeed in this endeavor, the student must learn to dissect a judicial opinion - to understand who sued whom, who did what to whom, who has what

[16] *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter, Scalia, *Rules*]; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter, Easterbrook, *Domains*].

[17] *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS & REFORMS 286 (1985); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

[18] *See, e.g.*, Estate of Covert v. Nicklos Drilling Co., 505 U.S. 469 (1992) (relying on *the text* of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 933(g), to hold that the injured employee of an oil company forfeited his rights to benefits under that section when he failed to obtain the written approval of his employer and the employer's insurer before settling his action against a third-party tortfeasor); Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992) (relying on *the structure* of the Occupational Safety and Health Act, 29 U.S.C. § 655, to hold that the Act preempted a similar Illinois Act, noting, at 99, that "[t]he design of the statute persuades us that Congress intended to subject employers and employees to only one set of regulations . . . ."); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (examining *the legislative history* of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq., in ruling that the Act did not preempt the local government's regulation of pesticide use).

[19] *See* Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure In Which Winnie-The -Pooh Meets Mrs. Palsgraf*, 34 CAL. W.L. REV. 351 (1998); *see also* W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1 (1997).

[20] *See* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 20 (1996). In a survey by Professor Friedland, 46% of sampled law professors said their aim in teaching first-year students was for the students to improve their thinking ability, compared to 15% who said they wanted the students to learn substantive legal doctrine, and 31% who aimed at both objectives. *See id.*

rights, and, most important, what the court said about the whole situation. The idea, as engineered by Professor Langdell at Harvard in the 1870s, is that by perusing appellate opinions the student would develop a critical flair for analyzing subsequent legal problems.[21] At the University of Baltimore, for instance, this lesson begins in orientation week with the famous *Thomas v. Winchester.*[22]

For those who briefed *Thomas* as a first law-school exercise, little doubt exists that such was a mind-boggling experience. Most laborious was the attempt to demystify the court's unorganized use of nineteenth-century legalese. Because the opinion is so poorly written, however, it makes an excellent apparatus for introducing new students to the case-law method of instruction. The students are expected not only to disentangle the factual intricacies of the case, but also to follow the court's muddy analysis. At the week's end, the amiable Professor Easton hopes to have oriented the students enough for what would permeate their first-year substantive courses - case analysis. As to those students who came to law school to learn "the law," they must develop a new respect for judicial opinions, and overwrite the impression that law is couched in black and white. They must learn, instead, to use the judge's oftentimes-flowery language as a blueprint for what may seem like a legal chess game. In Torts, for example, the students must be able to discern the assumption-of-risk theory from Judge Cardozo's colorful articulation in *Murphy v. Steeplechase Amusement Co.*[23]

From the language in *Murphy*, the Torts student must be able to argue, for instance, that the weak-at-heart who seeks amusement in a *House of Horror* assumes the risk of a heart attack. Or that one who goes on a bumper ride may not later claim damages for injuries from another participant's bump. With a little creativity, and a proficiency in case-synthesis, the first-year law student becomes a learned analogist. This is the case-law method, whether standing alone or supplemented by the problem-method;[24] law students are taught through casebooks. With judicial opinions like Judge Cardozo's, Judge Hand's, or Judge Friendly's, such an education is intriguing, even though challenging. There are two main drawbacks, however. First, because the case-law method depends on appellate opinions, which present cases already developed and refined by lawyers and judges, it limits the extent to which students develop their originality.[25] Second, and more

[21] *See* Russell L. Weaver, *Langdell's Legacy: Living With The Case Method*, 36 VILL. L. REV. 517, 549-52 (1991).

[22] 6 N.Y. 397(1852): Mr. Thomas, the husband of an ill woman purchased a medicinal extract, believing it to be what the label portrayed. But the manufacturer's employee mislabeled the bottle; the bottle actually contained a poisonous liquid. Mrs. Thomas drank the liquid and suffered physiological and psychological injuries. Unfortunately for the Thomases, Mr. Thomas did not buy the drug directly from the manufacturer, and New York law at the time required privity of contract for a suit to succeed against a manufacturer. With the case, however, the court changed the law. Winchester had to compensate Mrs. Thomas because the item sold was of a dangerous nature, and posed an imminent danger to unsuspecting customers, who also were more likely to consume the item than was the vendor who bought directly from Winchester. Thus, the genesis of New York's product liability law ignited.

[23] 250 N.Y. 479 (1929):

> *Volenti non fit injuria.* One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at the ball game the chance of contact with the ball . . . . *The antics of the clown are not the paces of the cloistered cleric.* The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. *He took the chance of a like fate, with whatever damage to his body might ensue from such a fall.* The timorous may stay at home.

Id. at 482-83 (citations omitted) (emphasis added). The plaintiff in *Murphy* fractured his kneecap when he was thrown backward by "the Flopper," a ride offered by the defendant to the public in its amusement park. The fun in riding "the Flopper" came from its jerky movement, the riders falling on one another, the screams and laughter. The plaintiff knew that he could fall, yet he got on the ride. *See id.* at 480-81.

[24] *See* Cynthia G. Hawkins-Leon, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Methods Continues*, 1998 B.Y.U. EDUC. & L.J. 1 (1998).

[25] *See* Weaver, *supra* note 21, at 591.

relevant to the discussion here, the case-law method relegates statutory law to the background, and distorts students' ideas about actual legal practice. Because students become comfortable with approaching legal problems in a casebook fashion, they find it increasingly hard to develop an appreciation for statutory law.[26]

This mediocre attitude towards statutory law is more so fortified by the absence of courses in statutory construction from law school curriculum.[27] Because law schools generally have not stressed the primacy of statutes in their curricula, emphasizing instead the *ratio decedendi* of judicial opinions,[28] few students ever get to know or master statutory construction in their law school careers.[29] Even where, as might be the case today, many law schools offer courses on legislation,[30] these courses are not included in the required curricula.[31] Some schools treat statutory construction only in the context of those substantive courses that derive primarily from codified law (tax courses, for example), hoping that interpretative skills would "rob off" on students.[32] This approach - called "the pervasive method"[33] - is, however, faulty because it attends primarily to substantive issues, not to the legislative process or interpretative principles.[34] As Judge Posner noted, a law professor's expertise in a particular statute is not a substitute for the systematic knowledge required for teaching legislation.[35] What is ironic about this gap in law school instruction is that most legal disputes today are likely to concern legislative enactment - statutes, regulations, or ordinances.[36] In fact, it would not be farfetched to say that more than fifty percent of cases decided annually by the United States Supreme Court involve statutory interpretation.[37] The story is not too different in state courts. For instance, about half of the eighty cases decided between September 15, 1995 and May 17, 1996 by the Court of Appeals of Maryland required the court to interpret a constitutional or statutory provision.[38] Yet most lawyers, and even trial judges, are not properly attentive to interpretation issues.[39]

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[26] *See* Paul T. Wangerin, *Skills Training in "Legal Analysis:" A Systematic Approach*, 40 U. MIAMI L. REV. 409, 438 (1986).

[27] *See* HOWARD ABADINSKY, LAW AND JUSTICE: AN INTRODUCTION TO THE AMERIACN LEGAL SYSTEM 89-112 (3d. 1995).

[28] *See id.*

[29] *See* Richard A. Posner, *Statutory Interpretation - In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); *see also* Otto J. Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663 (1987) (arguing that "[r]everence for tradition in law and for our common law roots seems to have exercised a deadhand control in this area, restraining any increase in emphasis in legal education on the study of legislation and its interpretation").

[30] *See* Robert J. Martineau, *Craft and Technique, Not Canon and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 5 (1993).

[31] *See* Hetzel, *supra* note 29, at 664. The University of Baltimore, for example, offers the course *Legislation* as an upper-level elective course, not as part of its intense and well-respected legal skills program.

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See* Posner, *supra* note 29, at 801; *see also* William N. Eskridge, Jr., & Philip P. Frickey, *Legislation Scholarship amd Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 691-92 (1987) (noting that, although substantive courses "can teach students a great deal about working with statutes, . . . they do not approach statutes as a systematic topic of inquiry and do not teach general skills of dealing with legislatures and their statutory products").

[36] *See* Hetzel, *supra* note 29, at 664.

[37] Of the 99 Supreme Court cases sampled by this author from the period between April, 1999 and April, 2000, 51 addressed some form of statutory construction issue.

[38] *See Annual Review of Maryland Law: Court of Appeals of Maryland, 1995-96 Opinions*, 26 U. BALT. L. REV. 1 (1996).

[39] *See* Hetzel, *supra* note 29, at 664.

B. What is Statutory Construction?

Statutory construction, according to Professor Eskridge, is "the Cinderella of legal scholarship."[40] For years, it received little, if any, academic attention, despite its first significant root in Aristotlean writings.[41] But, because civil obligations have derived much from the existence of codified provisions, statutory construction is at least as old as the quest to understand such obligations.[42] As Professor Eskridge further observed, the general applicability of statutory directives has historically depended on how practical such directives are to individuals.[43] Even as far back as the Code of Hummurabi in ancient Babylonia, and the Justinian Code of later Roman Empire, law's legitimacy flowed from how amenable its contents were to interpretation.[44] The interpreter's job, far from being passive and abstract, was an involved and a contextual endeavor, which gave an interpreter the incidental power to dictate the direction of a statutory command.

In today's society, the judge is that celebrated interpreter, mainly by virtue of a constitutional duty. Statutory construction, therefore, is the judicial attempt to give meaning to a statute, so as to decide whether and how the statute applies to a particular action. This quest for meaning is usually an artistic function,[45] whose complexity depends on how ambiguous the statutory language is, and on the angle from which the judge tackles such ambiguity. Even with its various approaches, however, modern statutory interpretation developed from ancient legal hermeneutics, which emphasized a dynamic relationship between the interpreter and the author.[46] Therefore, the judge's approach to statutory construction must express a judicious connection between a statute's enactment and its application and effects – it must be the judicial placenta between the legislative conception and the constitutional life of a statute.

Although legislative pronouncements have increased in modern times, and despite the distinguished intellectual history of statutory interpretation, American scholars did not become terribly attentive to this area of legal development until the early 1980s.[47] Even then, there was no attempt to formulate a coherent system of interpretation that translated into a unique legal discipline.[48] Statutory construction, unsettled and unbranded, has been a judicial "Hail-Mary," with a case-by-case hope that a particular judge would be blessed with the wisdom of biblical

[40] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 1 (1994).

[41] *See id.* at 1-3.

[42] *See id.* at 1.

[43] *See id.*

[44] *See id.* at 2.

[45] *See generally* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527 (1947).

[46] *See* Eskridge, *supra* note 40, at 4: Long before legal hermeneutics, however, Aristotle had, in his *Rhetoric* and *Nicomachean Ethics*, formulated his principles of statutory interpretation based on the concept of practical wisdom. In his view, statutory texts were not cast in stones, but were to be interpreted according to individual circumstances. This Chameleonic approach was to be followed later by the writers of the accompanying *Digest* to the Roman Justinian Code, who, although advocated a more directed approach, saw statutory interpretation also as a flexible endeavor. Building on Aristotle's *Rhetoric* and the Justinian *Digest*, the legal hermeneuticists of the Enlightement age, from whom modern theories developed, offered an approach that objectified the intent of the statutory author. To this end, one interpreting a statutory language was to assume the author's position, imaginatively reconstructing the circumstances surrounding the statute's creation, and interpreting the statute according to how those circumstances were understood. Modern hermeneuticists, such as legal process theorists, recognize, however, the problem with imaginative construction. As such, they offer statutory interpretation as a system under which the judge must give a statute such reading as is in line with the statute's purpose, paying particular attention to how the present situation has changed from one existing when the statute was written. As developed more in Part III of this article, many theories have resulted since then. *See id.* at 2-5.

[47] *See id.* at 1-2.

[48] *See id.*

Solomon.[49] Even with the presently heightened interest by scholars, and the resultant enrichment of the judge's toolbox, current efforts have not necessarily amounted to a settled legal discipline.[50] To understand this intellectual lag, and thereby control the case-law syndrome, one must first understand the nature of codified law, especially with regards to the development of the American legal system.

C. The American Codes of Statutes

In simplistic terms, a statute can be defined as "a command of a particular legislature (federal, state, municipal) that must be obeyed, under threat of governmental sanction, by those whose behavior it regulates."[51] In more descriptive terms:

> [O]n their face, statutes appear abstract. They reveal no story, no characters, no drama - usually just a dry recitation of rights and obligations. Sometimes their provisions conflict or are unclear or vague. But . . . *statutes never represent the abstract exercise of power.* They are always the legislative response to problems identified by legislative bodies as needing resolution in a particular fashion. Every statute has a story behind it, although (unlike a judicial decision) its story is usually untold in the statutory language. Often the story is quite dramatic. Second, statutes are almost always the products of compromise.[52]

To the extent that statutes direct more than they describe, they are skeletal in nature. Even though they could not exist without the "why" of the story they present, they recite only the "who," "what," and sometimes the "how," but seldom express the "why." They are the legislative expression of present public policy, which may not exist long enough to govern future conducts.[53] Because statutes are the problem-responding announcements of individual policy goals, they differ from case law in the latter's foundation on a fact-specific, two-party dispute. Statutes have been a part of the American legal and political system for ages. What is relatively foreign to the American polity, however, is the concept of codified law. American law, like its English antecedent, was not cast in a mosaic stone, but was a philosophical product of tentative legislation and judicial experimentation. As it epitomized the Crown's legitimacy, and also represented an ecclesiastical attempt at equity, the English common law had to be fact-restrained.[54] The law was "commonly" formulated by judges, who ironically were not "common men," but mainly royal intelligentsia with lukewarm attitudes toward codes.[55] The American law followed this disposition.

Codes, during the formative years of the United States, were unique to civil law regimes, such as the French and German systems.[56] While the French and German political environments were ripe for codified law, the American experience counseled a reliance on the English common-law system. The French *Code Napoléon*, for example, resulted from the French revolution against the *l'ancien régime*.[57] Moreover, pre-revolution French law

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[49] The approach employed is akin to the last-minute attempt by a losing quarterback in a football game to salvage the game by throwing the ball to the end-zone, without regards to the relative positions of the players, hoping that one of his teammates would catch the ball and score a touchdown - what is commonly referred to as a "Hail-Mary" pass.

[50] *See supra* note 46 and accompanying text.

[51] ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 2 (1997).

[52] *Id.* at 1 (emphasis added).

[53] *See* Randall B. Ripley, *Stages of the Policy Process, in* PUBLIC POLICY THEORIES, MODELS, AND CONCEPTS: AN ANTHOLOGY 157, 158-161 (Daniel C. McCool ed., 1995).

[54] *See generally* LEWIS MAYERS, THE AMERICAN LEGAL SYSTEM 338-366 (rev. ed. 1964).

[55] *See id.*

[56] *See* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 71 (1981).

[57] *See id.* at 3.

actually drew from various Roman codes.[58] The American legal revolution, in contrast, did not disband the common-law system.[59] American patriots, unlike the French, were not dissatisfied with the law as it existed in colonial times.[60] They were aggrieved, instead, by the Crown's obstruction of justice as in the subjugation of the judge's independence.[61] They sought, therefore, to discontinue the whimsical application of the existing law, not to replace the law with civil codes.[62]

The American codification movement, as a result, was not ignited until the nineteenth century when Jeremy Bentham passionately advocated for importing the European civil codes.[63] This movement derived essentially from the democratic exigency in making the law more accessible to those it sought to control.[64] Before then, the country had consistently rebuffed various calls to enshrine a code system.[65] Even Bentham's two letters to President Madison in 1811 did not persuade the President to commission a federal codification taskforce.[66] But, as it became increasingly difficult for the average citizen to know what the legal obligations were, attitudes towards codification began to change.[67] The potential for political instability coming from the lawlessness that could result from the inaccessibility and uncertainty of the law prompted the nineteenth-century surge to codify the law.[68]

The above is important in discussing how the U.S. law, even in today's codified format, differs fundamentally from European codes. Any viable system of statutory construction must be informed by these historical differences. To appreciate also why American codes require a different interpretative approach from European codes, it is paramount to acquaint oneself with the fundamental distinction between codes and statutes, and with how one code system differs from another. The common-law lawyer may find it hard to grasp this distinction, especially as codes and statutes are used interchangeably. But, while a statute is the actual law, a code is the form in which the law exists. A code is the systemic communication of the law - the evidence of the law. It is different from statutes in that statutes are mere legislative proclamations by the legislature. In the case of the U.S. federal statute, for example, they are usually the acts of Congress signed by the President. Because American codes began as a way of putting the average citizen on notice,[69] they are not codes in the actual philosophical sense. They are codes of publication convenience - they are not "substantive," but "formal," codes.[70]

A formal code does not begin with the original attempt at philosophically formulating a coherent body of law.[71]

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[58] *See id.* at 71.

[59] *See id.* at 3.

[60] *See id.* at 4.

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] *See id.* at 69-92. The greater part of the problem comes from the law being scattered in various locations. There was, of course, no organized system of legal publication, as in today's official and national reporter systems. Even congressional acts were mostly in leaflets, and it was a cherished privilege to own copies. *See generally id.*

[65] *See id.*

[66] *See* Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COL. L. REV. 1098, 1099 (1978). Bentham's argument fared better with such states as Louisiana, the Dakota territory, California, Georgia, New York, Montana and Alabama, although not equally. *See id.*; *see also* Andrew P. Morriss, *"This State Will Soon Have Plenty of Laws" - Lessons From One Hundred Years of Codification in Montana*, 56 MONT. L. REV. 359 (1995); Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1994).

[67] *See* Cook, *supra* note 56, at 12-18.

[68] *See id.*

[69] *See id.*

[70] *See generally* Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073 (1988).

[71] *See id.* at 1088.

It does not involve any creative social engineering that is geared towards the normative comprehension of an ideal social order. It is, instead:

> [A]n administrative undertaking aimed only at grouping together preexisting and scattered rules without modifying their content. It is nothing but a compilation for the purpose of facilitating, through their gathering, the knowledge of numerous rules, from varied and scattered sources. In other words, it is a purely formal gathering and unification of texts.[72]

The important point here is that U.S. codes, as products of formal codification, do not present a syllogistic framework for future development.[73] As "statute codes,"[74] they lack rules of interpretation.[75] They are after-the-fact compilations of mere statutory recitations,[76] and do not comprehend those general principles that allow for a deductive application, as is the case with civil codes.[77] Because they contain *problem-responding* enactment, formal codes rank experience over doctrinal logic.[78] This is in line with the common law's traditional caution against "freezing" the law in ancient philosophy.[79] As a result, although common law codes are easy to update, they present a special problem for the interpreter because they are easily outdated by social change.[80]

In contrast to common-law formal codification, substantive codification, as in civil codes, "consists of devising and shaping a coherent body of new or renovated rules within a whole aimed at instituting or reviewing a legal order," and "presupposes a rather elaborate clear, precise and definite written law . . .."[81] Consider the following elaboration:

> A [substantive] code stems from the will of its authors to consecrate a doctrine and to translate a specific inspiration into positive law. Even though the innovative forces vary according to the circumstances, a true codification aims at instituting a coherent body of new or renewed legal rules destined to either establish a new order or to restore the preexisting order. It occurs only after a thorough research, a general reflection, and a creative effort through which choices have been made, guidelines laid down and, lastly, decisions taken. Thus, in France, the 1804 Civil Code was based on fundamental ideas which were quite new at the time: the uniformity of the law throughout the whole territory; the acknowledgement of legislation as the only real source of law; the comprehensiveness of the law regulating all social relations; the separation of law from morals, religion, and politics.[82]

Ideally, the drafting of substantive codes begins with the philosophical writings of a celebrated jurist or a group

[72] *Id.* at 1089 (citations omitted).

[73] *See id.* at 1092.

[74] *See* Bruce Donald, *Codifications in Common Law Systems*, 47 AUST. L. REV. 160, 171 (1973).

[75] *See* Bergel, *supra* note 70, at 1092.

[76] As Bergel notes, *see id.*, this is done usually by grouping the law in an alphabetical order according to the subject-matters. See, for example, the Maryland Code, beginning with the Agriculture Article, and ending with the Transportation Article.

[77] *See* Bergel, *supra* note 70, at 1090.

[78] *See id.*

[79] *See id.*

[80] *See id.* at 1092. Because "statute codes" are easy to update does not mean that they routinely have been updated. Legislative politics may present a greater obstacle to a statute's revision than its original enactment, especially given congressional schedules.

[81] *Id.* at 1077-78.

[82] *Id.* at 1078.

of eminent jurists, who the legislature may entrust to transform those writings into codes, or whose writings may begin as a specific commission by the legislature to draft the codes.[83] As described in the quoted passage above, substantive codification strives to create a long-lasting framework and direction of the law.[84] The focus usually is on uniformity and stability, as the codes are written with such a prospective vigor as to go beyond a simple, cyclical legislation.[85] Regardless of what they are called - "complete comprehensive,"[86] "institutional comprehensive,"[87] "fully comprehensive,"[88] or "field comprehensive"[89] - substantive codes are not *mere* compilations of individual statutes, but legislatively adopted statements of durable legal doctrines. They present "organized system[s] of general rules which will be easy to discover so that from these rules, through an easy process, judges and citizens may deduce the manner in which this or that practical difficulty must be solved."[90] Unlike American "statute codes," they are not the spontaneous results of legislative politics, but, instead, embody a systematic conception of a coherent judicial philosophy. Thus, from a stated general principle, the interpreter of such a code can, through logical reasoning, deduce the solution to any given problem; there really is little need to consult the legislature for answers to interpretation questions. This is because the code should be "broad enough to be able to regulate various real situations."[91] While the advantages of this system are numerous, it may be criticized as retarding law's evolution and progress,[92] especially in a system where the judge must contribute actively to law's development. Hence, they should not be subjected to the same rules of interpretation that govern common-law statutes-codes.

III. NOTABLE APPROACHES TO STATUTORY CONSTRUCTION

Whatever differences exist among modern theories of statutory construction may relate especially to disagreements about (1) the judge's function in American constitutional democracy, and (2) how the judge can perform that function without trampling the separation-of-powers doctrine. These disagreements, however, are overexagerated, and may turn out to be merely a subtle projection of individual ideological bearings, which does not really translate into a patent homage to the Constitution. Although these approaches have certain similarities in their premises, and may even share a blurry aspiration to an otherwise unitary goal, three main theoretical camps can be distinguished: purposivism, intentionalism, and textualism.

A. Purposivism

Commonly associated with Henry Hart and Albert Sacks, this theoretical approach is premised on the idea that a statute's proper interpretation cannot emerge without

[83] *See id.* Professor Bergel gives the following examples: Switzerland 's civil code that was drafted by E. Huber; France's new family law coming from Dean J. Carbonnier's writing; and the Napoleonic Code drafted by a commission of jurists. *See id.*

[84] *See id.*

[85] *See id.* at 1079.

[86] *See* Donald, *supra* note 74, at 164-65.

[87] *See id.* at 165-68.

[88] *See* Mark D. Rosen, *What Has Happened to the Common Law? - Recent American Codifications, and Their Impact on Judicial Practice and the Law's Substantive Development*, 1994 WIS. L. REV. 1119, 1127-29 (1994).

[89] *See id.* at 1129-31.

[90] *See* T. Huc, Commentaire et pratique du code civil 37 (1892), *quoted in* Bergel, *supra* note 70, at 1080.

[91] *See id.* at 1083.

[92] *See id.* at 1079.

a close attention to the statute's purpose.[93] Because, in the legal-process tradition of Hart and Sacks, a statute culminates from the legislative purpose of addressing a particular problem, any reasonable attempt at discerning the statute's meaning must include an understanding of that purpose.[94] Where the statute's literal interpretation would lead to absurd results, therefore, the statute must be interpreted in a manner consistent with the particular purpose.[95] Consider the following example.

A statutory provision commands that "[c]orporations ... organized and operated for religious, charitable ... or educational purposes" may not be required to pay taxes.[96] A certain University, which obviously is organized and operated for "educational purposes," but does not consider African-American applicants for admission into its program, applies to the Internal Revenue Service (IRS) for a tax-exempt status based on the provision above. The IRS denies the request, citing the University's discriminatory policy. The University appeals this determination to the federal court, relying on the statutory text. It argues that a literal interpretation of the text warrants it a tax-exempt status. This argument is forceful. There is nothing in the text that requires that, to deserve a tax-exempt status, the University must be nondiscriminatory in its organization and operation. To follow the statute's text sheepishly, however, would mean a governmental support of discrimination - an absurd, if not an unconstitutional, result. Hence, to the purposivists, the court must avoid such absurdity, and must, therefore, consult the purpose and policy behind the statutory section. This was precisely what the Supreme Court did in *Bob Jones University v. United States*.[97]

In that case, the Court disregarded the literal language of § 501(c)(3) of the Internal Revenue Code for the purposivist view that "underlying all relevant parts of the Code is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity - namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy [against discrimination]."[98] The Court found that the legislative purpose of § 501(c)(3) was "to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose...."[99] It noted that "[t]ax exemptions for certain institutions thought beneficial to *the social order of the country as a whole* ... are deeply rooted in our history ...."[100] A discriminatory organization, it follows, goes against such purpose.

The purposivist approach is based, of course, on the necessary assumption that the statutory interpreter can

[93] Professors Hart and Sacks, relying on Max Radin's legal realism, had formulated two principal assumptions about legislation. They argued, first, that every statute has some form of purpose or objective and, second, that legislation involved an informed, deliberative and efficient process which governs the legislative quest for the particular purposive law. *See generally* HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958); *see also* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 62 (1962) (discussing the importance of purpose in statutory construction); LON L. FULLER, THE LAW IN QUEST OF ITSELF (1940) (formulating the theory that law is a function of societal purpose); Lon L. Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630, 667 (1958) (arguing that statutory interpretation- should be focused on a statute's purpose and structure, not its words); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) (denouncing legislative intent in favor of a legislative purpose as a tool of statutory interpretation). *Cf.* Frankfurter, *supra* note 45, at 528 (observing that statutes are the practical media of communicating governmental purposes).

[94] *See supra* note 93 and accompanying text.

[95] *See supra* note 93 and accompanying text. This point is properly captured by the Court's language in *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892) (emphasis added): "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not *within its spirit* nor within the intention of its makers."

[96] *See* 26 U.S.C. § 501(c)(3) (1954).

[97] 461 U.S. 574 (1983). The factual narration in the text is a simplified version of the facts in *Bob Jones*. *See id.* at 577-83.

[98] *Id.* at 586.

[99] *Id.* at 588.

[100] *Id.* (emphasis added).

readily discern the purpose of every statute.[101] This assumption is indeed correct to some extent. Some statutes may actually contain purpose-sections - sections announcing the purposes of the statutes.[102] In those circumstances, the judge's job becomes a bit less complicated. But the job is not altogether easy, because a statute may contain more than one purpose in its text.[103] The difficult aspect is deciding which purpose applies to the presenting situation. In that case, the purposivist approach is a much more complicated endeavor, as the search for the particular statute's purpose may even be more confusing than the ambiguous text. For, where the statute's purpose is not codified, the judge must sift legislative records to decide on a purpose - a job that may be akin to chasing a moving target. It is mainly for this reason - the use of legislative history - that opponents of purposivism criticize the method.[104] But, although such criticisms continue to intensify, purposivism remains a common approach to statutory construction.[105]

B. Intentionalism

Like the purposivist approach, intentionalism thrives on the use of legislative history, and also seeks to readily go beyond a literal interpretation of statutory text to answer the absurdity question. The basic notion of intentionalism is that an exercise in statutory construction must revolve around the legislative intent of a statute.[106] The interpreter asks: what was the intent of the legislator in drafting the particular statutory provision - "what were the drafters thinking and why were they thinking this rather than something else when they wrote the text?"[107]

[101] *See* Hart & Sacks, *supra* note 93, at 1156; *see also* 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, 400-402 (1950).

[102] *See, e.g.*, 29 U.S.C. § 651(1999) (declaring the purpose of the Occupational Safety & Health Act (OSHA)):

> Congressional statement of findings and declaration of purpose and policy
> (a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
> (b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

15 U.S.C. § 2641(b) (1997) (stating the purpose of the Asbestos Hazard Emergency Response Act):

> (b) Purpose
> The purpose of this subchapter is—
> (1) to provide for the establishment of Federal regulations which require inspection for asbestos-containing material and implementation of appropriate response actions with respect to asbestos-containing material in the Nation's schools in a safe and complete manner;
> (2) to mandate safe and complete periodic reinspection of school buildings following response actions, where appropriate; and
> (3) to require the Administrator to conduct a study to find out the extent of the danger to human health posed by asbestos in public and commercial buildings and the means to respond to any such danger.

[103] *See* 15 U.S.C. § 2641, *supra* note 102.

[104] *See infra* Part III (D).

[105] *See* Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Internal Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 594-95 (1991).

[106] *See generally* James Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

[107] *See* Robert John Araujo, *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 MISS. L.J. 225 (1998).

Legislative intent should not be confused with legislative purpose, even though attempts to differentiate the two concepts may indeed be laborious.[108] One can distinguish the concepts by looking closely at the questions implicated. While "purpose" asks the "why" question, "intent" goes more to the "how" and "what." As to purpose, the interpreter asks why the legislators enacted a particular statute - the general goal of the statute. For intent, the issue is how the legislators intended to use a particular provision to achieve the statutory goal (or purpose). One asks: How did the legislators mean to apply the provision? What did they intend to communicate or achieve when they used such and such words? Did they intend the particular result to which the court's interpretation leads? "Intent," thus, reveals more of the text's intended meaning, and "purpose" is simply the broad goal of the statute.

As Professors Eskridge and Frickey noted, there are at least three variants of intentionalism - three kinds of intent that the statutory interpreter may seek: actual intent; conventional intent; and imaginatively reconstructed intent.[109] As to actual intent, the statutory interpreter seeks to understand what *all* of the enacting legislators actually intended by the provision.[110] This is not an easy task, especially bearing in mind the number of legislators involved in the formulation of such intent.[111] Thus, the interpreter may rely on conventional intent. Conventional intent can be gleaned from the statements of those who worked closely with the statute throughout its enactment - the legislation's sponsors and floor managers, for instance.[112] This may be done through such legislative records as committee reports and records of floor debates.[113] This is a "de facto representative intent" in the sense that the intent of few legislators is imputed to the whole legislature. The third variant of intentionalism - Judge Posner's imaginative reconstruction - presents a two-part analysis.[114] First, the interpreting judge tries to "put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him."[115] If this inquiry is fruitless, "the judge must [then] decide what attribution of meaning to the statute will yield the most reasonable result . . . ," bearing in mind "it is [the legislators'] conception of reasonableness, to the extent known, rather than the judge's, that should guide the decision."[116] Notwithstanding the variant of intentionalism employed, the idea is that the judge must act "as the enacting legislature's faithful servant, discovering and applying the legislature's original intent."[117] This indeed is the most commonly employed of the approaches to interpretation.[118]

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[108] In fact, courts have variously employed the words in a confusing manner, sometimes, using them interchangeably. *See, e.g.*, Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis added) ("But even assuming the correctness of the Court of Appeals' implicit premise—that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the effect of interfering with that right . . . could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative *intent* even when statutes produce harmful results . . . ."); Leavitt v. Jane, 518 U.S. 137, 143 (1996) (emphasis added) ("Every legislature that adopts, in a single enactment, provision A plus provision B intends (A+B); and that enactment, which reads (A+B), is invariably a 'unified expression of that intent,' so that taking away A from (A+B), leaving only B, will invariably 'clearly undermine the legislative *purpose*' to enact (A+B). But the fallacy in applying this reasoning to the severability question is that it is not the severing that will take away A from (A+B) and thus foil the legislature's *intent*.").

[109] *See* Eskridge & Frickey, *supra* note 17, at 325-32.

[110] *See id.* at 326.

[111] *See* Radin, supra note 93, at 869-70 (observing that legislative intent could not be the intent of all the legislators voting for the statute).

[112] *See* Eskridge & Frickey, *supra* note 17, at 327.

[113] *See* Landis, *supra* note 106, at 888-89 (discussing the values of legislative records in discerning legislative intent).

[114] *See* Posner, *supra* note 17, at 286-93 [hereinafter, *Federal Courts*]; *see also* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP 4-14 (1988) [hereinafter, Posner, *Law & Literature*].

[115] Posner, *Federal* Courts, *supra* note 17, at 286-87.

[116] *Id.* at 287. This approach can be summarized thus: the first issue relates to what the legislators would have wanted, and the second is what they would have found reasonable or acceptable. Notice that these questions are related on a continuum.

[117] Eskridge & Frickey, *supra* note 17, at 325.

[118] *See id.*

C. Textualism

Unlike both purposivism and intentionalism, textualism denounces the use of legislative history. To the textualists, statutory interpretation must not involve the quest for legislative purpose and intent through legislative records. Instead, the proper aim is to understand "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris."[119] Intent and purpose, according to textualists, are objectified by statutory text, not discoverable from legislative history.[120] Even where the text leads to absurd results, and the judge must search for understanding outside the particular provision, the judge should look only to the structure of the statute, interpretations of similar provisions, and canons of statutory construction. The judge should also use these aids if the desire is merely to confirm the literal interpretation of a text.[121]

The textualist approach derives indeed from those scholars who, influenced by public-choice theory (and law and economics jurisprudence), strongly reject the purposivist and intentionalist reliance on legislative history.[122] There are two main versions of textualism.[123] There is the stricter version, which depends solely on the text as the supreme source of meaning.[124] Relying on this version, " '[w]e do not inquire what the legislature meant; we ask only what the statute mean.' "[125] This method begins and ends with the literal interpretation of the text, paying no attention to legislative intent.[126] Thus, if a statute states that "no one shall drive less than fifty miles per hour on Interstate 95, between Richmond, Virginia and Baltimore, Maryland," the strict textualist would not care if Senior Citizen Smith drives thirty-five miles per hour because of bad eyesight or inclement weather. She would neither inquire whether the legislature intended the law to apply with the same vigor at all times, nor consider the fact that the legislature's purpose in enacting the law was to curb "joy-riding" on the freeway. The second variant of textualism is, however, "less ambitious."[127] It relies on a statute's text not as a replacement but as evidence of the statute's legislative intent or purpose.[128] Following this scheme, " '[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression of its wishes.' "[129]

[119] Antonin Scalia, *Common-law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-17 (Amy Gutmann ed., 1997) [hereinafter, Scalia, *Common-law Courts*].

[120] *See id.*

[121] *See* William Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

[122] The public-choice theory rejects Hart and Sacks's view that legislators are rational people striving to enact purposive laws for public benefit. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250 (1992). Relying on public-choice postulates, law and economics scholars argue that statutes represent broad interest-group purposes in the form of legislative compromises. *See id.* Thus, statutory construction must be restrained to the codified evidence of these legislative compromises - the statutory text; any attempt to look for a broader purpose outside the text would lead to a deviation from what actually made it through the legislative process. *See id.*

[123] *See* Eskridge & Frickey, *supra* note 17, at 340.

[124] *See id.*

[125] *Id.* (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899), *reprinted in* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 203, 207 (1920)).

[126] *See id.*

[127] *Id.*

[128] *See id.* at 341.

[129] *Id.* (quoting United States v. American Trucking Ass'ns., 310 U.S. 534, 543 (1940)).

The basic textualist arguments above are the basis of today's prominent and highly reinvigorated textualism - what Professor Eskridge calls *The New Textualism*.[130] In the new textualists' view, the judge's interpretative scheme must be confined to the four corners of a statute, because "[i]f the question of a statute's domain may not often be resolved by reference to actual design, it may never properly be resolved by reference to imputed design."[131] Statutory provisions, hence, must be interpreted on the basis of ordinary (as opposed to legislative) context and word-usage, and consitent with the whole body of law within which the provision fits.[132] The notoriety of this textualist brand followed Justice Scalia's ascension to, first, the Court of Appeals for the District of Columbia, and, second, the United States Supreme Court.[133] His vigor in projecting a textualist approach to interpretation is premised on his dissatisfaction with both the purposivist and intentionalist methods.[134]

[130] *See* Eskridge, *supra* note 121, at 623. Professor Eskridge uses the word *New Textualism* to describe the new and modified wave of the old plain-meaning method. *See id.* at 623. Contrasted with the new textualism, the old plain-meaning rule requires the interpreter to begin a statutory analysis with the statute's text, and to seek legislative history only when the text is not plain. *See id.* at 626. Justice Antonin Scalia and Judge Frank Easterbrook are two of the most notable new textualists. *See generally* Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849 (1989) [hereinafter, Scalia, *Originalism*]; Easterbrook, *Domains*, *supra* note 16; Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) [hereinafter, Easterbrook, *Original Intent*]; Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998) [hereinafter, Easterbrook, *Textualism*]; Scalia, *Common-law Courts, supra* note 119; Scalia, *Rules*, *supra* note 16.

[131] Easterbrook, *Domains*, *supra* note 16, at 537, 544.

[132] *See* Eskridge, *supra* note 121, at 655 (citing Justice Scalia's concurring opinion in *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989)).

[133] *See id.* at 651.

[134] *See* Scalia, *Common-law Courts*, *supra* note 119, at 16-17.

D. The Theoretical Battle About Legislative History

The philosophical war among the purposivists, intentionalists, and textualists is actually an academic battle over the use of legislative history in statutory construction.[135] Between the purposivists and intentionalists, the battle concerns what the interpreter should seek in legislative history - purpose or intent.[136] The dispute between the purposivists and intentionalists on one hand and the textualists on the other stems from the latter's general disdain for any reliance on legislative history.[137] The arguments for and against these three camps are well stated. Beginning with purposivism, the problematic nature of a successful quest for legislative purpose, especially through legislative history, negates any sole reliance on this method. This is because, for the most part, legislative purpose may be neither rational nor unitary. A statute's purpose may be as reasonable as a lobbyist's desires, or as divisive as the ideological or political camps of legislators. While, for example, Congress may sometimes aspire to a unitary goal, it is no gainsaying that it may also produce 535 individual goals that might be difficult to coordinate.[138] As noted by one commentator, "[y]ou couldn't [even] get two-thirds of [] Congress to vote for the Ten Commandments."[139] Thus, Congress may not in fact produce purposive statutes;[140] "[t]he complex compromises endemic in the political process suggest that legislation is frequently a congeries of different and sometimes conflicting purposes."[141] This makes a statutory

[135] *See* Michael C. Dorf, *Foreword: The Limits of Sacratic Deliberation*, 112 HARV. L. REV. 4, 18 (1998).

[136] *See generally* Radin, *supra* note 93.

[137] *See generally* Scalia, *Common-law Courts*, *supra* note 119.

[138] *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND POLICIES 34 (2d ed. 1995).

[139] *See id.* (internal quotation marks omitted) (reporting the comment of one interviewee in the author's survey).

[140] *See* Eskridge & Frickey, *supra* note 17, at 334.

[141] *See id.* at 335.

interpreter's dependence on legislative purpose an exercise in futility.

More challenging than the search for legislative purpose, however, is the search for intent. The subjective nature of intent, and the multiplicity of congressional intent, makes it problematic for even a veteran statutory interpreter to succeed in its extrication. While the intent of some legislators in including a particular provision in a statute may be that they actually believed in the provision, other legislators may have simply decided to avoid a filibuster.[142] Therefore, as Professors Eskridge and Frickey noted, any reliance on actual or conventional search for a provision's legislative intent may lead to indeterminate results.[143] Judge Posner's imaginative reconstruction is similarly flawed. Its assumption that the judge could reconstruct the past understanding of a prior legislature does not account for the individual biases that may infiltrate the judge's view of that history.[144] Additionally, the method neglects any social change that may have taken place subsequent to the statute's enactment, as to devalue the particular legislature's previous understanding.[145] In all, such *imaginative* reconstruction, with a noisy ring of subjectivity, works little or no trick to change what is actually a mere record of political quibbles into a judicious approach to construction.

The textualists' qualms with purposivism and intentionalism do not end with the points above. Instead, they vigorously project the disregard for legislative history. To be sure, they rely adamantly on a statute in question, even for a context.[146] They search through a statute's structure and through other similar statutes for the statute's legislative intent.[147] A reliance on legislative history, according them, gives judges an unlimited power to manipulate a statute.[148] For, "under the guise or even delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their proclivities from the common law to the statutory field."[149]

To the textualists, such judicial activism is unconstitutional and must not be encouraged through the acceptance of legislative history as an interpretative tool.[150] But, as noted earlier, and would be argued further below, this criticism is myopic. It overlooks the nature of American codes, which sometimes require the judge to view beyond the text of a statute. It also ignores the fact that the enforcement of a legislative mandate is more probable with an understanding of the process of formulating that mandate, than with an academic reliance on the uniformity of grammatical rules. In fact, to dismiss legislative intent or purpose is tantamount to giving judges the latitude to engage unconstitutionally in judicial legislation. This is especially so as any intent garnered from an attenuated text (because a statutory text becomes attenuated if unclear) negates the respect for legislative supremacy. After all, if the legislators had expressed their intent clearly through the text, it is unlikely that both the lawyers and the trial judge would miss it. Otherwise, the intent is not that clear, but is what an individual judge infers.

The textualist argument against judicial activism is flawed primarily because of an erroneous definition, and a misplaced demonization, of such activism. Judicial activism, to the textualists, occurs when the judge discards the statutory text and relies on legislative history to arrive at a preferred result.[151] This, indeed, borders on a violation of the judge's oath of office. Judicial activism, contrary to the textualists' definition, is actually a judge's attempt to balance justice with the respect for legislative supremacy.[152]

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[142] For an excellent discussion of how Congress works, see generally CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH AND LEGISLATIVE GUIDE (1989).

[143] *See* Eskridge & Frickey, *supra* note 17, at 328.

[144] *See id.* at 330.

[145] *See id.* at 330-31.

[146] *See* Easterbrook, *Domains*, *supra* note 16, at 544-46. *See generally* Eskridge, *supra* note 121, at 655.

[147] *See id.*

[148] *See* Scalia, *Common-law Courts*, *supra* note 119, at 17-18.

[149] *Id.*

[150] *See id.*

[151] *See id.*

[152] *See infra* Part IV.

Passivity in statutory interpretation - what I call *judicial zombism* - is foreign to the American common-law root, and disharmonious with the institutional notion of justice. Judicial stewardship must not be a passive participation in constitutional democracy. Textualism is simply judicial passivity, akin to ignoring the distress calls of a crime victim upon the robotic view that you are not a police officer. These issues will now be explored in detail.

IV. JUDICIAL PASSIVITY

A. *Brogan v. United States*:[153] A Case-note of Judicial Passivity

A classic example of judicial passivity is the Supreme Court's modern construction of the False Statements Accountability Act.[154] In *Brogan*, the Court construed §1001 of the Act as proscribing the denial of an accusation by federal agents that one has obtained a bribe, even where

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[153] 118 S. Ct. 805 (1998).

[154] 18 U.S.C. § 1001 (2000). Section 1001(a) currently states:

> Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> (3) makes or uses any false writing or document knowing the same to contain any materially false,
> fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both."

First enacted in 1863, the predecessor to § 1001 was intended to curb fraudulent claims with government agencies. *See* Brogan, 118 S. Ct. at 813. In 1934, Congress broadened the statute to include its present language, which goes beyond claims or statements that are made to defraud the government. *See id.* As a result of this expansion by Congress, the government has used the statute to prosecute a wide range of defendants. *See id.*

Federal prosecutors have typically relied on § 1001 to bring charges against individuals for any false statements to federal agents. *See generally* Tim A. Thomas, Annotation, *What Statements Fall Within Exculpatory Denial Exception to Prohibition, Under 18 U.S.C.A. § 1001, Against Knowing and Willfully Making False Statement Which is Material to Matter Within Jurisdiction of Department or Agency of United States*, 102 A.L.R. FED. 742 (1991). The statute, even in its current text, does not seem to distinguish voluntary from responsive false statements. *See* 18 U.S.C. § 1001(a)(2) (2000). Accordingly, courts have applied it to both situations. *See* Thomas, *supra*, at 742. Moreover, in contrast to the 1893 Act that applied to only filed false claims, the broad language of § 1001 does not differentiate between verbal and written statements. *See id.* Thus, courts tended to apply it to both types of statements.

The Supreme Court first examined the scope of § 1001 (formerly, 18 U.S.C. § 80) in *United States v. Gilliland* 312 U.S. 86 (1941). *Gilliland* involved several defendants who willfully and fraudulently reported inaccurate amounts of petroleum produced from certain oil wells. *See id.* at 87. The Court rejected the argument that § 1001 applied to only those matters in which the government had a financial or proprietary interest. *See id.* at 93. The court, tracing the legislative history of the statute, noted that the statute resulted from Congress's answer to the call by the Interior Secretary as to the serious problem of fraudulent claims, particularly in the 1934 era. However, Congress later broadened the statute to include all false statements made to government agents. *See id.* Instead, the Court observed that the statute was intended to "protect the authorized functions of governmental departments and agencies from perversion which might result from . . . deceptive practices." *Id.*

Subsequent to *Gilliland*, prosecutions under § 1001 broadened in scope. *See* Giles A. Birch, Comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990) (arguing that courts should dismiss § 1001 charges if agents induce lies from suspects). In 1953, federal prosecutors brought, for the first time, § 1001 charges against a defendant for merely lying to federal agents in the course of an investigation. *See* United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953). In *Levin*, the defendant was convicted for lying to FBI agents in the course of investigating the defendant for a stolen emerald ring. *See id.* After *Levin*, several defendants were prosecuted for lying to federal agents. *See* Birch, *id.* at 1276. These prosecutions subsequently extended to mere denials of wrongdoing. *See id.*

As a result of the potential for abuse and injustice, many federal judges were troubled by how broadly § 1001 was applied. *See id.* at 1279. This was especially so as § 1001 prosecutions raised two serious issues: departure from the original intent of the statute, and the near violation of the Fifth Amendment. *See id.* Thus, in 1962, the United States Court of Appeals for the Fifth Circuit, in *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962), formulated the "exculpatory no" doctrine. *See* Birch, *id.* at 1280. The doctrine became a defense to § 1001 charges, excusing the mere false denial of wrongdoing. *See generally* Paternostro,

the Government has not yet proven such a crime.[155]. The Court ruled that § 1001 did not exclude a mere denial of wrongdoing.[156] The Court rejected the "exculpatory no" doctrine as not within the text of § 1001.[157] In so holding, the Court overruled those past decisions embracing the "exculpatory no" doctrine.[158]

By abrogating the "exculpatory no" doctrine as a defense to § 1001 charges, the Court has undone more than forty years of restricting the broad language of the statute.[159] The Court's decision hence refurbishes the problems that prompted the "exculpatory no" doctrine. Without any limitations on its reach, § 1001 presents two-layered chances for prosecuting the unwary suspect.[160] To assure a conviction, federal investigators could simply engineer a mere denial of wrongdoing that may very well derive from a suspect's fear of self-incrimination. As noted by one commentator, "the authority to force suspects to admit their guilt either by words or silence, is an unusual power in the hands of an investigative agent."[161] This is an absurdity, and the potential for prosecutorial abuse is enormous. Equally striking is the court's belated loss of confidence in its earlier acquiescence in the "exculpatory no" doctrine. Although the Court has had ample opportunities to abolish the "exculpatory no" doctrine,[162] it waited more than forty years to do so.[163] The Court's ruling raises several questions regarding approaches to statutory construction.

Justice Scalia did not see any need to deviate from what he interpreted as Congress's command through the text of § 1001.[164] According to Justice Scalia, the text, as applied to Brogan's situation, was unambiguous.[165] It categorically proscribed giving "*any* false statement of whatever kind" to a federal investigator.[166] In falsely answering "no" to the agents' question, in Justice Scalia's view, Brogan made a false statement within the purview of § 1001.[167] Whether that statement amounted to a mere denial of wrongdoing was irrelevant. This was because there was nothing in § 1001 that excused a mere denial of

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311 F.2d 298. With this doctrine, statements made by the accused to exculpate themselves, whether later proven to be false or not, were not indictable. Following the Fifth Circuit, seven other circuits adopted the doctrine. The Fifth Circuit, however, in 1994, abrogated the doctrine. *See* United States v. Rodriguez-Rios, 14 F.3d 1040 (1994).

[155] *See* Brogan, 118 S.Ct. at 807. Brogan was convicted for lying to federal agents from the Department of Labor and the Internal Revenue Service. *See id.* He was an officer of a union that represented workers of JRD Management Corporation in New York ("JRD"). *See id.* He was alleged to have collected some cash or gifts (bribe) from JRD. *See id.* Federal agents went to his home to question him about the bribe. *See id.* While there, they asked him if he received cash from JRD. He replied "no." *See id.* Unknown to him, the agents had, before going to his home, obtained some records showing that he received the money in question. *See id.* Hence, after he denied receiving the money, the agents produced the records, and advised him that it was a federal offense to lie to agents. *See id.* at 808. Brogan was subsequently charged and convicted under the False Statement Act in the United States District Court for the Southern District of New York. *See id.* The United States Court of Appeals for the Second Circuit affirmed Brogan's conviction. *See id.* The Supreme Court granted certiorari. *See id.* The Court, Justice Scalia writing, affirmed Brogan's conviction. *See id.*

[156] *See* Brogan, 118 S Ct. at 809.

[157] *See id.*

[158] *See, e.g.*, Moser v. United States, 18 F.3d 469 (7th Cir. 1994); United States v. Taylor, 907 F.2d 801 (8th Cir. 1990); United States v. Equihua-Juarez, 851 F.2d 1222 (9th Cir. 1988).

[159] *See* Birch, *supra* note 153, at 1277.

[160] *See id.*

[161] *See id.* at 1287.

[162] *See id.*

[163] Particularly notable is the fact that the Court's decision comes four years after the Fifth Circuit, which originated the "exculpatory no" doctrine, rejected the doctrine. *See* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

[164] *See* Brogan, 118 S. Ct. at 809.

[165] *See id.* at 808.

[166] *See id.*

[167] *See id.* at 809.

wrongdoing.[168] Thus, the "exculpatory no" doctrine departed from the statute's text.[169] Again, relying on the text, Justice Scalia also rejected the contention that § 1001 was meant to punish only those statements that perverted governmental functions.[170]

Justice Scalia's analysis is consistent with the textualist approach to statutory construction. As a professed textualist, he would not "restrict the unqualified language of [§ 1001] to the particular evil that Congress was trying to remedy."[171] To do so, would "render democratically adopted texts mere springboards for judicial lawmaking."[172] This position reiterates his view that the Court ought to interpret the law as Congress enacted it.[173] Even when a judge perceives the broader social purposes a statute serves, the judge has no authority to fill the gap that may exist in the statute's text.[174] Otherwise, the judge would be making, not interpreting, the law.[175] Therefore, according to Justice Scalia, the legislative intent of § 1001 is irrelevant, because the text is plain and unambiguous.[176]

The argument above is forceful. There is nothing illogical about assuming that a statute means what its text conveys. One should ordinarily have faith in the legislature to draft clear and unambiguous law. A statute's meaning should naturally come from its text. Section 1001 seems clear from its text. The meaning that Justice Scalia ascribes to it is reasonable.[177] When closely examined, however, Justice Scalia's reading is not the only reasonable reading of § 1001. Despite what the textualists may think, congressional grammar is not as perfect as one would anticipate. Although it is a good idea to follow Justice Scalia's advice and apply the meaning that "a wise and intelligent person"[178] ascribes to § 1001, judges possess different levels of wisdom and intelligence. As such, the textualist approach becomes "as open to arbitrary judicial discretion and expansion as the use of legislative intent, or other interpretive methods, if the text-minded judge is so inclined."[179]

A text is amenable to different interpretations, and, thus, manipulable. The Court's decision in *Hubbard v. United States*[180] buttresses this point. In *Hubbard*,[181] an opinion in which Justice Scalia concurred,[182] the Court reversed how it originally interpreted § 1001 in *United States v. Bramblett*.[183] The issue in *Bramblett* was the meanings of "department" and "agency" in § 1001.[184] The *Bramblett* Court concluded that these words meant *all* branches of the government.[185] Forty years later, the Court was not so sure. Although nothing about these words in § 1001 changed to show them in a different light, the *Hubbard* Court ruled that "department," as used in this section, excluded the judiciary.[186] Thus, the Court recognized the "judicial function" exception to § 1001.[187]

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[168] *See id.*

[169] *See id.*

[170] *See id.*

[171] *Id.*

[172] *See* Scalia, *Common-law Courts, supra* note 119, at 17.

[173] *See id.*; *see also supra* Part III.

[174] *See id.*

[175] *See id.*

[176] *See* Brogan, 118 S.Ct. at 809.

[177] It must be reasonable for six of nine justices to agree with Justice Scalia.

[178] *See* Scalia, *Common-law Courts, supra* note 119, at 18.

[179] Gordon S. Wood, Comment, *in* Scalia, *Common-law Courts*, *supra* note 119, at 63.

[180] 514 U.S. 695 (1995).

[181] *See id.* at 706.

[182] *See id.* at 716 (Scalia, J., concurring).

[183] 348 U.S. 503 (1955).

[184] *See id.* at 504.

[185] *See id.* at 509.

[186] Hubbard, 514 U.S. at 714.

[187] *See id.* at 709-11.

The Court saw *Bramblett* as a seriously flawed decision, because "the *Bramblett* Court made no attempt to reconcile its interpretation with the *usual* meaning of department."[188] The problem with this reasoning is precisely why the vacuous reading of a text is flawed. As Justice Scalia stated in *Hubbard*, the potential for mischief is great in a mistaken reading.[189] Why, for example, did the *Hubbard* Court interpret "department" to exclude the judiciary? What is *usual* about this definition?

Most often, a statutory text is not as plain as it appears at first blush. Justice Scalia, in *Brogan*, interpreted the text, "any false statement" to mean *all* false statements, including a "no" response to a question.[190] However, when read with the word, "makes," the phrase, "any false statement" excludes a responsive pleading, as in defendant Brogan's one-word denial of wrongdoing. Although a statement may mean "that which is stated . . . in words of facts or opinions,"[191] the word "make" is susceptible to a wide range of interpretations, all of which suggest an affirmative act.[192] Even Justice Scalia has in the past concurred in such an "affirmative" definition. In *Patterson v. MacLean Credit Union*,[193] he joined Justice Kennedy in holding that the phrase "to make" meant "to form." Whereas, the dictionary defines "form" in at least forty-one ways, the most relevant of which means "to construct or frame (ideas, opinions, etc) in the mind."[194] These words are not derivative but initiative in nature. The *usual*[195] meaning of "make" in Brogan's situation, therefore, was the initiative act of doing, not the reactive or defensive one of responding. To be sure, the word "no" is used normally with a comparative;[196] it is a negative response (a derivative). So, even if it is a "statement," it is not the affirmative declaration required by § 1001.

The terms "knowingly and willingly," and the apparent flavor of § 1001, fortify the argument above.[197] Although Brogan conceded "knowingly and willfully" responding to the agents' question,[198] these words show how disputable the Court's interpretation is of "making a false statement" under § 1001. The word "knowingly" underscores the fact that § 1001 does not apply to *all* false statements. What if the question to Brogan was whether he received "a bribe," as opposed to receiving some cash? In that case, for "no" to be a false response, he must know that receiving some cash translates into receiving "a bribe." But, is whether one received a bribe not a triable issue for the jury to decide? For Brogan, therefore, to knowingly answer falsely, he would have had to be his own jury, as the federal agents already are his judges. This questionable result becomes clearer when one considers the word "willfully."

To "willfully" make a statement is to volunteer or take the initiative to declare words of facts or opinion.[199] A constructive duress contaminates such element of will in a criminal investigative circumstance. It is unlikely that one "willfully" responds to a federal agent's *inculpatory* question, especially when one does not fully appreciate the right to remain silent in that situation. Little wonder the statute does not state, "whoever knowingly and willfully

[188] *Id.* at 702 (emphasis added) (internal quotation marks omitted). For its "usual" meaning of "department," the Court relied primarily on how 18 U.S.C. § 6 defined that word, *see id.* at 700, even though it faulted the *Bramblett* Court for relying on 18 U.S.C. § 287 (the so-called statutory cousin of section 1001), *see id.* at 702-703 (a part of the majority opinion in which Justice Scalia concurred).

[189] *See id.* at 716.

[190] Brogan, 118 S.Ct. at 808.

[191] *See id.* at 807 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 2461 (2d ed. 1950)).

[192] *See* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 820 (1992 ed.).

[193] 491 U.S. 164 (1989).

[194] *See* Webster's, *supra* note 192, at 523.

[195] Relying on the Court's reasoning in *Hubbard.*

[196] *See* Webster's, *supra* note 192, at 919.

[197] *See* Brogan, 118 S.Ct at 807.

[198] *See id.*

[199] *See* Webster's, *supra* note 192, at 1524.

responds." The literal reading of the text, therefore, does not furnish a complete understanding of § 1001.

B. Rethinking Justice Scalia's New Textualism

The textualist approach to statutory construction is appealing in many respects. A statute's text is the most relevant evidence of its command. The out-of-text statements by legislators, presented to support the truth of a statute must be excluded as "legislative hearsay." Because such congressional statements, for the most part, are not consensual, they lack constitutional legitimacy. They may also be susceptible to judicial manipulation. As observed in the preceding section, Justice Scalia clutches to this rationale as the basis for his brand of textualism.[200] This projection is consistent with his shift in focus from the formalist argument that textualism is consistent with the separation-of-powers principle to the functionalist attitude that it curtails judicial legislation.[201]

The main appeal of textualism, however, is the predictability and uniformity that is *achievable* by limiting judicial decisions to statutory text. For, as Justice Scalia notes, when the judge's interpretative job goes beyond the textual rule of law, there exists the danger that "equality of treatment is difficult to demonstrate . . . predictability is destroyed [and] judicial arbitrariness is facilitated . . ."[202] Consider, for example, the Court's decision in *Holy Trinity Church v. United States.*[203]

In that case, the Court construed a statute that made it "unlawful for any person . . . to . . . in any way assist or encourage the importation or migration of *any* alien . . . into the United States . . . to perform labor or service of *any kind* . . . ."[204] The issue was whether the Holy Trinity Church violated this provision when it brought a minister into the United States.[205] The statute, in another section, exempted certain occupations but did not exempt ministers.[206] Yet the Court ruled that Congress did not intend to prohibit ministers from coming into the country when it enacted the statute, citing congressional records.[207] This is so, according to Justice Brewer, because the United States was a Christian nation that would not exclude ministers from its shores.[208]

Although it has been suggested that Justice Brewer's religious background influenced his opinion in *Holy Trinity*,[209] his reliance more on congressional records than on a seemingly clear text is remarkable. Even for ardent followers of legislative history, Justice Brewer's use of congressional records to support his "Christian nation" rationale in *Holy Trinity* borders on judicial politicking. The textualist argument, therefore, is reasonable in such a situation. There may be times when judges go too far in using legislative history. These judges "run the risk of imposing their own notion of public interest upon the inferred purpose of the language they interpret."[210] The risk is heightened when the majority of judges in the particular court share the same social, religious or political views. The result may be judicial legislation, removed from statutory construction. This problem, however, is not peculiar to the use of legislative history.

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[200] *See supra* Part III (C).

[201] *See* Eskridge, *supra* note 121, at 656; *see also* Roger Colinvaux, *What Is Law? A Search for Legal Meaning and Good Judging Under Textualist Lens*, 72 IND. L.J. 1133 (1997) (analyzing the efficacy of the textualist approach to statutory interpretation).

[202] Scalia, *Rules, supra* note 16, at 1175.

[203] 143 U.S. 457 (1892).

[204] *Id* at 458.

[205] *See id.*

[206] *See id.* at 458-59.

[207] *See id* at 465. The Court, relying on committee reports, noted a difference between "brain toilers," a category to which ministers belonged, and "manual laborers," the importation of whom was the "evil" Congress sought to correct through the statute. *Id* at 463.

[208] *See id.* at 466.

[209] *See* WILLIAM N. ESKRIDGE, JR & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, at 523, n. 2 (2d. ed. 1995) (pointing to the fact that Justice Brewer was a minister's son).

[210] *See* Russell Holder, *Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning* in *California Courts*, 30 U.C. DAVIS L. REV. 569, 586, n. 99 (1997).

As noted previously, a statute's text is as manipulable as congressional records. To completely ignore a statute's history, for a stringent adherence to its text, does not account for the danger inherent in the semantic manipulation of text, or erase the differences in how judges comprehend the English language. Justice Scalia's brand of textualism is fallacious in three crucial respects. First, it erroneously assumes that the English or legal language is scientifically precise, and that all judges are bound by the same rules of grammar. Second, it flagrantly ignores how important context is (or what context is most important) to communication, especially statutory communication. Lastly, Justice Scalia's personal practice exposes a hypocrisy that defeats the textualist claim to judicial consistency in statutory interpretation.

As in *Brogan*, Justice Scalia's approach confines a statute to a narrow-minded universe. It cuts off the head and tail of the statute and traps the body in a vacuous "text-tube," and then calls for its magical revival via judicial lexicology. But, even if lexicology were a science, the English language, or the legal language, for that matter, does not enjoy the luxury of scientific precision. The idea that a disputed text is plain and unambiguous, in a sense, invites the view that the lawyers arguing over such a text are either poorly educated or engaged in frivolity. At a minimum, it suggests the omnipotence of the judicial lens. Such an idea disregards the fact that judges often disagree as to the plainness of a text.[211] This is especially so as the legal language is even more complicated than the ordinary English language. Otherwise, there would be no need for legal training. Justice Scalia understands this point. Indeed, in his Confirmation Hearing before the Senate Committee on the Judiciary, he had noted: "[W]e do not normally have a lawsuit in front of us if the language of a statute is clear."[212]

Justice Scalia understands also that political compromises affect a statute's clarity.[213] The problem is further complicated when the statute is a social legislation.[214] When one adds the congressional logistics involved in legislating to "any frailty in draftsmanship, and the malleability and imperfections of English words, the likelihood that one would find plain language diminishes dramatically."[215] The textualists begin to fail when, because they denounce extra-textual sources, they so readily find plain language.

According to Professor Plaas, Justice Scalia, in his textualist approach, is quick to conclude that a provision is plain and amenable mainly because he defines "plain" in a broad manner.[216] The broader he defines "plain," the narrower the chances that a provision is vague or ambiguous.[217] By avoiding the conclusion of vagueness and ambiguity, "he rationalizes his reliance on interpretive devices that may not have been considered or relied on in the legislative process."[218] This leads him to a result-oriented analysis.[219] In other words, he more easily manipulates the text of a provision. Take, for example, his dissenting opinion in *Babbit v. Sweet Home Chapter of Communities for a Greater Oregon*.[220] The issue in

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[211] One need only sift through the Supreme Court's opinions in the past two years to understand that a statute's plainness is in the eyes of the beholder.

[212] *Confirmation Hearing Before Senate Comm. on the Judiciary*, 99th Cong. 65 (1986)(statement of Antonin Scalia, Supreme Court nominee).

[213] *See* Stephen A. Plaas, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 105 (1995) (commenting on Justice Scalia's dissenting opinion in *Johnson v. Transportation Agency*, 480 U.S. 616, 671 (1986)). In that case, Justice Scalia said: "To make matters worse, [the majority] assays the current Congress'[s] desires with respect to the particular provision in isolation, rather than (the way the provision was originally enacted) as part of a total legislative package containing many *quids pro quo*" (emphasis added). *See* Johnson, 480 U.S. at 671.

[214] Plaas, *supra* note 213, at 105.

[215] *Id.*

[216] *See id.* at 106.

[217] *See id.*

[218] *Id.*

[219] *See id.*

[220] 515 U.S. 687 (1995).

Babbit was the logical construction of the Endangered Species Act.[221] Section 9 of the Act prohibits a person from "taking" a species.[222] The question for the Court was what the Act meant by "take." The Act defines "take" to include "harm," but does not define the latter.[223] The Department of Interior, in its regulations of fish and wildlife services, defines "harm" to include the modification of the species' habitat in a way that injures or kills members of the species.[224] The Court considered whether this definition was correct.[225] To answer this question, the Court relied on its analysis in *Chevron U.S.A., Inc. v. NRDC*.[226]

The Court found the word "take" to be ambiguous and so deferred to the agency.[227] The majority, relying on the Act's legislative history and the ordinary meaning of "harm," adopted the agency's definition.[228] Justice Scalia, on the other hand, did not find any ambiguity in the provision, and, therefore, saw no need to defer to the agency. He relied, instead, on such interpretive devices as the dictionary, Blackstone commentaries and statements by the Solicitor of the Fish and Wildlife Service.[229] He then construed "take" not to include "harm" as defined in the agency's regulations. Instead, "take" and "harm," according to him, fell within "the sense of affirmative conduct intentionally directed against a particular animal or animals," not the indirect action of modifying the animal's habitat.[230]

One may advance many theories as to why Justice Scalia thought that how he defined "harm" in *Babbit* was the only way to define the word, but none of the theories points to the efficacy of the textualist approach. The word "harm" in the *Babbit* situation is not plain and unambiguous but susceptible to many definitions. But, even if one were to follow its ordinary meaning, there is nothing unreasonable about "harm" being the indirect result of modifying an animal's habitat.[231] An animal is "harmed" when one destroys its habitat. It is also harmed when it is met by the hunter's bullet. The point is that, without an *appropriate* context, a seemingly plain word may be lost in a semantic war, which war the textualists use vigorously to avoid legislative history.

On most occasions, Justice Scalia finds his context in statutory words.[232] When the words do not furnish sufficient context, he resorts to the Whole-Act Rule, and finds context in other parts of the statute that use similar

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[221] *Id.* at 690.

[222] The Endangered Species Act specifically provides: "[W]ith respect to any endangered species of fish or wildlife . . . it is unlawful for any person . . . to . . . (B) take any such species within the United States . . ." 16 U.S.C. § 1531 (1988 & Supp.).

[223] Section 3(19) defines "take" as "to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (emphasis added).

[224] *See* 50 C.F.R. § 17.3 (1994).

[225] Babbit, 515 U.S. at 690.

[226] 467 U.S. 837 (1984). *Chevron* stands for the proposition that courts would construe an ambiguous statute as the governmental agency that enforces the statute construes it. Thus:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 843-44.

[227] Babbit, 515 U.S. at 690.

[228] *See id.*

[229] *See id.* at 717-721.

[230] *See id. at* 720.

[231] This is even more reasonable than Justice Scalia's interpretation of "willingly making a false statement" to include the derivative "no" answer in *Brogan*.

[232] *See* Scalia, *Common-law Courts, supra* note 119, at 23.

words.[233] This approach is problematic, because the idea that one can rely on the context furnished by a confusing act is self-defeating. Moreover, the Whole-Act Rule is nothing more than a backdoor to legislative intent. The idea is to get the whole act's flavor as to how the act addresses what it is meant to address, so as to find a provision's proper meaning.[234] This doubly processed legislative intent should not be as forceful as that found in congressional records.

The textualist approach assumes that words maintain an independent existence. But words are alive only to the extent of the dynamics between the speaker and the perceiver. To quote Professor Plaas, "judges should not be free to read the notes of a song written by Congress without listening to the music."[235] While it is rational to construe a statute according to its text, Justice Scalia's textualism ignores the fact that "words 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 were used . . . ."[236]

Justice Scalia's argument against legislative context is that it is not reliable, and it creates the danger of "judicial freewheeling."[237] As to unreliability, he cites the fact that, most often, legislators are not well versed in a statute's text because they neither write the actual law nor pay attention when such is read on the floor of the House.[238] This "congressional passivity" argument, however, neither makes up for the textualists' sole or enormous reliance on statutory text, nor rights a "judicial passivity." If the history of a law cannot be trusted to shed light on the law, why should the language of the law be trusted? As to judicial freewheeling, that danger also permeates the textualist approach. As noted above, judges do not follow uniform rules of grammar. In fact, *Brogan*'s reading of § 1001 derives from the majority's (more specifically, Justice Scalia's) semantic freewheeling. Hence, if the majority is wrong in interpreting § 1001, a new law is made, and the textualists' fear of judicial freewheeling is nevertheless realized.

Philosophical and literary theories indicate that universal objectivity in statutory interpretation is an illusion, because the interpreter's perspective will always mingle with the text.[239] Judicial philosophy is ordinarily governed by individual social, political and economic ideologies.[240] To be sure, Justice Scalia's grammatical compass (and, so, his textualism) is more often influenced by his conservative ideology than his textualist fellowship.[241] As such, he is notoriously guilty of judicial freewheeling. On many occasions, Justice Scalia has deviated from his textualism, but very cleverly presents his opinions in a textualist shell.[242] His "textualist malpractice" is most

[233] The idea of the Whole Act Rule is that each section of a statute should be interpreted in the context of the whole act. *See* Eskridge & Frickey, *supra* note 209, at 644-645 ("The key to the whole act approach is . . . that all provisions and other features of the enactment must be given force, and provisions must be interpreted so as not to derogate from the force of other provisions and features of the whole statute.").

[234] *See id.*

[235] Plaas, *supra* note 213, at 127.

[236] *See* Eskridge & Frickey, *supra* note 17, at 342, n. 81 (relying on Shell Oil Co. v. Iowa Dep't of Revenue, 109 S. Ct. 278, 281 n.6 (1988), quoting NLRB v. Federbush Co., 121 F.2d 954, 957 (2nd Cir. 1941)).

[237] *See* Scalia, *Common-law Courts, supra* note 119, at 34.

[238] *See id.* at 32-33.

[239] *See* Eskridge & Frickey, *supra* note 17, at 343.

[240] *See generally* Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998) (examining the factors that influence judges to decide cases the way they do); *see also* Plaas, *supra* note 213, at 128-130. Professor Plaas correctly notes the Supreme Court's ideological make-up as to the division between "liberal," "moderate," and "conservative" justices. He points out that, "to the extent that a Justice is controlled by precast views, the likelihood of truly objective decision-making is reduced to an illusion." *Id.*

[241] *See id.* (arguing that Justice Scalia's opinion is motivated by his conservative politics).

[242] *See generally id.* (discussing generally Justice Scalia's inconsistencies in applying the textualist methods; what Professor Plaas calls "textualist malpractice").

obvious in civil-rights and environmental-law cases, especially cases that affect disadvantaged litigants.[243] An example of this point is his opinion in *Independent Fed'n of Flight Attendants v. Zipes,* where the meaning of § 706(k) of Title VII was in contest.[244]

The issue in *Zipes* was whether the plaintiffs could recover attorney's fees from losing intervenors.[245] Section 706(k) provided that "a court, in its *discretion, may* allow the *prevailing* party . . . a reasonable attorney's fees as part of the costs."[246] One would expect this text to be plain to Justice Scalia. This time, however, Justice Scalia deviated from his textualist tradition, and was quick to find ambiguity in the text.[247] Hence, uncharacteristically, he not only looked to such extrinsic evidence as the American legal position that winners are not entitled to fees from losers,[248] but also relied on legislative history.[249] He held that plaintiffs could not recover attorney's fees under his reading of § 706(k), "in light of the competing equities that Congress normally takes into account," and since his reading furthered "congressional policy in favor of 'vigorous' adversary proceedings."[250] To the proponent of legislative history in statutory construction, this sounds awfully familiar.

Another striking example of where Justice Scalia uncharacteristically deviated from his textualist approach is *Lukhard v. Reed.*[251] The Court in *Lukhard* decided the issue of whether, pursuant to the Aids to Families with Dependent Children Act (AFDC),[252] a personal injury award was "income" or "resources," for the purpose of assessing eligibility for benefits under the Act.[253] The word "income" ordinarily connotes gain or profit.[254] A personal injury award is not commonly understood as a gain or a profit but a financial attempt to put the plaintiff in his or her original position.[255]. Yet Justice Scalia ignored the dictionary and common usage (textual devices), and, instead, opted for legislative intent.[256] He couched this reliance on legislative intent in textual terms, holding that, because other statutes excluded personal injury awards from income, congressional silence as to the AFDC statute showed Congress's intent to include such awards in an applicant's income pool.[257] He also relied on post-enactment statements of those involved in passing the statute.[258]

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[243] *See id.*

[244] 491 U.S. 754 (1989). *See* Plaas, *supra* note 213, at 111, for an excellent discussion of Justice Scalia's opinion in *Zipes*.

[245] Zipes, 491 U.S. at 755.

[246] *See id.* (quoting 42 U.S.C § 2000e-5(k) (1988)) (emphasis added).

[247] Justice Scalia had, in other cases, found "plain" texts that were muddier than § 706(k). See *Babbit,* where Justice Scalia found that ESA's language was plain even when "harm" was not defined in the act, and was subject to several meanings. Additionally, he had on at least one occasion stated that Title VII was "a model of statutory draftsmanship." *See* Johnson v. Transportation Agency, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting) (arguing that Title VII is so clear as to be against affirmative action).

[248] *See* Zipes, 491 U.S. at 758.

[249] *See id.* at 761.

[250] *Id.* at 761-766.

[251] 481 U.S. 368 (1987).

[252] *See* 42 U.S.C §§ 601-615 (1988).

[253] *See* Lukhard, 481 U.S. at 373.

[254] The respondents referred to the dictionary, a resource which Justice Scalia frequently uses in his textualist approach. *See id.* at 375.

[255] To be sure, personal injury awards are not "income" for tax purposes. *See* 26 U.S.C. § 104(a)(2) (1999 & Supp.). *See generally* John E. Theuman, Annotation, *Propriety of Taking Income Tax Into Consideration in Fixing Damages in Personal Injury or Death Action,* 16 A.L.R.4th 589 (1982).

[256] *See* Lukhard, 481 U.S. at 376.

[257] As Professor Plaas notes, "he allowed congressional silence to trump text, common usage and similar schemes." Plaas, *supra* note 213, at 119. The respondents in *Lukhard* had, among other definitions, utilized the IRC's definition of "income" in 26 U.S.C. § 104(a) (1988). *See* Lukhard, 481 U.S. at 376.

[258] *See* Lukhard, 481 U.S. at 378. In his discussion of *Lukhard,* Professor Plaas correctly notes that Justice Scalia had, in another case, rejected the type of post-enactment statements he relied on

Apart from the two cases above, Professor Plaas lists at least four other cases in which Justice Scalia's deviation from textualism is so flagrant that his decisions are irreconcilable.[259] These decisions expose the fact that Justice Scalia's textualism may be motivated by other considerations than consistency, predictability and judicial restraint. His socio-political ideology is a logical suspect. This is supported by the fact that even when he agrees with the so-called liberal Justices, he goes out of his way to distance his opinions from theirs by hiding under different issues. In *California Federal Savings & Loan Ass'n v. Guerra*,[260] for example, the issue was whether California law providing special protections for pregnant female employees discriminated against men, pursuant to Title VII, which prohibits employment discrimination based on sex.[261] Justice Scalia, even while agreeing with Justice Marshall in answering this question in the negative, contended that the Court should have limited its analysis to the preemption issue also raised in the case.[262] This is a suspicious reasoning because preemption was not really a strong contention in that case.[263] One may wonder if Justice Scalia was trying to avoid sanctioning the ruling in *United Steel Workers of America v. Weber*,[264] a decision that he had vigorously argued to be overturned.[265]

For Justice Scalia, like those judges who seek to hide their judicial politicking, textualism presents a principled front. It offers a cherubic mask of judicial neutrality. While judges who rely on a statute's text appear detached from politics, those who use legislative history are more likely to expose their political biases. The textualists appear consistent and neutral because an opinion couched in textual terms very effectively masks the writer's underlining ideological biases.

V. CONTEXTUAL ACTIVISM

Brogan is a typical example of where dogged adherence to statutory text leads to jurisprudential absurdity. While a false exculpatory statement may seem to fit in the text of § 1001, the majority's literal interpretation is judicial passivity, if not jurisprudential zombism, far from the common sense of justice.[266] As Justice Stevens correctly noted, even though § 1001 can literally be read to prohibit false statements by federal undercover agents

in *Lukhard*. *See* Plaas, *supra* note 213, at 119 (referring to *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988), where Justice Scalia, at 118-19, said: "[s]ince such statements cannot possibly have informed the vote of the legislators who earlier enacted the law, there is no more basis for considering them than there is to conduct post-enactment polls of the original legislators").

[259] *See* Plaas, *supra* note 213, at 112-121.

[260] 479 U.S. 272 (1986).

[261] *See id.* at 274. Title VII states:

> (a) Employer practices
> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race*, color, religion, *sex*, or national origin . . . (emphasis added).

See 42 U.S.C. 2000e-2 (1994).

[262] *See id.* at 280.

[263] *See id.*

[264] 443 U.S. 193 (1979).

[265] *See* Johnson, 480 U.S. at 1472 (Scalia, J., disenting) (criticizing the Court's decision in *Weber*). *Weber* addressed a similar issue to that in *Guerra*. The issue in *Weber* was whether, under Title VII, an employer's affirmative-action program (concerning employee training and promotion) for black employees amounted to discrimination against a white employee. *See* Weber, 443 U.S. at 196. The Court answered this question in the negative, holding that such a voluntary and temporary measure geared towards correcting the historical discrimination against black employees, even when race-conscious, was not prohibited by Title VII. *See id.* at 208. At the time of *Weber*, Justice Scalia was not on the Supreme Court, but upon joining the Court, he has been relentless in arguing (as he did in *Johnson*) that *Weber* should be overruled. For such a committed textualist, you would expect Justice Scalia to consistently find the text of Title VII to be plain in its prohibition of employment discrimination, whether based on sex or race.

[266] Justice Scalia confuses "justice," which should always inform judicial decisions, with "writ[ing] into our law [a] species of compassion inflation." *See* Brogan, 118 S. Ct. at 810.

to drug traffickers,[267] it is not likely that the Court would subscribe to such a construction.[268] Justice Stevens was also correct when he observed that the majority's analysis wrongfully deviated from a well-established principle that counsels against applying a criminal statute where doing so would lead to a broader result than Congress intended.[269] Because it is not unquestionably obvious that § 1001 is intended to punish exculpatory statements, since the text is subject to two *permissible* meanings,[270] the rule of lenity should have been applied to construe the statute in favor of the defendant, Brogan. Justice required the *Brogan* Court to choose a restrictive, not Justice Scalia's harsh, punitive construction, if indeed the idea is to force Congress to clarify § 1001.[271]

Although justice does not call for the judicial usurpation of legislative authority, statutory construction is "something more than judicial passivity."[272] Textualism, in fact, promotes the usurpation of legislative authority. At the very least, it promotes injustice. It overlooks the fact that statutory construction is an art, not a science.[273] In the alternative, it suggests that such artistry should be confined to grammatical creativity, devoid of historical context. But one need not rely on the science of etymology to understand that the meaning of a word may depend on the user's purpose in communicating. The meaning of a legal text must not be detached from the "why," as well as

[267] Clearly, drug-trafficking is a matter within the jurisdiction of the United states. *See* 21 U.S.C. § 841 (1998).

[268] *See* Brogan, 118 S. Ct at 817 (Stevens, J, dissenting). The Court in the situation described above is very likely to apply a policy-driven "government-function" exception to exclude such agent's statement from § 1001. However, a Constitution-driven "exculpatory no" exception is also consistent with public policy, i.e., the right to be free from constructively or directly coerced self-incrimination. Although Justice Scalia contends that "proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely, " *See* Brogan, 118 S. Ct. at 810 (quoting United States v. Apfelbaum, 445 U.S. 115, 117 (1980)). Silence where that right is not well understood is a canard. This is mainly so as the *Miranda* instruction given defendant Brogan was materially defective, even though Justice Scalia relies on "the modern age of frequently dramatized 'Miranda' warnings" to conclude that Brogan understood his rights. The agents told Brogan that "if he wished to cooperate, he should have an attorney *contact* the U.S Attorney's Office . . . ." Yet the agents proceeded to question him. *See* Brogan, 118 S. Ct. at 807.

[269] *See* Brogan, 118 S. Ct. at 817. Justice Stevens refers to the Rule of Lenity. The Rule of Lenity is a substantive canon of statutory interpretation that states that laws that are punitive in purpose must be construed strictly. Thus, where a statute does not *clearly* prohibit a conduct, the statute should not be applied to punish a violator. *See* Eskridge & Frickey, *supra* note 209, at 655-56. Even discarding legislative history, Justice Stevens's alternative interpretation of § 1001 is consistent with the Rule of Lenity, a canon of statutory interpretation with which textualists have no qualms. *See* McNally v. United States, 483 U.S. 350, 359 (1987) ("[W]hen there are two *rational* readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and *definite* language.") (emphasis added); *see also* Chisom v. Roemer, 501 U.S. 380 (1991) (Scalia, J., dissenting) ("[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some *permissible* meaning other than the ordinary one applies.") (emphasis added). Although Justice Scalia frequently avoids applying the Rule of Lenity, because he is quick to find "plain" language, he assents to the rule where there is reasonable doubt as to what a text conveys. *See, e.g.*, Deal v. United States, 508 U.S. 129 (1993) (recognizing that the Rule of Lenity may apply in certain situations, but finding no need to apply it to the petitioner's situation because the word "conviction" in 18 U.S.C. § 924(c)(1) is unambiguous).

[270] *See* Chisom, 501 U.S. at 380. In fact, not only is there an alternative permissible meaning of § 1001, for more than forty years, courts have read the provision to exclude mere denials of wrongdoing. *See supra* Part IV.

[271] *See* Brogan, 118 S. Ct. at 810 ("The objectors' principal grievance [as to the force of § 1001] . . . lies . . . with Congress . . ."). In *McNally*, the court applied the Rule of Lenity and strictly construed the mail fraud statute to exclude "depriving another of the intangible right of honest service" from the statutory language "scheme or artifice to defraud." *See* McNally, 483 U.S. at 330. The Court, in an opinion joined by Justice Scalia, left it up to Congress to clarify the statutory language. *See id.* Congress did so by stating that " 'scheme or artifice to defraud' includes scheme or artifice to deprive another of the intangible right of honest services." *See* 18 U.S.C. § 1346 (1988). *See generally* Eskridge & Frickey, *supra* note 209, at 674.

[272] *See* Scalia, *Common-law Courts, supra* note 119, at 61.

[273] *See id.* at 15.

from the "how" or "what," of the text. A major flaw in textualism is that it is one-sided. Its disregard for legislative purpose exposes a gap in its foundational projection of the separation-of-powers doctrine, and does not accord it the constitutional legitimacy that its proponents so desire.

A. The Role of the Judge in an Era of Codes

As discussed earlier, the nineteenth-century surge to codify American law did not overthrow the common-law system. Instead, the resultant code-system was to exist alongside, if not employed to facilitate the common law. Implicit in this idea is the recognition that law must not exist in a vacuum but must be functionally viable to respond to societal changes. This logic, which has long fueled the role of the common-law judge - to apply and develop the law in real circumstances - also projects the constitutional role of the judge in American modern democracy. Even with the separation-of-powers doctrine, the common-law judge was not to become a juristic invalid, whose legitimate posture in policing the majority could easily be thwarted by the same majority. To the contrary, the judge's constitutional role suggests a judicial activism that must be guided by the constitutional duty of protecting justice, not frozen in the *formal* codification of legislative enactment. This role, however, does not permit the imposition of the judge's will on the legislature.[274]

The judge has to weigh the quest for justice against the respect for legislative supremacy; this is what should be understood as judicial activism. On the one hand, the judge, in interpreting a statutory provision, must protect justice and individual liberty by guarding against jurisprudential absurdity. On the other hand, care must be taken so that individual will and force may not override the legislative expression of a *legitimate* majoritarian will. This is the problem that the common-law judge faces.[275] To solve this problem, the judge must begin with the Constitution - the most potent acceptance of majoritarian rule by the minority, and the single best protection for the minority.[276] The judge must use the Constitution as a judicial compass in finding and curtailing jurisprudential absurdity. But, in a common-law system, the judge must not stop with the Constitution. For, where the legislature has enacted an unclear statute, "it is the province of the courts to *liquidate* and *fix* [its] meaning and operation."[277]

The Constitution, though the threshold of liberty, does not complete the quest for justice. The quest for justice is intricately linked with the judicial ability to "liquidate" and "fix" a bad law, not only to invalidate the law simply on constitutional grounds. But, the judge also must perform this duty without violating the Constitution, because "[i]t can be of no weight to say that the courts, on the pretense of repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."[278] The limit of the judge's function in "liquidating" and "fixing" a problematic statute is the issue one must address. Some who engage in judicial passivity try to justify such a choice in terms of judicial restraint and passive virtues.[279] The basic contention is that the judge must not play too active a role in interpreting a statute, as to rely on the political origin of the statute in "liquidating" and "fixing" the statute's meaning. To evaluate this argument, however, one must not ignore the nature of the system within which the judge must function. There are two questions that must be addressed. First, what is a bad and an unjust law? Second, how does the judge liquidate and fix such a law without implicating individual will and force at the expense of constitutional legitimacy? It is indeed the second question that has been the source of much controversy in statutory construction, and the main focus of this Article.

A bad and an unjust law, for purposes of interpretation, is one that lacks clear and general applicability. That type of law is one whose meaning is not apparent from its text, or whose application defeats

[274] *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

[275] *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1-10 (1982).

[276] *See* THE FEDERALIST NO. 51 (James Madison).

[277] THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis added).

[278] *Id.*

[279] *See supra* Parts III and IV. For an excellent presentation of the arguments, see CALABRESI, *supra* note 275, at 1-10.

its purpose because it results in absurdity. Such a law, if criminal, promotes what I call a *Type-1A Error* - punishing those whose conducts would not be proscribed by a *rational* majority, but by the law's textual ambiguities.[280] A law is also bad if it has outlived its usefulness; if its enforcement absolutely makes no sense in present society - it is an anachronistic law.[281] Most bad laws, without judicial intervention, result not only in the violation of constitutionally stipulated rights but also in the denial of fundamental justice, recognizing that justice is a function of the times – a function of societal *Zeitgeist*. These bad laws may be the products of inadequate draftsmanship, or the consequences of a socio-cultural lag. The latter is what Judge Calabresi calls "the problem of legal obsolescence," which he describes as "the combination of the [law's] lack of fit and lack of current legislative support."[282] Both sources of bad laws are, nevertheless, linked to the American codification movement discussed earlier.

As already indicated, the American code-system is not perfect. Although today's statutes may be more detailed and better drafted than before,[283] they still are inadequate to require only a passive interpretation. Because the codes are not elaborate in stating the legal principles that must govern interpretation, they are ravaged with gaps. These gaps defy juristic logic, as to oftentimes require more than a textual construction. This is so regardless of whether these gaps are due to sheer inefficiency in drafting, as with the Internal Revenue Code, or the unintended result of legislative logistics, as in the case of political compromises.

The American judge, therefore, is at a loss if required to interpret these bad laws as the civil-law counterpart would a civil code.[284] This is especially so where the laws also suffer from Judge Calabresi's syndrome of legal obsolescence, where "[c]hanged circumstances, or newer statutory and common law developments, render[ ] some statutes inconsistent with a new social or legal topography."[285] In those situations, the judge is confronted with a law that is so outdated as to make its application irresponsible and unjust. A bad and unjust law, thus, is one whose legislative purpose is undermined by gaps in drafting and changes in social circumstances. What then is a judge to do, as the common-law tradition requires the judge "to think of the law as functional, as responsive to current needs and current majorities, and as abhorring discriminations, special treatments, and inconsistencies not required by current majorities?"[286]

Judge Calabresi is right in advocating a solution through a judicial-legislative balance, with which the court's role is "no more and no less than the critical task of deciding

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[280] This error in judgment can be distinguished from Type-I and Type-II errors. Type-I error is where the court concludes that a conduct is illegal where it is not; Type-II error is the conclusion that a conduct is not illegal where it is. *See* Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1051 (1985); *see also* CURT R. BARTOL & ANNE M. BARTOL, LAW AND PSYCHOLOGY: RESEARCH AND APPLICATION 183-84 (2d ed. 1994).

[281] *See* CALABRESI, *supra* note 275, at 6.

[282] *See id.* at 2.

[283] *See* G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977), *cited in* CALABRESI, *supra* note 275.

[284] *See* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 235 (1999) ("[T]he kind of statute undergirding the civilian attitude, the Code Civile, [for exampe], has characteristics that support the more distinctly separated judicial and legislative role characteristic of western European legal systems"). As noted earlier, European codes:

> [E]merge in a single legislative act, after exquisite intellectual consideration, as an integrated whole. They are rarely if ever amended; and if amended, only after equivalent study and attention to the integrated effects of change. A cohesive, comprehensive, enduring text, not easily changed in any forum, the Code Civile, say our Restatements - invites scholarly explication and judicial modesty.

Id. This type of code hardly needs a rigorous examination of its political history for a proper interpretation, because such history is either evident in the text or can be gleaned without the help of the legislature.

[285] CALABRESI, *supra* note 275 at 6.

[286] *Id.; see also* HELEN SILVING, SOURCES OF LAW 79-125 (1968).

when a retentionist or a revisionist bias is appropriately applied to an existing statutory or common law rule."[287] Although it may be tenuous to advocate Judge Calabresi's version of judicial activism,[288] it is enough to note that judicial activism in a bad-law situation must not violate the judicial-legislative balance. Because a bad law is one which undermines justice, "liquidating" and "fixing" such a law involves a *judicious* application of the law, not Justice Scalia's textual imperialism over legislative will. The judge's role, even in an era of codes, must go beyond textual idolatry, to include the judicial safeguard of justice and liberty for all.

By examining the law's history, the judge aims at "majoritarian" justice, and avoids the constitutional difficulty of imposing independent will and force on legislative intentions - Hamilton's hope.[289] Moreover, where the legislative intentions are oppressive and unresponsive to current constitutional notions of justice and liberty, the law must be presumed unconstitutional. Notice that this judicial-legislative balance does not translate into the merger of the judiciary and the legislature, but into a dynamic relationship that projects our cherished system of checks and balances.[290] Indeed, the judiciary merges with the legislature where the judge imposes an independent intent without regards to legislative due process. The judge, by not paying attention to legislative intent or purpose, but by applying the law according to individual understanding and will, becomes a default legislator. We must, therefore, formulate any approach to statutory construction with the above in mind.

B. Contextual Activism as a Practical-Reasoning Alternative to Textualism

Judicial activism done within the context of legislative supremacy and legal pragmatism is what I call *contextual activism*. The judge's job is to "judge." The *art* of "judging" requires the employment of those techniques that lead to a practical solution to any issue at stake. It should not matter whether the judge uses legislative history, simply looks at statutory amendments, or examines a text in harmony with other provisions, so long as the focus is on avoiding a nonsensical construction. The best approach must consult any source that would shed light on an ambiguous text. Where it is necessary, the judge should fuse historical facts with textual aids. In other words, the judge should engage in what Professors Eskridge and Frickey call the "funnel of abstraction" or "practical reasoning" method.[291] With such an approach, the judge does not passively interpret a provision, but actively seeks a just and constitutional result. The result is "just" because it comports with what is already published as prohibited. It is constitutional because it does not stray from a legitimate legislative goal.

Statutory construction should include an understanding and the use of a statute's background in interpreting its text.[292] While recognizing the primal nature of statutory text, the interpreter should apply historical factors to accentuate the textual language. The text, usually, must be the starting point, whereby one considers a problematic text in the context of the whole statutory scheme.[293] That statutory scheme, in turn, should be understood by a look at the historical undertones of the statute's enactment; generally, this should involve the cautious use of legislative history to discern the statute's purpose.[294] Where there are more than one possible purpose, it is important to study them contemporaneously,

[287] CALABRESI, *supra* note 275, at 164-65 (emphasis in original).

[288] *See id.* at 163-66 (arguing that judges should be allowed to overrule a problematic statute, especially when such is not in synchrony with modern times).

[289] *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

[290] *See* CALABRESI, *supra* note 275, at 164.

[291] *See* Eskridge & Frickey, *supra* note 17, at 353.

[292] *See id.* at 353-62.

[293] *See id.* at 354-55.

[294] *See id.* at 356, 358.

and to see how they work together to give meaning to the text. With a "smoking-gun" legislative history,[295] if not planted to derail the focus of the statute to where a loser legislator or lobbyist wants it, the judge's job is dramatically reduced. The judge should also examine those evolutive factors as to understand how changed circumstances affect the statutory meaning.

Instead of Professors Eskridge and Frickey's emphasis on a hierarchical consideration of these contextual factors,[296] however, the contextually active judge focuses more on the harmony among the relevant factors; apart from the statutory text, no one factor is more important than the other. Moreover, the level of inquiry into these factors must not go as deep as to transform the context into the law. Additionally, unlike what Professors Eskridge and Frickey suggest in their practical-reasoning method,[297] the contextual activist need not engage in Judge Posner's imaginative reconstruction. Such imaginative reconstruction permits the judge to impute an individual legislative amateurism into the interpretive process. This is an attempt at lawmaking, to which the textualist objection is warranted. The relevant notion, instead, is to have a sufficient background for understanding a text. There is no need for a "psychic" reconstruction of defunct congressional thought-process.

While one may find context in legislative records, such records must be used with caution. A statutory context must not overshadow the text. Legislative history, while an appropriate context, is not the law. To over-emphasize this history is to stand a chance of losing sight of the actual law that went through the enactment process. Thus, contextual activism does not mean the unbounded resort to legislative history. As it rejects the vacuous and mindless dependence on text, so does it denounce the irresponsible reliance on the scattered verses of legislators. Statutory interpretation, instead, is "judging," an endeavor that must be based on judicial sensibilities, and aim at legal practicability.

C. The Maryland Approach as an Example of Contextual Activism

It has been argued that there is no difference between the Supreme Court and state courts in how they approach the interpretation of statutes.[298] According to Judge Abner J. Mikva and Professor Eric Lane, "approaches to statutory interpretation are not divisible into 'state' and 'federal.' Differences in interpretative approaches are the product of individual judicial sensibilities and not, for the most part, particular jurisdictions."[299] Along this line, Professor Lane further contends that state courts are not unique in their application of common-law techniques in construing statutes.[300] In his views, federal courts, like state courts, use the common law to fill the gaps in statutes.[301] Because judges, whether "federal" or "state," must "decide" cases, the common law is an inevitable technique on both benches, not one restricted to the state bench.[302] Instead of jurisdictional differences, factors that determine whether a judge will impose his or her individual will on a statute include the statute's clarity, the intensity of the individual will, and the judge's sense of responsibility towards statutes in general.[303]

The views above are partially right. While it may be right that "individual judicial sensibilities" account for a large part of a judicial decision, differences in the political dynamics of the two jurisdictions may control such sensibilities differently. Thus, the tune of the common-law technique applied may derive from jurisdictional sensibilities. In state courts, for example, the electoral or republican nature of the relationship between courts and citizens may require judges to employ a more pragmatic approach to statutory interpretation. Thus, the state judge's sense of responsibility towards a statute may be more

[295] *See id.* at 356.

[296] *See id.* at 353-54.

[297] *See id.* at 356-57.

[298] *See* MIKVA & LANE, *supra* note 51, at 3-4.

[299] *Id.*

[300] *See* Eric Lane, *How to Read a Statute in New York: A Response to Judge Kaye and Some More*, 28 HOFSTRA L. REV. 85, 87 (1999).

[301] *See id.*

[302] *See id.*

[303] *See id.*

judicious and less detached than found in a one-tracked approach as in textualism. Because the politics of selecting federal judges differ from that of state judges, the aggregate make-up of individual judicial sensibilities may be different for both benches. Moreover, judicial sensibilities derive considerably from individual ideological or political persuasions. Regardless of the reasons, there should be no serious dispute over whether there are certain differences between the Supreme Court and state courts in their approaches to statutory construction. Take the Court of Appeals of Maryland, for example.

Maryland's approach is a classic example of contextual activism, far from the Supreme Court's inconsistent homage to legislative context. Like several state high courts, the Maryland Court of Appeals relies primarily on the legislative context of a statute for the meaning of its text. The focus is on avoiding an interpretation that would lead to absurd results, because such results could not have been the intent of the enacting legislature. Judge Wilner's articulation of the Maryland approach is an excellent description of contextual activism. Thus:

> [I]n construing a statute, [the] objective is to ascertain and give effect to the intent of the Legislature. If the language of the statute is clear and unambiguous and expresses a meaning consistent with the statute's goals and apparent purpose, our inquiry normally ends with that language. If, on the other hand, the language is susceptible to more than one meaning and is therefore ambiguous, we consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment, and, in those circumstances, in seeking to ascertain legislative intent, we consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.[304]

Maryland courts have variously relied on what they call "the cardinal rule of statutory construction" - to ascertain and effectuate the intent of the legislature. This cardinal rule, I argue, does not usually operate beyond what should be called "the papal rule of statutory construction" - that courts must not effectuate that expression of intent that is inconsistent with common sense, or leads to absurd results. In performing this function, courts must start with the text of a statute. Logically, where the text is plain and unambiguous in its expression of the legislative intent, there is no need to continue the inquiry. The problem, however, is that the judge who ignores context, or who is quick to find plain text, is at a high risk of not effectuating the intent of the legislature. Such a judge is one who also thinks that the intent of the law is different from that of the legislature; a position that is conducive for "judicial freewheeling."

Although I have noted earlier that legislative intent may be difficult to discern, the court can use the statute's purpose as a basis for understanding such intent. In ascertaining intent, the judge must note that the members of a legislature are rational people, and, therefore, would not intend an absurd result, but one that comports with common sense. This is precisely what the Maryland high court does with great consistency and efficiency. Regardless of how recent Maryland began keeping legislative record, the Maryland Court of Appeals has done well in tracing the legislative history of a statute, and in discerning the intent of a particular provision. Certain factors may account for this efficiency, and for the state court's better use of legislative context than done by the Supreme Court. For one thing, as compared to Congress, state legislatures are more unified in their goals and intent. Although local constituencies in state legislatures may approximate the diversity found in Congress, state lawmakers, on the whole, seem to have fewer distracters to confront. It is one thing for Baltimore City to compete for legislative attention against another Maryland county, it is quite another for Maryland to go against states like California, Texas and Florida in Congress. The members of Congress simply have more diversified interests competing for their attention.[305] Therefore, it may be more

[304] Chesapeake Charter, Inc. v. Anne Arundel County Board of Educ., 358 Md. 129, 135, 747 A.2d 625, 628 (2000) (citations omitted).

[305] *See* KINGDON, *supra* note 138.

difficult to ascertain congressional intent than it is to ascertain the intent of a state legislature.[306]

Whatever may be the reason, Maryland courts have consistently followed the rule stated by Judge Wilner in *Chesapeake Charter*. The state high court seems to have done this in all of the 163 cases that this author reviewed. While the court emphasized certain aspects of the rule in some cases, it never strayed from the rule in all of the cases. In some cases, the court seemed to emphasize the clarity of a text; and, in other situations, it dwelt on legislative context. The logic of this differential emphasis is precisely why courts cannot depend on any one principle of interpretation to attack a statutory problem. The issue in a case must depend on the particular circumstance. While a statute may present a problem of serious textual ambiguity, another statute may implicate such absurdity questions as to require a reliance on legislative history. Either way, the focus must remain on discerning and effectuating that legislative intent that is consistent with the particular circumstances. The Court of Appeals of Maryland reiterated this approach in *Sacchet v. Blan*.[307]

The issue in *Blan* was whether "manslaughter by automobile" should be classified as a "crime of violence," for the purpose of determining the rate to be applied in calculating an inmate's good-conduct credits.[308] Section 700 (d) of Article 27 of the Maryland Annotated Code is the statutory authority under which the Division of Correction ("D.O.C.") awards good-conduct credits to an inmate, which generally results in an earlier release of the inmate.[309] In calculating these credits, this section differentiates between crimes of violence and other crimes.[310] While those convicted of violent crimes are awarded credits at a rate of five days per month, other convicts receive ten days per month.[311] In *Blan*, the defendant was convicted of manslaughter by automobile.[312] The question, therefore, was whether this crime was a crime of violence, as to deserve five, instead of ten, days per month in good-conduct credits.[313] Section 643B(a) of Article 27 lists which crimes are considered crimes of violence.[314] Under this section, manslaughter, except involuntary manslaughter, is a crime of violence.[315] However, there is no indication as to whether manslaughter by automobile is such a crime,[316] since this crime is different from those enumerated in Section 643B(a) in that it does not require proof of intent but simply proof of gross negligence.[317]

The parties' arguments derived considerably from their search for legislative intent in the textual amendments to Section 643B(a).[318] In the State's views, the legislative intent of this section, as it concerns automobile manslaughter, is evident in the phrase "manslaughter, except involuntary manslaughter."[319] By this phrase, according to the State, the General Assembly intended to categorize as crimes of violence all forms of manslaughter except common-law involuntary manslaughter.[320] This conclusion was warranted, the State contended, because if the legislature had meant to include only common-law voluntary manslaughter, it could have specifically done so by using a different phrase from "manslaughter, except

[306] *See supra* Part III (D).

[307] 353 Md. 87, 724 A.2d 667 (1999).

[308] *See id.* at 92, 724 A.2d at 669.

[309] *See* MD. ANN. CODE art. 27, § 700 (1997 & 1998 Supp.).

[310] *See id.*, § 700(d)(2)&(3).

[311] *See id.*

[312] *See* Blan, 353 Md. at 88, 724 A.2d at 667-68.

[313] *See id.* at 92, 724 A.2d at 669.

[314] *See* MD. ANN. CODE art. 27, § 643B(a) (1997 & 1998 Supp.).

[315] *See id.*

[316] *See id.*

[317] *See id.* at § 388.

[318] *See* Blan, 353 Md. at 93-95, 724 A.2d at 669-70.

[319] *See id.* at 93, 724 A.2d at 669.

[320] *See id.*

involuntary manslaughter."[321] The inmate, Blan, argued, in contrast, that this phrase actually expressed the legislature's intent to focus on only the two common-law forms of manslaughter – voluntary and involuntary manslaughter.[322] Otherwise, the legislature would have expressly mentioned manslaughter by automobile, especially having amended other phrases in the same subsection, with a view to clarifying the list of crimes of violence.[323]

The court of special appeals found Blan's argument persuasive, basing its ruling upon the failure of the General Assembly to amend the subsection as suggested, despite the past opportunities.[324] The court of appeals, however, went beyond this point, noting that the answer to the issue did not lie in either "any supposed plain meaning of the phrase 'manslaughter, except involuntary manslaughter' . . . [or] in any purported inaction with respect to the same language by successive Legislatures."[325] This is because each of these two factors is amenable to different, but equally, plausible interpretations, "if all we look to is the single, contested phrase as if in a vacuum."[326] Therefore, "viewing statutory language in isolation is a method of construction which this Court eschews."[327] Instead, the court would "examine the language of the statute in the context in which it was adopted, and consider the general purpose, aim, or policy behind the statute."[328] In other words, the court would apply practical reasoning in looking beyond the text of a statute, especially with a view to understanding such text within the context of legislative intent and purpose, instead of finding that intent and purpose in the unclear text.

The court, upon rejecting the parties' overemphasis on the statutory text, began addressing the issue by examining the nature of the crimes categorized as crimes of violence under Section 643B(a).[329] One distinguishing factor between those crimes and automobile manslaughter, the court noted, is that, unlike the former which required proof of criminal intent, the latter required only proof of gross negligence.[330] The latter, in fact, is an offense committed while the offender is doing a lawful thing in an unlawful manner, compared to the crimes listed in Section 643B(a), which are culpable acts in themselves.[331] The only crime mentioned in this section that does not require criminal intent, the court continued, is involuntary manslaughter, which is expressly excluded from crimes of violence.[332] The court found it anomalous, therefore, that the legislature would include a crime that does not require criminal intent in the same category as those requiring intent as all crimes of violence, and, at the same time, except another crime – involuntary manslaughter- that also does not require intent.[333] This anomaly it found to negate "the prerogative and practice . . . to avoid interpretation of a statute that effects an unreasonable or illogical result or one that is inconsistent with common sense."[334]

The court next looked at the fact that Section 643B(a) also includes as a crime of violence an attempt at committing any of the listed offenses.[335] According to the court, there is no such crime as attempted manslaughter

[321] *See id.* 724 A.2d at 669-70.

[322] *See id.*

[323] *See id.*

[324] *See id.* at 94, 724 A.2d at 670.

[325] *Id.* at 95, 724 A.2d at 670.

[326] *Id.*, 724 A.2d at 671.

[327] *Id.* (citing *In re* Douglas P., 333 Md. 387, 393, 635 A.2d 427, 430 (1994); Kaczorowski v. City of Baltimore, 309 Md. 505, 514-15, 525 A.2d 628, 632-33 (1987)).

[328] *Id.* (citations omitted).

[329] *See id.*

[330] *See id.*

[331] *See id.* at 96, 724 A.2d at 671.

[332] *See id.*

[333] *See id.*

[334] *Id.* (citing Condon v. State, 332 Md. 481, 91-91, 632 A.2d 753, 758 (1993); Curtis v. State, 284 Md. 132, 149, 395 A.2d 464, 474 (1978)).

[335] *See id.* (quoting MD. ANN. CODE art. 27, § 643B(a)).

by automobile, because an attempt requires a criminal intent, and involuntary manslaughter only requires that the offender be grossly negligent in operating an automobile.[336] In the court's view, therefore, inclusion of this crime in the violent category would amount to recognizing a non-offense as in attempted manslaughter by automobile.[337] Such absurdity the court was not willing to support. To buttress its point, the court referred to the history of the statute.[338] It noted that at the time the legislature enacted Section 643B, Section 388 (dealing with automobile manslaughter) was already in force.[339] In fact, it was then a misdemeanor, which carried a three-year maximum sentence.[340] At this same time, meanwhile, involuntary manslaughter carried a ten-year sentence.[341] It would not, as such, make any sense that the legislature intended to treat automobile manslaughter more harshly than involuntary manslaughter.[342] For the foregoing reasons, the court concluded that automobile manslaughter is not a crime of violence.[343]

The beauty of the court's approach in *Blan* is its practical reasoning, far from the vacuous manipulation of an unclear text. The aim is at a sensible execution of a legislative intent, an intent that is better understood within the context of the statute's enactment. While the court in *Blan* did not need to rely on such legislative records as committee reports and floor statements, its extrication of the statute's legislative intent revolved around the practical application of the provision in question. The court was not sheepish in its examination of the text. Even with such a whole-act approach, the primary focus was not necessarily on how the legislature used the unclear text in other parts of the statute, but on the consistency and uniformity of the legislature's enacting goals. This approach is a middle ground between the hardened prisoner of texts and the untamed addict to legislative history. Where a textualist would necessarily end the inquiry with the phrase "manslaughter, except involuntary manslaughter," and the legislative historian would readily find solace in committee reports, the contextual interpreter focuses mainly on avoiding that interpretation that leads to an unreasonable or absurd result. This, as indicated earlier, should be the foundation upon which the court's activism must rest. To be sure, the mere examination of the overall nature of a statute is not enough to excuse a court from judicial passivity.[344] The court must choose that interpretation that comports with common sense and justice. Unlike Justice Scalia's textualist approach, and his result-oriented utilization of the whole-act rule, the Maryland high court would not hesitate to employ any means that would render an intelligible and a practicable result. This is contextual activism.

VI. CONCLUSION

Statutory construction is an art – a judicial art. It requires judges to interpret the words of others – the words of politicians, or at least of those who work for politicians. These words are sometimes not clear even to the most studious interpreter. Although statutes are deliberate legal documents, they are also political products, often with holes left by the enacting legislatures' inability to address every related concern in the statutes. As such, they are bound to contain unclear language. In a system where statutes are primarily recitations of legislative responses to practical problems, and those responses are molded by logistical compromises by legislators, it is not surprising that courts would commonly encounter ambiguous statutory

[336] *See id.* at 97, 724 A.2d at 671.

[337] *See id.*, 724 A.2d at 671-72.

[338] *See id.*

[339] *See id.*, 724 A.2d at 672.

[340] *See id.*

[341] *See id.*

[342] *See id.* at 97-98, 724 A.2d at 672.

[343] *See id.* at 98, 724 A.2d at 673.

[344] *See generally* Brogan, 118 S. Ct. 805 (1998)(examining the general nature of 18 U.S.C. § 1001, but reaching a passive and an absurd result). Note that while the approach to Section 643B(a) of the Maryland Code avoided the denial of a statutorily granted right, *Brogan*'s vacuous interpretation of § 1001 demeaned the constitutional right to due process.

provisions. In interpreting these provisions, the ultimate goal should indeed be the avoidance of a meaning that leads to absurdity. The objective is to abide by the constitutional doctrine of separating the judiciary from the legislature. This objective is hard to achieve without one branch understanding what, why and how the other carries out its functions.

The idea that statutory construction should be confined to a statute's text is shortsighted and inadequate for what is required in a democratic system that draws a lot from the common law. Although statutes are supreme in today's constitutional democracy, they do not exist in a vacuum. They are created within the political context of the problems they address; they express well-debated public policies. When the statutory interpreter goes outside this debate, there is an increased chance that she creates a different debate, which eventually results in tackling the wrong problem (or the right problem with the wrong approach). Justice Scalia's textualist approach to statutory construction is faulty on many grounds. The main problem is that it marginalizes the importance of context, and ignores the fact that this context is crucial to justice. Even when it relies on context, it chooses the wrong one. Its criticism of purposivism and intentionalism as relying on legislative history and falling into the trap of "judicial freewheeling" is myopic. To the contrary, textualism presents a more serious danger of "judicial freewheeling," because when a judge uses devices that are alien to a statute's creation, there is a high likelihood that judicial opinions will become result-oriented. Justice Scalia's own practices buttresses this point, especially as they show that his textualism is a convenient tool for conserving and masking his political ideology.

The best approach to statutory construction is that employed by several state courts - what I have referred to as contextual activism. Because statutes tackle practical problems, they must be interpreted with a practical-reasoning approach. The issue is not whether the judge must consult legislative history, but whether this history can furnish sufficient context to the statutory text so that the judge's interpretation would not lead to an absurd result. While legislative records are not authoritative sources of law, their cautious use presents a complete picture. This approach is necessary in light of the American common-law tradition, the skeletal nature of American codes, and the constitutional primacy of respecting the legislature's authority. Moreover, law, in a democracy, must not maintain an independent existence, but must live or die by its purpose.

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