Akron Law Review

Volume 35 | Issue 3 Article 3

2002

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OVERCOMING TEXT IN AN AGE OF TEXTUALISM: A PRACTITIONER'S GUIDE TO ARGUING CASES OF STATUTORY INTERPRETATION

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As law students, we encounter the law largely through cases. We learn that cases establish legal rules and that these rules develop organically through a process of case-by-case adjudication. As practitioners, the law often appears in a much different form. Yes, cases play an important role in law development but, more often than not, the legal rule that affects our client's interest has its origins, not in the decision of a court, but in an existing statute, ordinance, or regulation. Our job as lawyers is to make sense out of the positive law by employing the tools of statutory interpretation.

The practitioner's task, when confronted with a governing statute, is not an easy one. Statutes are often ambiguous. The rules of statutory construction, ostensibly created to resolve statutory ambiguity, are, in many cases, less than elucidating. It has been five decades since Karl Llewellyn authored his famous article on the canons of statutory construction, demonstrating a fundamental truth about the process of statutory interpretation: that for every canon of construction leading to one result, there is a corresponding canon, of seemingly equal weight, leading to the opposite result.[2] Llewellyn's article typifies the legal realist position, which views the process of statutory interpretation, as practiced by courts, as the embodiment of result-oriented jurisprudence.

There is some truth in the realist critique, as anyone who has seen action in the trenches of statutory disputes can attest. Most battles of

1. Mr. Gregory is a senior attorney in the Office of General Counsel, U.S. Equal Employment Opportunity Commission. This Article was written in the author's private capacity. No official support or endorsement by the U.S. Equal Employment Opportunity Commission or any other agency of the United States government is intended or should be inferred.

2. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

statutory interpretation play out like a fixed game of cards. One party invokes the canon of statutory construction most supportive of its position. The other party invokes a contrary canon of statutory interpretation supportive of its position. Sometimes, the parties invoke the same canon, quarreling over who may rightly claim the mantle of the preferred canon (a frequent occurrence with the plain language rule, the most valued of the statutory canons). The court holds the ultimate trump card. If the court desires to reach the result sought by party A, it relies upon the canon invoked by that party. If the court desires to reach the result sought by party B, it relies upon the canon invoked by that party. Rarely is one firmly convinced that this process yields a result that is the product of neutral principles. More than likely, this process leaves an impression of a result in search of a supporting principle.

Although this feature of the interpretative process complicates the life of the practitioner, there are ways in which the practitioner can make sense out of the interpretative quagmire. Legal realists are undoubtedly correct that there exists a certain deal of gamesmanship and manipulation in the use of canons of statutory construction. Yet, there is an important point that may be lost in the realist critique. Over time, seemingly contrary canons of construction emerge, each claiming at least some support in case law. In particular eras, however, certain canons tend to predominate over others. In one era, canon A may reign supreme. In another era, canon B, A's opposite, may emerge as predominant. Without discounting the views of the realists, it may be argued that the principles of statutory interpretation influence the outcome. The key is to know, at any particular point in time, which set of interpretative principles carry the favor of the courts.

For most of this century, the prevailing view of statutory interpretation was one that denied the primacy of the bare text. The leading luminaries of twentieth century American jurisprudence—Holmes, Cardozo, and Hand among others—disparaged what they perceived as an overly technical reliance on the written word.[3] They believed in an "archaeological" approach that dug beneath the text in its search for legislative meaning.[4] The goal of statutory interpretation was to discern the under-

3. Learned Hand, for example, wrote that it was "not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose." LEARNED HAND, *How Far Is a Judge Free in Rendering a Decision? in* THE SPIRIT OF LIBERTY 103, 106 (I. Dilliard ed., 3d ed. 1960).

4. Professor Aleinikoff has used the "archeological metaphor," referring to "[i]ntentionalism" as the "second major archeological strategy," one that "locates statutory law beyond, or behind, the statutory language." T. Alexander Aleinikoff, Patterson v. McLean*: Updating*

lying intent of the legislature; an intent that was often more clearly revealed by purpose and context rather than naked text.

An approach that emphasizes statutory purpose, at the expense of the bare text, tends to favor those canons that permit a more flexible approach to statutory interpretation. Two canons cited in the Llewellyn article illustrate this point. Llewellyn cites, as one canon, the oft-cited rule that "[e]very word and clause [of a statute] must be given effect."[5] He cites as its opposite the rule that, if "[a word or clause] is inadvertently inserted or repugnant to the rest of the statute, [the word or clause] may be rejected as surplusage."[6] In an era that emphasizes the search for the underlying "intent," with text being one of many competing indicia of that intent, the prevailing canon in this case is likely to be the latter canon because it permits rejection of the incongruous text as mere surplusage.

In recent years, the interpretative paradigm has moved, quite dramatically, in a different direction. The search for a more elusive statutory "purpose" or "intent" has given way to a strong emphasis on text; new textualism, as one leading commentator has described it."[7] The precise contours of this new textualism are debatable, but without a doubt, it has changed the rules of the game. Text, once a mere player in the broader search for legislative meaning, has now taken center stage—framed by its champions as the end of the statutory inquiry itself, rather than a subservient means to some other end. Arguments rooted in non-textual considerations, if not totally eviscerated, are not held in favor by the courts.

There has been a good deal of academic criticism relating to the new textual hegemony in statutory interpretation.[8] For the practitioner, however, the issue is more concrete. The practitioner may say, "I have a

Statutory Interpretation, 87 MICH. L. REV. 20, 22-23 (1988).

5. Llewellyn, *supra* note 2, at 404.

6. *Id*.

7. William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990) [hereinafter *New Textualism*]; *see also* Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1254 (2000) (using the new textualism terminology).

8. *E.g.*, Bell, *supra* note 7, at 1261 ("Jurists who adopt new textualism purely for instrumental reasons impose severe societal costs by frustrating majority rule and denigrating the traditional role of courts in dispute resolution."); Eskridge, *supra* note 7, at 683 ("Perhaps the biggest problem with Justice Scalia's new textualism is that it seems unfriendly to democratically achieved legislation and threatens to undo much of Congress' statutory work."); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306-07 (1990) (criticizing the new textualists for ignoring legislative history); Aleinikoff, *supra* note 4, at 55-56 (the "new plain meaning" can "never be an adequate theory of interpretation" because it "is not interested in searching for a sensible reading of a statute, one that would seek either to further the project begun by the enacting legislature or to weave the statute into the warp and woof of the legal system") (citations omitted).

case involving the interpretation of a statute. I want to argue that the statute means X. X is not clearly supported by the naked text. How do I construct an argument, consistent with textual primacy, that achieves my desired result?"

This Article attempts to provide the practitioner with an answer to this question. First, the Article describes the historic movement from purpose to text in the interpretation of statutes. In doing so, the Article notes a critical feature of textualism as currently configured—that it permits some flexibility (more than many people realize) in the interpretation of statutes. The Article next discusses the impact of the textual movement on the process of arguing cases of statutory interpretation. In particular, the Article sets forth three possible options available to the practitioner when confronted with a statutory provision that does not, by its naked terms, support the result sought by the practitioner. The primary goal is to suggest ways in which a practitioner can successfully argue, within the textualist framework, for a result that is not, strictly speaking, dictated by the naked text. Stated differently (and more candidly), the Article seeks to assist the practitioner in using the rhetoric of textualism to achieve a result that is textualist in form, if not in substance. Finally, the Article roots this discussion in two real-world cases. It first analyzes a recent Supreme Court decision that provides a model for the way in which a party may use text-based arguments to achieve a result that might be viewed as contra-textual. The Article then puts that model to use in the context of another real-world example of statutory interpretation, yet unresolved.

I. A LITTLE BACKGROUND PLEASE

Statutes are given life in two stages. First and foremost, they are created by legislative bodies. Second, they are construed and applied by courts (or, in some cases, executive branch agencies responsible for their enforcement). The practicing lawyer typically operates at the second stage. The lawyer has a client. The client's interests are potentially affected by a statute. The lawyer, on behalf of his or her client, seeks to persuade a court to interpret the statute in a way that favors the client's interests.

The basic points surrounding the process of statutory interpretation are not disputed. The legislature reigns supreme in the area of lawmaking. The legislature is comprised of elected officials. These officials are responsible for determining statutory policy. At the federal level, the lawmaking function has a constitutional dimension. Only Congress is

given lawmaking powers.[9] In carrying out those powers, Congress must follow carefully prescribed procedures that require, among other things, a majority vote in both Houses of Congress.[10]

Because lawmaking powers lie largely with the legislature, the role of the judiciary is a subservient one. Courts do not possess formal lawmaking powers of their own.[11] They simply interpret and apply the laws passed by legislatures. Because a court must give effect to the positive law, it may not simply cast aside the legislative judgment and replace it with a policy deemed more desirable.

Although courts play a subordinate role in the lawmaking process, it is obvious to any keen observer that this role is far from ministerial. Statutes are often ambiguous or vague.[12] This ambiguity is sometimes inadvertent, the result of an oversight, a poorly chosen word, or a misplaced comma. In other cases, Congress deliberately avoids clarity in order to secure enactment of legislation, writing at that level of specificity (or generality) where consensus is possible. In either case, the task of interpreting or applying a statute involves some element of discretion. The court's job is to assign meaning to the words of the statute. But how exactly does a court arrive at the proper meaning of a statute? Does it look only at the words of the statute? Is it free to consult legislative history? Should it rely more on the naked text or the statute's objective or purpose?

For a good part of the twentieth century, the predominant view of statutory interpretation emphasized the statute's purpose more so than literal textual meaning. The chief proponents of this purpose-oriented approach were Henry Hart and Albert Sacks, the leading authorities of their day on issues of statutory interpretation.[13] The Hart and Sacks approach was based on the premise "that every statute and doctrine of unwritten law, developed by the decisional process, has some kind of purpose or objective. This approach applies even though it may be difficult,

9. *See* U.S. CONST. art. I, § 1.

10. *See* U.S. CONST. art. I, § 7.

11. Of course, in deciding specific cases, courts do have the power to fashion common law principles. *See* Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443 (1975). Those principles, however, exist only in the absence of a legislative mandate to the contrary. Swift v. Philadelphia & R.R., 64 F. 59, 63 (N.D. Ill. 1894).

12. In some circumstances, a statute is so vague that a court "is impliedly invited, and indeed compelled, to supplement it with more specific rules." REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 238-39 (1975).

13. For a discussion of the historic influence of the Hart and Sacks approach, *see* Aleinikoff, *supra* note 4, at 26-28 (noting that Hart and Sacks "produced the most sustained intentionalist argument" and for years "dominated the interpretive scene").

on occasion, to ascertain or to agree exactly how it should be phrased."[14] Hart and Sacks invited an interpreter to "identify the broader purposes embodied in the legislation and answer the interpretive question in a manner consistent with those purposes."[15] The statutory text was relevant to the interpretive inquiry because "the words by which the legislature chose to express its intent" provided persuasive evidence of the purpose of a statute."[16] However, the bare text was not controlling. "Literal interpretation dogma" was to be distrusted,[17] because it could lead to a result which every sensible man would recognize to be the opposite of what the legislature intended."[18]

Many of the great legal minds of the early-to-mid twentieth century favored the purpose-oriented approach that Hart and Sacks reflected in their writing. Justice Holmes believed that a court's job was to give effect to the "will" of the legislature, irrespective of whether that will was found in the "terms" of the statute itself.[19] Justice Holmes characterized the plain meaning rule as "an axiom of experience [rather] than a rule of law," urging that courts were free to depart from the plain meaning of a statute where there was "persuasive" evidence of a contrary intent.[20] Justice Holmes cautioned against treating the literal word as "crystal, transparent and unchanged."[21] Justice Cardozo shared the view that a judge's job was not merely "to match the colors of the case at hand against the colors of many sample cases spread out upon [his] desk."[22] The judge's involvement begins "when the colors do not match—when the references in the index fail" and at this point, a judge must fashion

14. Aleinikoff, *supra* note 4, at 34 (citing HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 166 (tentative ed. 1958)).

15. *Id.* at 24.

16. United States v. Am. Trucking Ass'n, 310 U.S. 534, 543 (1940).

17. *Id.*

18. HAND, *supra* note 3, at 106.

19. Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).

20. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928).

21. Towne v. Eisner, 245 U.S. 418, 425 (1918). Holmes also made the comment, oft-quoted by the textualists, that, in construing statutes, courts "do not inquire what the legislature meant; [they] ask only what the statute means." OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation, in* COLLECTED LEGAL PAPERS 203, 207 (1920). But Holmes was no literalist. He understood the importance of context and was more than willing, in appropriate cases, to look beyond the naked test in determining what the "statute means." *See, e.g.*, *Johnson*, 163 F. at 32
"The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before". *Id.*

22. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 20-21 (1921).

law for the litigants before him, "acting within a statute's interstices."[23] Finally, Judge Hand was a frequent critic of courts that made "a fortress out of the dictionary."[24] Judge Hand believed that literalism risked "pervert[ing]" a statute by "contradict[ing] or leav[ing] unfulfilled its plain purpose."[25] In Judge Hand's view, "statutes always [had] some purpose or object to accomplish, whose sympathetic and imaginative discovery [was] the surest guide to their meaning."[26]

In an era where purpose reigned supreme, the practitioner's job was to make sense of the statute. This included offering interpretations that flowed, not from a grammarian's parsing of the literal text, but from the broader purposes of the statute and the surrounding legal context. Hyper-technical exercises in textual exegesis were not favored. Those canons calling for a flexible approach to statutory interpretation trumped those insisting upon strict adherence to textual niceties or linguistic conventions. Remedial statutes were to be liberally construed; rules of grammar were to be disregarded where strict adherence to such rules would defeat the statutory purpose; courts were empowered to give effect to the manifest purpose of a statute even in the face of seemingly unambiguous statutory language.

An example of the purpose-oriented approach in operation is provided by *NLRB v. Scrivener*,[27] a 1972 Supreme Court decision. *Scrivener* involved a claim of unlawful retaliation under the National Labor Relations Act (NLRA). The NLRA's anti-retaliation provision made it unlawful "for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act."[28] The claimants in *Scrivener* were dismissed from their jobs after they gave sworn statements to the National Labor Relations Board, as part of an investigation by the Board. The question before the Court was whether the protections of the anti-retaliation provision extended to an employer's reprisal of an employee for giving testimony at a formal hearing.[29] If not, it would place claimants, who merely gave sworn statements to the Board, outside the protections of the statute.

The Supreme Court acknowledged that the NLRA's reference to an employee who "has filed charges or given testimony" could be read

23. *Id*. at 20-21, 129.
24. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945).
25. HAND, *supra* note 3, at 106.
26. *Cabell*, 148 F.2d at 739.
27. 405 U.S. 117 (1972).
28. 29 U.S.C. § 158(a)(4) (1968).
29. *Scrivener*, 405 U.S. at 121.

strictly and its reach confined to formal charges and formal testimony."[30] The Court also noted that the NLRA's anti-retaliation provision had its origins in a provision of the National Industry Recover Act, which, in contrast to the NLRA, specifically referenced the giving of evidence "with respect to an alleged violation."[31] Nevertheless, the Court broadly interpreted the anti-retaliation provision as protecting the employee during the investigative stage not only protecting an employee in connection with the filing of a formal charge or the giving of formal testimony.[32] The Court ruled that this interpretation comports with the objective of that section "to prevent the Board's channels of information from drying up by employer intimidation of prospective complainants and witnesses."[33] The Court also stated that its interpretation squares with the practicalities of appropriate agency action," under which "[a]n employee who participates in a Board investigation may not be called formally to testify or may be discharged before any hearing at which he could testify."[34] Finally, the Court stressed that the approach to the NLRA's anti-retaliation provision generally has been a liberal one in order to fully effectuate the section's remedial purpose."[35]

There is much to commend in the purpose-oriented approach, as applied in a case such as *Scrivener*. It is clear that by enacting the NLRA's anti-retaliation provision Congress sought to protect individuals who assist the Board in investigating potentially illegal conduct. It makes little sense "to protect the employee because he participate[d] in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time."[36] A pure textualist might object to the expansion of the statute beyond its literal terms, as strictly construed. However, it is entirely reasonable to read the anti-retaliation provision as protecting an employee who is fired for giving sworn testimony to the Board.

The objection to the purpose-oriented approach is not rooted in cases such as *Scrivener*. It is rooted in cases where, under the rubric of statutory purpose, judges adopt an interpretation that reflects their own views rather than those of the enacting legislature. A decision that is of-

30. *Id*. at 122.
31. *Id*. at 123.
32. *Id*. at 121.
33. *Id*. at 121-22 (quoting John Hancock Mut. Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (1951)).
34. *Id*. at 123.
35. *Scrivener*, 405 U.S. at 124.
36. *Id.*

ten cited as an example of the purpose-oriented approach run amok is *United Steelworkers of Am. v. Weber*.[37] In *Weber*, the Supreme Court held that the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 did not condemn all private, race-conscious affirmative action plans. The Court reached this conclusion despite the fact that Title VII, by its plain terms, prohibited an employer from discriminating against "any individual . . . because of such individual's race."[38] The Court reached this conclusion despite compelling indications in the legislative history that the enacting Congress intended to prohibit, not endorse, preferential treatment for members of a protected group.[39] The Court rested its decision on what it described as the "spirit" of the statute.[40] The objective evidence of this "spirit" was thin. In fact, almost every indicia of congressional intent pointed to a "color-blind" paradigm where any form of race-based discrimination was improper. Under a dynamic approach to statutory interpretation, one could defend the result in *Weber*, based on intervening "practical and equitable" considerations and a changing legal context.[41] The Court's interpretation, purportedly drawn from its reading of the original statutory purpose, was questionable.

As it turned out, *Weber* marked the end of an era. Beginning in the early 1980's, Ronald Reagan began appointing self-described "strict constructionists" to the federal bench. Many of these judges took a direct aim at cases such as *Weber* and at the interpretive method that produced them. One of those judges, Justice Scalia, quickly moved to the forefront of the conservative critics. Justice Scalia embarked on a campaign to discredit the purpose-oriented approach to statutory interpretation.[42] Justice Scalia insisted upon a return to literalism as he argued against the use of legislative history, which he viewed as extra-

37. 443 U.S. 193 (1979).

38. 42 U.S.C. § 2000e-2(a)(1) (1979).

39. *Weber*, 443 U.S. at 231-55.

40. *Id*. at 201.

41. *Id*. at 209-10 (Blackmun, J., concurring); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987) (arguing that, because "the legal and constitutional context of the statute may change" over time, an interpreter should "ask her self not only what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society") [hereinafter *Statutory Interpretation*].

42. *See* Eskridge, *New Textualism*, *supra* note 7, at 650-56 (discussing Justice Scalia's role as an aggressive critic of the "traditional approach" to statutory interpretation). Justice Scalia mounted a similar campaign against non-textualist approaches to the interpretation of the United States Constitution. *See* Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia, and Its Intellectual Incoherence*, THE NEW REPUBLIC, May 5, 1997.

constitutional and subject to manipulation by legislators and their committee staffs.[43] The result of these efforts was a shift to a new interpretive methodology—what some have described as a new textualism."[44]

The new textualism rests on the premise that "the constitutionally-mandated role of the Court is to interpret laws' using the actual statutory language, rather than [to] reconstruct legislators' intentions."[45] From that premise, new textualism lays down several basic principles: (1) The text is not merely a means to an end—an aid, if you will, in ascertaining congressional intent. Instead, it is the end itself. (2) Only the text is the law; only the text represents the congressional will as expressed through the constitutionally-prescribed procedures for lawmaking. (3) Ambiguities in the text should not be lightly inferred. Where they do exist, they should be resolved, if at all possible, by applying the objective canons of construction, particularly those that operate within the four corners of the text. (4) Legislative history can never trump the plain text and should not be used to resolve statutory ambiguity, except when the statutory language is hopelessly ambiguous or unclear.[46]

A case that illustrates the new textualism in operation is *West Virginia University Hospitals, Inc. v. Casey*.[47] *Casey* involved a claim for expert witness fees under 42 U.SC. § 1988, a federal civil rights statute. This statute authorized an award of reasonable attorney's fee as "part of the costs."[48] In an opinion by Justice Scalia, the Supreme Court held that this statute did not authorize an award of expert fees. The Court noted that the statute, by its literal terms, did not reference expert fees. The Court also found that the record of statutory usage convincingly demonstrates that "attorney's fees and expert fees are regarded as separate elements of litigation cost."[49] The Court cited numerous federal

43. *See* Blanchard v. Bergeron, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring) (discussing the ways in which committee reports and floor statements can be manipulated by those unable to secure consensus for their positions).

44. *E.g.*, Eskridge, *New Textualism*, *supra* note 7.

45. *Id*. at 653 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring)).

46. As one commentator has noted, "most of the new textualists will consider legislative history if the other aids still leave the statutory meaning truly unclear." Eskridge, *New Textualism*, *supra* note 7, at 669.; *But see* Bell, *supra* note 7, at 1264-65 (stating that new textualists argue that "only statutory text should create legal obligations and that legislative history does not provide a legitimate source of legal obligations").

47. 499 U.S. 83 (1991).

48. The statute has since been amended to make explicitly clear that a court, "in its discretion, may include expert fees as part of the attorney's fee." 42 U.S.C. § 1988(c) (1994). The amendment was passed in response to the *Casey* decision, as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1074, 1079 (1992).

49. *Casey*, 499 U.S. at 88.

statutes that, in contrast to Section 1988, expressly provided for an award of expert witness fees.[50] The Court rejected the argument that "the congressional purpose in enacting [Section] 1988 must prevail over the ordinary meaning of the statutory terms." It states that "the best evidence of that purpose is [that] the statutory text was adopted by both Houses of Congress and [subsequently] submitted to the President."[51] The Court then dismissed the argument that the Court's interpretation should be "guided by the 'broad remedial purposes'" of Section 1988.[52] Finally, the Court took aim at the contention that "even if Congress plainly did not include expert fees in the fee-shifting provisions of [Section] 1988, it would have done so had it thought about it."[53] On this point, the Court offered the following:

> This argument profoundly mistakes our role. Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do not do so because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the corpus juris. But where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional 'forgetfulness' cannot justify such a usurpation. Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the better disposition. But that is not for judges to prescribe.[54]

In his dissent, Justice Stevens charged the majority with "put[ting]

50. *Id.* at 89 n.4 (citing, *e.g.*, 5 U.S.C. § 504(b)(1)(A) (1994); 15 U.S.C. § 57a(h)(1) (1994); 42 U.S.C. § 9659(f) (1994); 43 U.S.C. § 1349(a)(5) (1994)).

51. *Id.* at 98.

52. *Id.* at 99.

53. *Id.* at 100. As the Court acknowledged this contention had carried the day in at least one circuit court. *See* Friedrich v. Chicago, 888 F.2d 511, 514 (7th Cir. 1989), *vacated* 499 U.S. 933 (1991) (awarding expert fees under Section 1988 because a court should "complete . . . the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly").

54. *Casey*, 499 U.S. at 100-01 (citation omitted).

on its thick grammarian's spectacles and ignor[ing] the available evidence of congressional purpose."[55] Justice Stevens opined that, "excluding expert witness fees from the reach of Section 1988 was both arbitrary and contrary to the broad remedial purpose that inspired the fee-shifting provision of [Section] 1988."[56] It was arbitrary because the term "reasonable attorney's fee," as used in Section 1988, permitted reimbursement for such items as paralegal and law clerk fees, attorney's travel expenses, and long-distance telephone calls, even though they are not literally part of an 'attorney's fee,' or part of 'costs' [as that term is defined]."[57] According to Justice Stevens, the majority opinion was contrary to the congressional purpose because the legislative history and historic context indicated that Congress enacted Section 1988 with the intent of allowing courts to shift fees, including expert witness fees. It also intended to "make those who acted as private Attorneys General whole again, thus encouraging the enforcement of the civil rights laws."[58] In Justice Stevens' view, "[t]he fact that Congress has consistently provided for the inclusion of expert witness fees in fee-shifting statutes when it considered the matter is a weak reed on which to rest the conclusion that the omission of such a provision represents a deliberate decision to forbid such awards."[59] Justice Stevens concluded with the following statement, plainly intended as a rebuttal to the interpretive methodology employed in Justice Scalia's majority opinion:

> In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error. . . . The Court concludes its opinion with the suggestion that disagreement with its textual analysis could only be based on the dissenters' preference for a 'better' statute. It overlooks the possibility that a different view may be more faithful to Congress' command.[60]

Casey marked the ascendance of one paradigm of statutory inter-

55. *Id.* at 113 (Stevens, J., dissenting); *see also id.* at 102 (Marshall, J., dissenting) (agreeing with Justice Stevens that the majority had "[u]sed the implements of literalism to wound, rather than to minister to, Congressional intent").

56. *Id.* at 107-08.

57. *Id.* at 107.

58. *Id.* at 109-11 (citing, *e.g.*, S. Rep. No. 94-1011, at 4 n.3 (1976); H.R. Rep. No. 94-1558, p.1 (1976)).

59. Casey, 499 U.S. at 115-16.

60. *Id.* at 115.

pretation and the denouncement of another. Justice Scalia, the new textualist, carried the day by insisting upon strict adherence to the statute's literal terms, looking outside the statute only for the purpose of drawing a contrast between the text of the statute in question and that of other federal statutes. Justice Stevens, the traditionalist, invoked, in a losing cause, the rhetoric of the purpose-oriented approach, referencing the views of Judge Hand and Justice Cardozo;[61] views that may very well have carried the day only a decade or so before.[62] In 1989, the time of the *Casey* decision, Justice Stevens could plausibly claim that in "recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation."[63] Since *Casey*, the "vacillation" has been replaced by the steady drumbeat of textualism.

Those of us who practice under the new textualist regime are well aware of its practical consequences. Arguments based on legislative history are held in contempt, at least where the history is cited as the primary source of legislative meaning.Arguments based on a statute's remedial purpose are held in even less regard. The interpretive canons, particularly those that seek to resolve ambiguity within the four corners of the statute or by reference to the language of analogous statutes, are strongly favored. If a party treats the text lightly, it does so at its peril.

Despite these developments, it would be a mistake to assume that the new textualism has squeezed all flexibility out of statutory interpretation. First, even the most ardent textualists acknowledge that there are cases, rare as they may be, where a court is entitled to depart from the ordinary meaning of the statutory text. These situations arise when the effect of implementing the ordinary meaning would be "patently absurd" or the result would be demonstrably at odds with the intention of its drafters."[64] Justice Scalia has acknowledged that there may be a

61. *Id*. at 115-16 & n.19.

62. In his dissent, Justice Stevens cited several prior Supreme Court cases in which the Court had "eschewed the literal approach." *Id.* at 112 & n.11. One of the cases cited was *United States Steelworkers of America v. Weber*. United States Steelworkers of Am. v. Weber, 443 U.S. 193 (1979). Justice Stevens acknowledged that the dissenters in *Weber* "had the better textual argument" but urged that the Court had "opted for a reading that took into account congressional purpose and historical context." *Id*. at 112 n.11. It seems clear that, in the decade between *Weber* and *Casey*, the Supreme Court's approach to statutory interpretation underwent a significant transformation; almost assuredly, the Court that decided *Casey* would have decided *Weber* differently.

63. *Casey*, 499 U.S. at 112.

64. BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (1994) (Souter, J., dissenting) (citing I.N.S. v. Cardozo-Fonseca, 480 U.S. 421, 452 (1987); United States v. Ron Pair Enterprises, 489 U.S. 235, 244 (1989)).

"scrivener's error exception" to the canon that, where "the statute's language is plain, the sole function of the court is to enforce it according to its terms."[65] Although committed to the result dictated by a statute's literal terms, Justice Scalia has expressed a willingness to depart from those terms where the literal interpretation produces an absurd or unworkable result.[66]

More importantly, the Supreme Court has not abandoned the view that the language of a statute must be read in the relevant context. The Supreme Court has repeatedly stated that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[67] In the Court's view, the "inquiry must cease if the statutory language is unambiguous" (subject to the caveat for absurd results).[68] The Court has also stated that the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used and the broader context of the statute as a whole."[69] Under this standard, it is not enough for a court to focus solely on the literal meaning of words the of a statutory provision. A court must examine those words in context, placing them within the specific framework of the statute at issue as well as the broader legal framework. Standing alone, the literal words may seem clear. Yet, a contextual analysis might reveal an ambiguity. The analysis may evince that the term has a common usage in the law that differs from its dictionary definition. Moreover, it may show that the literal reading of the provision conflicts with (or undermines) other provisions in the statute. In either case, a court would be justified in declaring the statute ambiguous and engaging in a further explication of statutory meaning, based on legislative history or statutory purpose. As one commentator has observed, the new textualism escapes the "no-context objection;" it "considers as context dictionaries, and grammar books, the whole statute, analogous provisions in other statutes, canons of construction, and the common sense God gave us."[70]

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65. Johnson v. United States, 529 U.S. 694, 723-24 (2000) (Scalia, J., concurring).

66. Green v. Bock Laundry Machine Co., 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring).

67. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

68. *Id.*

69. *Id.* at 341.

70. Eskridge, *New Textualism*, *supra* note 7, at 669. Although the new textualism escapes the "no-context objection," there may be limitations on a party's ability to exploit the broader context of the statute to create ambiguity. In practical terms, the case for ambiguity is more easily made when there is at least some play in the language itself. *See* discussion *infra* notes 133, 140 and accompa-

This understanding of new textualism is critical. There is no doubt that new textualism focuses the interpretive inquiry on the statute's text. However, the new textualists recognize the wisdom of Justice Holmes' admonition that a "word is not crystal, transparent and unchanged." Rather, it is the skin of living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[71] There is room for maneuvering within the constraints imposed by the new textualism paradigm. The question for the practitioner is how to exploit that wiggle room to achieve a result that does not appear to be supported by a statute's literal terms.

II. THE INTERPRETIVE APPROACHES

With this background in mind, we now turn to the interpretative approaches available to the practitioner in cases where the text does not clearly resolve the matter in the practitioner's favor. Justice Cardozo reminds us that "[l]awsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues the controversy relates most often not to the law, but to the facts. In countless litigation, the law is so clear that judges have no discretion."[72] Justice Cardozo also urges that, the serious business of the judge "begins in those cases where the colors do not match; when the references in the index fail."[73] The same could be said for the practitioner, who must also do his best work "when the colors do not match." Let us assume that a statutory provision does not clearly support the practitioner's position. Let us assume, in fact, that the literal terms of the statute seem to point in a different direction. How does the practitioner respond?

A. The Plain Language Gambit

The first approach available to the practitioner is to invoke the plain language rule. At first blush, this might appear foolhardy. The plain language rule operates to a party's advantage when the language of the statute unambiguously supports the party's position. In our scenario, the literal terms of the statute work against the party's position. Under these circumstances, why bother with the plain language rule?

One reason is simple, the plain language rule is a powerful weapon, especially in a textualist era. No one wants to cede away the textual

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nying text.

71. Towne v. Eisner, 245 U.S. 418, 425 (1918).

72. CARDOZO, *supra* note 22, at 128-29.

73. *Id.* at 21.

high ground; no one wants to readily concede that the language of the statute does not clearly support his position. Parties fear that if they do not invoke the plain language rule, their opponent surely will—to the opponent's advantage.

Truth be told, no canon of construction is more tortured than the plain language rule. In most litigated cases, the interpretive issue is a close one. If the language were truly plain," the parties would not be in court squabbling over its meaning. It is not uncommon for both sides in a statutory dispute to claim the plain language mantle. Obviously, both sides cannot be correct. In many cases, neither side is correct because the language is not plain. The plain language rule is invoked because of its rhetorical power; the Orwellian assumption, not entirely misplaced, that by saying something is true you make it true.

An additional reason for invoking the plain language rule in seemingly inapposite circumstances is organizational. The Supreme Court has stated that the interpretive inquiry begins with a statute's text. Although the Court has indicated that an unambiguous text generally ends the interpretive inquiry, a party rarely stops at the text. Typically, the party first advances a textual argument. Next, the party marshals the relevant legislative history. Lastly, the party looks to the broader purpose of the statute. This linear form of argument tends to provoke plain language arguments. A party wants to construct an argument in which the text, history and purpose combine to create a clear picture of congressional intent. To strike the right note, at the textual stage, a party will want to argue that the text is plain. The party will structure the argument in this manner: the language of the statute is clear; any doubt on the point is put to rest by the legislative history; the reading of the statute supported by the text and history furthers the overall purpose of the statute.

An example of the use of the plain language rule, in seemingly hostile textual waters, can be found in a recent Supreme Court case, *Circuit City Stores, Inc. v. Adams*.[74] *Adams* involved the proper interpretation of Section 1 of the Federal Arbitration Act (FAA).[75] That Section excludes from the reach of the FAA "contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce."[76] On its face, this provision appears to betray an ambiguity. Does the provision extend just to workers, such as seamen or

74. 532 U.S. 105 (2001).
75. Federal Arbitration Act § 1, 9 U.S.C. § 1 (2001).
76. Federal Arbitration Act § 1.

railroad employees, directly involved in the transportation of people or services in interstate commerce, or does the provision extend to some broader class of workers, *e.g.*, those "engaged in" interstate commerce? Section 2 of FAA, the FAA's coverage provision, further complicates the picture because it extends the statute to a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce."[77] The phrase "involving commerce," as interpreted by the Supreme Court,[78] is broader than the phrase "engaged in" commerce," as used in Section 1 of the FAA. This suggests that the Section 1 exclusion does not reach all employment contracts otherwise covered under the Act. If anything, the language tends to support a narrower construction of the Section 1 exclusion. Certainly, the statute would have to be classified as ambiguous.

Despite these textual points, the United States filed a brief as *amicus curiae*, invoking the plain language rule to argue that Section 1 of the FAA broadly excluded all employment contracts otherwise subject to the Act. The United States urged that the ordinary meaning of the Section 1 phrase excludes from the FAA all employment contracts that could come within the FAA under Section 2.[79] The United States stressed that, when the FAA was passed, the phrases "involving commerce" and "engaged in commerce" had identical dictionary definitions and, thus, were interchangeable terms.[80] As the United States stated:

> Absent indications to the contrary, Congress is ordinarily presumed to have used the ordinary and common meanings of the terms it employs in statutes. These ordinary meanings, however, are necessarily the meanings of the terms at the time Congress enacted the statute.' Dictionaries from the period when Congress enacted the FAA establish that the terms 'involved in' and 'engaged in' had the same meaning.[81]

Was this a credible use of the plain language rule? The point is debatable. As it turns out, there are strong arguments, rooted in history, context and logic, that Congress intended to exclude all employment contracts from the reach of the FAA. Would it not have been more persuasive for the United States to adopt the approach, discussed below,[82] of pointing out the ambiguities in the text and then turning to arguments

77. 9 U.S.C. § 2 (2001).

78. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995).

79. Brief for the United States as Amicus Curiae Supporting Respondent at 6, Circuit City Stores, Inc. v. Adams 532 U.S. 105 (2001) (No. 99-1379).

80. *Id*. at 7.

81. *Id*. (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

82. *See infra* part II.C.

of history, context, and logic to make the case for a broader reading of the Section 1 exclusion? Perhaps, but, to do so, would have arguably ceded too much ground on the textual point. The United States chose the more positive approach of wedding its arguments based on history, context, and logic to a plain language argument. In these circumstances, that approach can be defended.[83]

So what are the downsides to invoking the plain language rule in the face of a statute that does not, by its terms, seem overly supportive of a party's position. The most obvious is a loss of credibility. Judges know that adversaries inflate the facts and the law. To some degree, this is expected and tolerated. However, a party cannot push this judicial grace too far. To invoke the plain language rule, when the language of the statute is stacked against your side, risks a loss of credibility. To invoke the plain language rule when the statute is woefully ambiguous presents a similar risk. When a litigant loses credibility in a court's eyes, it loses its most valuable asset.

A second problem with the plain language argument is a loss of flexibility. When a party acknowledges that the statute is ambiguous, the party can concede textual points without losing the war. The party can point to those features of the statute that favor its position and those features that do not. However, when the party rests an argument on the plain language rule, there is little margin for error. Any perceived ambiguity may cause the plain language argument to unravel. The party must constantly put out the "textual fire" by rigidly arguing in the face of contrary evidence, that a seemingly ambiguous statute is in fact unambiguous.

The final problem with the use of the plain language rule in these situations is that it has the practical effect of forcing the party to either win or lose the case on the plain language point. A statute may be ambiguous. A party may have strong arguments, based on history and purpose, that the ambiguity should be resolved in its favor. However, statutory arguments almost always begin with the text. When a party invokes the plain language rule, it short-circuits its secondary, non-textual arguments. This is because the court itself will view the argument largely in terms of the way in which it is framed by the party—either the language is plain, in which case the party wins, or the language is not plain, in

83. Although the approach can be defended, as it turns out, it proved unsuccessful. The Supreme Court, in a 5-4 decision, adopted the narrow construction of the Section 1 exclusion, holding that the exclusion "exempts from the FAA only contracts of employment of transportation workers." Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1311 (2000). 532 U.S. 105, (2001). The Court did not address the specific textual argument advanced by the United States. *Id.*

which case the party loses (irrespective of the other indicia of congressional intent). Conceivably, a court could reconstruct the argument for the party by holding that while the language is not plain, it is ambiguous and the ambiguity can be resolved in the party's favor. But courts are reactive, not proactive decision-makers. If a party uses the plain language rule as the underpinning of its statutory argument, a court is likely to take the party at its word. If the party loses on that point, the court may well decide the case against the party without further inquiry.[84]

What then is the proper approach to the issue? Does one employ the plain language gambit? Or does one admit the ambiguity in a statute and argue from there? Here, as in so many other areas of the law, it comes down to a question of judgment. If the textual argument is a close one, as it arguably was in the *Adams* case, the use of the plain language rule may be the most effectively persuasive device. However, where a plain language argument cannot be credibly made, a party is well-advised to stay away from plain language rhetoric. At best, use of the plain language rule will be a distraction. At worst, it will defeat an otherwise viable statutory argument. As we shall see, there are better ways to exploit textualist thinking than to torture the plain language rule.

On a final note, the Supreme Court has indicated that the plainness of a statute is to be determined "by reference to the language itself, the specific context in which that language is used and the broader context of the statute as a whole."[85] This means two things. First, a statutory provision that is seemingly plain, viewed in isolation, can be rendered ambiguous by an examination of the specific and general context. This point is discussed further below.[86]

How far can one push this point? Take, for example, a statute whose literal terms, viewed in isolation, appear to support a plain language reading at odds with a party's position. Can the party use the "specific context" in which those words are used and "the broader context of the statute as a whole" to flip the result to a plain language reading in its favor? Not likely. Arguing from the inside out (from the literal terms of the statute, read in isolation, to the terms viewed in context) is an effective way to create textual ambiguity. It is also an effective way, in some cases, to resolve textual ambiguity. It is not a way, how-

84. This would not be a critical point if a party could simply argue in the alternative, *i.e.*, "I win because the language is plain or, if not, I win because the language is ambiguous and the other indicia of congressional intent favor me." However, there are practical difficulties in making alternative arguments of this nature. *See infra* part II.D.

85. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

86. *See infra* part II.C., part III.

ever, to reverse entirely, the judgment of the literal language, standing alone. The Supreme Court has left room for context, even at the threshold stage of determining "the plainness or ambiguity of statutory language."[87] It has not, however, left that much room. In this sense as well, the plain language approach has its limits.

Second, a statutory provision that is seemingly ambiguous, viewed in isolation, can be made plain by an examination of the specific and general context. This, in effect, is what occurred in the *Casey* case,[88] where the Court eliminated the potential ambiguity in the statute (whether the terms "attorney's fees" and "costs" were sufficiently broad to encompass expert witness fees) by comparing that statute to analogous statutes.

B. The Textual End Run

The second option for the practitioner is to do a textual end run. As noted above, even the new textualists concede that there may be cases in which a court is authorized to digress from the statute's plain terms. These cases are rare, in their view, but they do exist where the effect of implementing the ordinary meaning of the statutory text would be patent absurdity or "demonstrably at odds with intentions of its drafters."[89] A party, confronted with hostile text, can opt to invoke this line of argument.

For obvious reasons, this is a high-risk strategy. Historically, courts were willing to trump text to further the statutory purpose. For example, in the *Scrivener* case, the Supreme Court relied principally on the manifest purpose of the NLRA's anti-retaliation provision.[90] The text was mentioned, but only peripherally.[91] Similarly, in *Weber*, the Supreme Court was able to escape the plain language of the statute by invoking the "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."[92] These decisions, right or wrong,

87. *See supra* notes 47-54 and accompanying text.

88. *Casey*, 499 U.S. 83 (1991).

89. BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (Souter, J., dissenting) (citing I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987); United States v. Ron Pair Enterprises, 489 U.S. 235, 244 (1989)).

90. The Court began its interpretive analysis with a discussion of statutory purpose. *See* NLRB v. Scrivener, 405 U.S. 117, 121 (1972).

91. *Id.* at 122.

92. United States Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979) (citing Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

are relics of a by-gone era.[93] In the current interpretive milieu, any resort to statutory purpose as a source of legislative meaning independent of text is likely to be met with a chilly reception.

At the very least, the practitioner should be aware of the difficulties in pressing this type of argument. The new textualists are well-versed in public choice theory. This theory states that because legislation is the product of compromises among groups, "attributing a purpose to a statute may either: (1) improperly privilege the interests of one group over another (thereby undermining the bargain); (2) or may impute a purpose where none (other than the desire to reach agreement) existed."[94] Adherents of public choice theory are highly skeptical of proposed interpretations that argue from some fixed statutory purpose. This is because they are convinced that no such fixed purpose can be properly identified. No statute has a single statutory purpose. Every statute is the product of a give-and-take. To the public choice theorist, attempts to discern legislative intent from a statute's purpose" are foolhardy.[95]

A case that illustrates the public choice theory is *Rodriguez v. United States*.[96] In that case, a Circuit Court read the Comprehensive Crime Control Act of 1984 as superseding a prior federal statute that gave federal judges the authority to suspend the execution of certain sentences and impose probation. The court did so despite the fact that the 1984 Act contained no explicit repeal of the prior statute. The court rested its conclusion, in part, "on its understanding of the broad purposes of the 1984 Act, which included decreasing the frequency with which persons on pretrial release commit crimes and diminishing the sentencing discretion of judges."[97] The Supreme Court took issue with that approach. The Court stated that "no legislation pursues its purposes at all costs."[98] Deciding "what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice and it frustrates, rather than effectuates the legislative intent by assuming that whatever furthers the statute's primary objective must be the law."[99] The Court concluded that "where the language of a provision is sufficiently clear in its context, there is no occasion to examine the additional considerations of policy . . . that may have influenced the

93. The result in at least one of these cases, *Scrivener*, can be justified under a textual analysis. *See infra* notes 129-32 and accompanying text.

94. Aleinikoff, *supra* note 4, at 28.

95. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983).

96. 480 U.S. 522 (1987).

97. *Id*. at 525.

98. *Id.* at 525-26.

99. *Id.* at 526.

lawmakers in their formulation of the statute."[100]

Rulings such as this reveal the difficulties that a party confronts when attempting to end run text on the basis of an ill-defined statutory purpose. It is not enough to invoke a statute's "remedial purpose." Nor is it enough to show that the non-literal reading of the statute makes more "sense". The Supreme Court lectern is littered with the remains of advocates who have constructed seemingly air-tight arguments as to why Congress could not possibly have intended a particular result only to have those arguments thrashed by skeptical Justices, who question the ability of any onlooker to know what Congress really intended. To have any prospect for success under this approach, the party must point to something very concrete. The best case for a textual override is that the statute is unworkable or dysfunctional if read in accordance with its literal terms, or that it is irrational to the point of absurdity and Congress did not intend for absurd results. To trump text, the degree of irrationality must be severe.

If a party opts for this interpretive approach, it must be up-front. The party must not invoke the old case law, recite the purpose-oriented chestnuts from that case law (*e.g.*, the "spirit" of the statute prevails over its plain terms) and argue the case as if the purpose-oriented approach were still in vogue. It must acknowledge, up–front, the extraordinary nature of the argument, justify the reason for departing from the plain text and make the best case possible.

If that sounds like an uphill battle, well, it is. As a stand-alone approach, the textual end run is a long shot. The approach might fare better, however, when paired with another interpretive approach. I return to this point later.[101]

C. Using Text to Bypass Text

We now turn to the third option left for the practitioner. By design, the Article framed these approaches in "Goldilocks" fashion. The plain language gambit is "too hot." The textual end run is "too cold." Now comes the approach that is just right." This Article promotes the view that this approach using text to bypass text holds out the best chance of overcoming seemingly hostile text.

This interpretive approach is simple enough to describe. The Supreme Court has made clear that the plain language of a statute typically controls. The Court has also indicated, however, that, in determining the

100. *Id.* (citing Aaron v. S.E.C., 446 U.S. 680, 695 (1980)).

101. *See infra* part II.D.

plainness of a statute, a court must look, not only at the language of the particular statutory provision in isolation, but at the "specific context in which that language is used, and the broader context of the statute as a whole." A provision may, at first blush, appear clear. When examined, however, in context, that clarity may disappear, causing the court to conclude that the statute is ambiguous. When a statute is ambiguous, the court itself must resolve that ambiguity, and it may do so by reference to the broader indicia of intent, such as statutory purpose. If a party can persuade a court that the statute is ambiguous, and if the broader indicia of intent favor that party's position, the party can prevail.

The advantages of this approach are obvious. First, it deploys textualist ideology and rhetoric. The new textualism emphasizes the primacy of text; it instructs the interpreter to resolve the statutory dispute, if at all possible, by reference to the text read in context. The textual bypass approach does just that. It does not avoid the text; it *welcomes* the text with open arms. The text is run through the ringer, examined, probed and poked. Only when the end result of this textual exegesis is an unresolved ambiguity does the approach open the door to other indicia of intent, such as legislative history or a broader statutory purpose. This is precisely the result advocated by the new textualism.

A second advantage of this approach is that it gives a party credibility and flexibility. Because this approach acknowledges the possibility of ambiguity, a party is not required to use the plain language feint—to pretend as if an ambiguous statute is in fact clear. A party, moreover, need not maintain an air-tight ship. The party may concede that the statute is less than pellucid. The party can even concede that certain features of the text favor the other side's position. Indeed, the argument can be structured as a tit-for-tat, *i.e.*, here are the features of the statute favoring my position, here are the features favoring the other side's position. So long as the argument leaves some room for doubt, the party has done all it needs to do to open the statute to a broader interpretive inquiry.

Differences between this interpretive approach and the plain language gambit are evident. The plain language approach requires a party to argue the case as if the statute were crystal clear. In cases where the text appears to favor the other side, such an argument may not be credible. The plain language approach also requires a party to hold the text in a vise grip. A party cannot concede a single textual point or else the plain language argument begins to unravel. In using text to point out statutory ambiguity, a party avoids being forced into what may be an unreasonable statutory argument.

Despite the obvious advantages of this interpretive approach, there are some potential downsides. First, in interpretive battles, one is always reluctant to concede away a textual point. Most lawyers prefer to take the offensive. Most courts expect nothing less than the most aggressive, some might say shrill, lawyering. By conceding ambiguity, a party assumes a defensive posture. A party effectively concedes that the statute does not clearly support its interpretation. This could be perceived by the court as a sign of weakness; an admission that the text does not support that party's position. This stands in contrast to the plain language approach which presents the statutory argument in the most positive light.

A second downside is that a party must cross two rivers to reach the other side. A party must first convince a court that the statute is ambiguous. This, itself, may be no easy task, but it is only half the battle. To prevail, the party must also persuade the court that the unresolved ambiguity in the statute should be resolved in that party's favor. This provides a contrast with the plain language approach. Under that approach, there is rarely a second act. If a party persuades the court that the language clearly supports that party's position, the matter ends (except in those rare cases in which the court is willing to set aside the plain meaning of the statute).

These factors suggest that the textual bypass approach is not for every case. If the textual arguments are close and the broader indicia of intent do not clearly favor a party's position, the party may be better off taking its chances with the plain language approach. However, the analysis changes if the party is likely to lose the textual battle (if argued as a dueling plain language case), and there are compelling arguments of history, purpose and logic that favor the party's position. In that circumstance, the optimal interpretive strategy is one that argues for textual ambiguity, thereby providing a text-centered argument for bypassing the unfavorable text and reaching the more favorable, secondary sources of legislative meaning.

D. The Combination Approach

The above discussion assumes that these interpretive approaches are mutually exclusive. This, of course, is not necessarily true. Litigants can make multiple arguments in the alternative. At least in theory, it is possible for a party to combine interpretive approaches in a single case.

The most obvious pairing of interpretative approaches brings together the two non-plain language approaches, the textual end run and

the textual bypass. In a case in which the plain language approach is not available to a party, a party has two choices: (1) argue that this is the type of case in which the court can set aside the statute's plain meaning; or (2) argue that the statute is ambiguous. A party does not have to choose only one approach. It may argue that the text is ambiguous and that the ambiguity should be resolved in the party's favor, and, in the alternative, argue that the broader indicia of intent are so compelling that they trump the statute's literal terms, even assuming that those terms are not ambiguous.

In using this combination approach, it is critical that the party begin with the approach that is most text-centered. That is, begin the argument by making the case for textual ambiguity and then turn to the textual end run as a fallback argument. Again, in the new textualism era, any argument that places text first is favored.

The combination that seems most unlikely is the pairing of the plain language gambit and the textual end run. The plain language approach argues with confidence that the terms of the statute plainly support the party's position. If the language is truly plain (or at least arguably so), it is non-sensical to argue that the language plainly supports the other side's position, thus requiring a textual override. Of course, in advancing the plain language argument, a party will want to follow the textual argument with a discussion of the relevant history, context, and purpose. The party should frame that discussion as supportive of the plain meaning argument; it should not pit these broader indicia of intent against text.

The more difficult pairing is that of the plain language gambit and the textual bypass. It might appear that these two approaches are easily wed. A party starts by invoking the plain language rule. The party argues that the statute's plain terms support its position. The party argues, in the alternative, that the statute is ambiguous and that the ambiguity should be resolved in the party's favor.

In practice, it is much harder to achieve a bond of these two approaches. Legal briefs are written with a single voice. They have a central theme, a thesis, that carries through the brief. In the context of interpretive arguments, the defining moment of the brief is the initial textual volley. If a party sounds the plain language theme, that theme typically sets the tone for everything that follows. Although it is not unusual for litigants to advance alternative arguments, the shift in emphasis, from "the statute is plain" to the "statute is ambiguous," is awkward, at best, self-defeating, at worst.

Indeed, there are structural problems with attempting this combina-

tion approach. A party begins by arguing plain language. The party then shifts gears completely by arguing that the statute is ambiguous. To make this argument persuasively, the party must unpack or deconstruct the statute. The party might begin by pointing to the ambiguities in the statutory provision at issue. The party may expand the inquiry to draw comparisons to other provisions of that statute or other related statutes to create ambiguity in the statute. Finally, the party might point to broader contextual factors, such as the law predating the statute's enactment, in an attempt to raise ambiguity. By the time the party is finished, it may have emphasized the ambiguity to such an extent that it harpooned the initial plain language argument.

Take for example a statute that provides rules for the registration of "cats, dogs and any other animal." If a party wants to argue that these rules apply to horses, the party must begin with a plain language argument. The party may argue that the phrase "any other animal," by its plain terms, applies to horses. In the alternative, the party may argue that the statute is ambiguous but should be construed as covering horses. The party could acknowledge that, under the interpretive canon known as *ejusdem generis*, the phrase "any other animal" is construed in the context of the list that precedes it. This arguably supports a narrower interpretation of the phrase, limiting its reach to other domestic pets such as cats or dogs. Moreover, the statutory section of which this provision is a part appears to contemplate regulation of domestic pets; most of the provisions focus on domestic pet issues.

On the other hand, assume that there is a closely related statute governing a different issue of animal regulation that uses the phrase "cats, dogs and any other domestic pet." This suggests that the use of the phrase "any other animal," in the statutory provision at issue, was intended to give the provision a broader reach. From this, the party may urge that the statute is ambiguous and in need of judicial explication based on the broader indicia of intent (which, in this case, support the party's position). The party may have made a convincing case for statutory ambiguity, resolved in the party's favor by the broader manifestations of intent. However, by doing so it has undermined completely the initial plain language argument. The party, in effect, has argued against itself.

Of course, one can always argue that the language of a statute is plain and simply acknowledge, in passing, the possibility of an ambiguity. In other words, the party can make a plain language argument, note that the statute is possibly ambiguous, and then proceed to the other indicia of intent ——such as context, purpose and history. However, this is

not a combination of the plain language and textual bypass approaches. It is simply a deployment of the plain language approach with a slight disclaimer or safety valve added to the argument. To effectively argue a case under the plain language and textual bypass approaches, is a difficult, if not impossible feat.

This discussion suggests that, in making an interpretive argument in those cases in which the text might appear to be less than supportive, a party must carefully choose an interpretive strategy. A party must choose between the plain language gambit and the textual bypass, each of which has its advantages and disadvantages. The choice of interpretive strategy will dictate the way in which the argument is constructed and, ultimately, the success or lack of success of that argument.

III. A SUPREME COURT PARADIGM: *ROBINSON V. SHELL OIL CO.*

With these approaches in mind, we can now turn to a real-world example. The example is instructive for a number of reasons. First, it illustrates the benefits of the textual bypass approach. Second, it suggests how a party can achieve the same result, in textual terms, that would have been achievable in non-textual terms under prior interpretive paradigms. Finally, it raises questions about how far the textual bypass approach can be pushed, which in turn transitions nicely into the last section of the Article.

The real-world example is *Robinson v. Shell Oil Co.*[102] *Robinson* involved a claim of unlawful retaliation under Title VII of the Civil Rights Act of 1964.[103] The plaintiff in *Robinson* had been fired from his job with the defendant. The plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission. After the charge was filed, the defendant provided a negative job reference to a prospective employer of the plaintiff. The plaintiff claimed that the defendant provided the negative reference to the plaintiff as a retaliation for the charges that the plaintiff filed against the employer. The plaintiff argued that the negative reference was an unlawful retaliation under Title VII. The defendant argued that the protections of Title VII did not extend to the plaintiff's claim because Title VII only protected employees, not former employees, from unlawful retaliation.

The Fourth Circuit Court of Appeals agreed with the defendant.[104]

102. 519 U.S. 337 (1997).

103. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

104. Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995) (*en banc*), *rev'd*, 519 U.S. 337 (1997).

The Court of Appeals relied on the plain language of the statute,[105] which makes it unlawful for an employer "to discriminate against any of his employees or applicants for employment" because of the protected activity (*e.g.*, charge-filing) of those employees or applicants.[106] The court ruled that, by its plain terms, the statute extends to employees and applicants for employment, not former employees. The court acknowledged that a number of circuit courts had read the statute more broadly but asserted that these decisions "depend on broad policy arguments not supported by the plain language of Title VII."[107] The court concluded that because Congress had chosen, "in no uncertain terms," not to protect former employees, the court was not free to interpret the statute in accordance with the "underlying policies" of the anti-retaliation provision.[108]

The Supreme Court granted certiorari in *Robinson* and unanimously reversed the Fourth Circuit decision. The Supreme Court stated that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[109] The Court stressed that "a court's inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent."[110] The Court proceeded to clarify that "the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used and the broader context of the statute as a whole."[111]

With these precepts as its guide, the Court concluded that the language of the statute did not unambiguously foreclose coverage of former employees. The Court acknowledged that, "[a]t first blush, the term 'employees' in [the anti-retaliation provision] would seem to refer to those having an existing employment relationship with the employer in question."[112] The Court determined, however, that "[t]his initial impression" does not withstand scrutiny in the context of [the anti-retaliation provision]."[113] The Court stressed that "there is no temporal qualifier in

105. *Id*. at 331-32.

106. 42 U.S.C. § 2000e-3(a) (1994).

107. *Robinson*, 70 F.3d at 332. The Court described these decisions as "at odds with the well-settled rule that in the absence of expressed Congressional intent, courts must assume that Congress intended to convey the language's ordinary meaning." *Id*.

108. *Id*. at 332.

109. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

110. *Id*.

111. *Id*. at 341.

112. *Id*.

113. *Id*.

the statute such as would make plain that [the anti-retaliation provision] protects only persons still employed at the time of the retaliation."[114] In particular, the statute defines the term "employee" to mean an individual employed by an employer," not an individual who "*is* employed" by an employer.[115] The Court found additional ambiguity in the simple fact that the term "employee" does not have some intrinsically plain meaning" that renders the term unambiguous.[116] Finally, the court deemed it significant that "a number of other provisions in Title VII use the term 'employees' to mean something more inclusive or different from 'current employees.'"[117] The Court concluded that, "[o]nce it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous."[118]

Having concluded that the statute was ambiguous, the Court assumed the role of resolving that ambiguity.[119] The Court did so by looking to the "broader context" of the statute, which seemed to "contemplate that former employees would make use of the remedial mechanisms of Title VII."[120] The Court also drew support from the plaintiff's argument that the word 'employees' includes former employees because to hold otherwise would effectively vitiate much of the protection afforded by the [anti-retaliation provision]."[121] The Court agreed with the plaintiff "that it would be destructive of this purpose of the anti-retaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII."[122]

Robinson provides a virtual road map for using textual argument to dodge a seemingly hostile text. The vehicle for doing so is the textual bypass approach. The Court invoked the rhetoric of the new textualism. The Court made clear that statutory text, seemingly plain, could be

114. *Id*.

115. *Robinson*, 70 F.3d at 342 (emphasis in original) (citing 42 U.S.C. § 2000e(f) (1994)).

116. *Id*. at 344 n.4.

117. For example, Section 717(c) of Title VII provides that an "employee or applicant for employment, if aggrieved, by the final disposition of his complaint, . . . may file a civil action . . . ." 42 U.S.C. § 2000e-16(e) (1996). Given "that discriminatory discharge is a forbidden 'personnel action[n] affecting employees,' the term 'employee' in [Section] 717(c) necessarily includes a former employee." *Robinson*, 519 U.S. at 343 (citation omitted).

118. *Robinson*, 519 U.S. at 343.

119. *Id*. at 345.

120. *Id*.

121. *Id*.

122. *Id.* at 346. As the Court explained, exclusion of former employees "would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employees to fire employees who might bring Title VII claims." *Id.*

viewed as ambiguous when read in context. The Court construed the anti-retaliation provision by referencing other provisions in Title VII; provisions that seemed to belie the argument that the protections of the statute did not extend to former employees. Having reached the conclusion that the statute was ambiguous, the Court went on to assign meaning to the statute, based on broader arguments of context, purpose and logic.

What makes *Robinson* significant is that the Court reached its conclusion in terms that are acceptable to the new textualists. Historically, a number of circuit courts had concluded that Title VII's anti-retaliation provision applied to former employees. These courts had done so largely on non-textual grounds, invoking the purpose-oriented approach to statutory interpretation. In one case the court acknowledged that the words of the statute, "[r]ead literally," might exclude former employees from the reach of the anti-retaliation provision.[123] However, the court ruled that such a narrow construction would not give effect to the statute's purpose, stressing that there is no better guide to the '"interpretation of a statute than its purpose when that is sufficiently disclosed.'"[124] In another case, the court determined that "a strict and narrow interpretation of the word employee' to exclude former employees would undercut the obvious remedial purposes of Title VII."[125] The court opined that the "plain meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the statute."[126]

It is questionable whether the rationale of these decisions survives the shift in interpretive paradigms that has taken place over the past few decades. Certainly, the proponents of the new textualism would be skeptical of any approach that denied the primacy of the written word. Yet, in *Robinson*, the Supreme Court unanimously reached the same result that had been reached in these prior circuit court decisions. The key is that the Court did so by focusing principally on text. The Court invoked the purpose of the anti-retaliation provision but only after it carefully sifted through the text and concluded that the statute was ambiguous. *Robinson* proves the central point of this Article—that, in an age of textualism, the way to overcome seemingly hostile text is not to fight the text (or to ignore it) but to use textualist rhetoric to create ambiguity and thereby broaden the interpretive inquiry.

It is instructive in this regard to consider how cases decided under the now discarded purpose-oriented regime might fare under the textual

123. Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1054-55 (2d Cir. 1978).
124. *Id*. at 1055 (quoting *Fed. Ins. Deposit Corp. v. Tremaine*, 133 F.2d 830 (2d Cir. 1943)).
125. Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988).
126. *Id.*

bypass approach as articulated in *Robinson*. For example, in *Scrivener*,[127] the Supreme Court held that the NLRA's anti-retaliation provision extended to individuals who gave "sworn statements" to the Board. The Court's analysis, rooted principally in the "objective" of the statute, might be passe. Yet, the *Robinson* approach might well have produced the same result. The statute in *Scrivener* protected individuals who had given "testimony." The term "testimony" is not unambiguously restricted to oral testimony in a formal hearing.[128] More fundamentally, the statute contemplated the participation of individuals in board proceedings under circumstances that would not produce formal testimony."[129] This suggests that the language of the statute was ambiguous when viewed in "the specific context in which that language [was used], and the broader context of the statute as a whole."[130] Had the Supreme Court documented this ambiguity, it could have then turned to the broader indicia of intent to resolve that ambiguity, rather than relying upon those indicia in the first instance; the very anti-textual approach that raises the ire of the new textualists. One could easily rewrite the opinion in *Scrivener* to reach the same result in terms that would meet the demands of the new textualism.

Although *Robinson* provides a blue print for arguing cases of statutory interpretation in a textualist era, it leaves some questions unanswered. In *Robinson*, the Court first examined the specific language of the statutory provision at issue. The Court found this language to be ambiguous. The Court then looked outward, examining other sections of the statute for signs that Congress had some fixed understanding of statutory coverage. This statutory outreach confirmed the ambiguity that was in the specific language itself. *Robinson* suggests that the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used and the broader context of the statute as a whole."[131] However, there was no need to look beyond the language itself" because the language was ambiguous, a point that the broader context" merely confirmed.

In other cases, the words of the statutory provision, in isolation, might not be ambiguous. Yet, when examined against the broader con-

127. *See supra* notes 27-36 and accompanying text.

128. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1218 (1998) Testimony is defined as "a firsthand authentication of a fact." *Id.*

129. NRLB v. Scrivener, 405 U.S. 117, 124 (1972). The *Scrivener* Court raised this feature of the statute, but only as a secondary point; it began its analysis with the "objective" of the statute. *Id.* at 121. The new textualist would insist that the interpretive analysis begin with the text.

130. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

131. *Id.*

text of the statute as a whole," an ambiguity might emerge. This presents a different scenario than the one in *Robinson* where there was ambiguity at every step of the analysis, working from the inside out. *Robinson* seemingly supports the view that an ambiguity at any step of the analysis is enough to take the case out of the plain language rule. It must be acknowledged, however, that the textual bypass becomes more difficult when the "language itself" and "the specific context in which that language is used" do not point to any ambiguity; thus, leaving only the more amorphous argument that the statutory language is ambiguous when determined by reference to the "broader context of the statute as a whole." A party may have a strong argument of statutory ambiguity based upon the broader context of the statute. If at all possible the party should first try to suggest some ambiguity in the language of the statutory provision itself. Even assuming that the "broader context" of the statute might support the existence of a statutory ambiguity, it is a risky strategy when employing the textual bypass approach to concede a lack of ambiguity in the "language itself."

IV. THE INTERPRETIVE APPROACHES IN PRACTICE: A CASE IN POINT

It is now time to put into practice the principles discussed in this Article. To do so, I turn to an issue of statutory interpretation that is currently wending its way through the federal courts of appeals. The issue concerns the scope of the anti-retaliation provisions of the federal anti-discrimination statutes. The issue is not the same issue of statutory interpretation that occupied the Supreme Court's attention in *Robinson*. Nevertheless, the *Robinson* decision may well have some bearing on how this issue is resolved.

In particular, let us focus on Title VII of the Civil Rights Act of 1964. That statute makes it unlawful for an employer to retaliate against employees or applicants who have engaged in protected activity under Title VII. Specifically, the statute provides as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has

> made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[132]

In *Robinson*, the Supreme Court addressed one of the interpretive issues raised by this provision (*i.e.*, the protection of former employees). There are, however, other interpretive issues. One such issue is whether the protection of this provision extend to cases of third-party retaliation where the employer retaliates against one employee because of the protected activity of another.

In the prototypical retaliation case, an employee engages in some protected act, such as filing a charge of discrimination with the Equal Employment Opportunity Commission. The employer responds by taking some adverse action against that employee. However, In some cases the employer does not take action against the employee who has engaged in the protected activity, but instead, targets an employee who is associated in some way with the employee who has engaged in the protected activity. The targeted employee may be a close relative of the employee who engaged in the protected activity or the individual on whose behalf the other employee engaged in protected activity. (The other employee, for example, may have opposed a discriminatory act directed at the targeted employee. The employer then retaliates against the targeted employee rather than the employee who opposed the discriminatory act.) In either case, the employer has taken adverse action in retaliation for protected activity; however, the employer has not taken action against the individual who actually engaged in the protected activity.

A cursory look at the text of the statute reveals the problem. The statute makes it unlawful for an employer "to discriminate against any of his employees or applicants for employment . . . because he [employee or applicant] has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing."[133] The use of the term "he" implies that the statute prohibits an employer from discriminating against an employee when *that* employee engages in protected activity. Read literally, the statute could be construed as not applying in cases in which the employer retaliates against one employee because of the protected activity of another employee (or individual).

Courts have split over the question. The Sixth Circuit Court of Appeals has held that the anti-retaliation provision extends to cases of third-

132. 42 U.S.C. § 2000e-3(a) (1994).
133. 42 U.S.C. § 2000e-3(a).

party retaliation, "i.e., discrimination against one person because of a friend's or relative's protected activities."[134] The Sixth Circuit has stressed that "courts have frequently applied the retaliation provisions of employment statutes to matters not expressly covered by the literal terms of these statutes where the policy behind the statute supports a non-exclusive reading of the statutory language."[135] The Fifth Circuit, by contrast, has rejected the third-party retaliation theory.[136] Invoking the "plain language" rule, that court has limited the reach of the anti-retaliation provision to cases in which the target of the retaliation has himself engaged in protected activity.[137]

For reasons that should be obvious, this interpretive dispute provides an excellent illustration for the interpretive approaches discussed in this Article. There is a compelling argument that the purpose of the anti-retaliation provision would be compromised if an employer were free to retaliate with impunity against the spouse or friend of an employee who has engaged in protected activity. Yet, the literal terms of the statute might support just such a narrow reading of the provision. Historically, the manifest purpose of the anti-retaliation provision might have carried the day in any interpretive dispute. Under the new textualism paradigm, such a purpose-oriented approach might well fail. This presents a challenge for the party seeking a broader reading of the anti-retaliation provision. How best to make the case for a reading of the statute that would cover the claim of an employee who suffers an adverse employment action because of the protected activity of another employee?

Clearly, this is not a case in which the plain language gambit is a viable option. There may be some wiggle room in the text that is suffi-

134. EEOC v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993) (quoting DeMedina v. Reinhardt, 444 F. Supp. 573 (D.C. 1978), *aff'd in part and remanded in part*, 686 F.2d 997 (D.C. Cir. 1982)).

135. *Id.* at 545.

136. Holt v. JTM Indus., Inc., 89 F.3d 1224 (5th Cir. 1996). *Holt* involved a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2001). That statute, however, contains an anti-retaliation provision that is virtually identical to the provision in Title VII. *Compare* 42 U.S.C. § 2000e-3(a) (2001) *with* 29 U.S.C. § 623(d) (2001).

137. *Holt*, 89 F. 3d at 1226-27. Another circuit court has agreed with *Holt*, although without much analysis of the issue. *See* Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998). The issue has also been addressed in a number of district court decisions, with varying results. *See, e.g.*, Fogleman v. Mercy Hosp., Inc., 91 F. Supp. 2d 788 (M.D. Penn. 2000) (no coverage); Thomas v. Am. Horse Shows Ass'n, Inc., No. 97-CV-3513 JG, 1999 WL 287721 (E.D.N.Y. April 23, 1999), *aff'd* 205 F.3d 1324 (2000) (coverage); EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206 (E.D. Cal. 1998) (coverage); Murphy v. Cadillac Rubber & Plastics, 946 F. Supp. 1108 (W.D.N.Y. 1996) (coverage).

cient to create a statutory ambiguity. However, the language of the statute cannot be read as plainly supporting the position that the statute prohibits third-party retaliations. As discussed above, in many interpretive disputes, the critical, tactical decision is whether to argue the case in plain language terms or concede ambiguity. In this case, the statute makes the decision for the party. The plain language argument is simply not available.

On the other hand, this case seems well suited for the textual end run. There is a very strong argument that the purpose of the anti-retaliation provision would be thwarted if employers were free to engage in third-party retaliations. An employer could target non-participating employees for retaliation and engage in a campaign of purging protected activity from the workplace; the very thing that the anti-retaliation provision seeks to guard against. The problem is that, in an era governed by the new textualism, the textual end run is at best a long shot. The textual end run might work as an alternative argument in combination with the textual bypass approach. However, to base the statutory argument on nothing more than a non-textual, purpose-oriented analysis is a risky proposition that is likely to incur the wrath of a textualist judge who will want to see, at least, some textual analysis.

This leaves the textual bypass approach. In some ways, the third-party retaliation issue closely resembles the issue before the Supreme Court in *Robinson*. As in *Robinson*, the dispute focuses on the anti-retaliation provision of Title VII. As in *Robinson*, the party seeking coverage is confronted by a text that is not plainly supportive of coverage. As in *Robinson*, there is a compelling argument that the purpose of the anti-retaliation provision would be thwarted if the provision were given a narrow reading. Despite these similarities, there is one critical difference. In *Robinson*, the dispute turned on whether the term "employees" necessarily meant "current employees." The Court was able to say that the statute was ambiguous because the term "employee" does not necessarily mean "current employee" and the statutory definition of "employee"—an "individual employed by an employer"—contains no temporal qualifier. In the case of third-party retaliations, the dispute turns on the fact that the statute refers to retaliation against an employee because "he"—the employee—has engaged in protected activity. The ambiguity that was relatively easy to identify in *Robinson* does not exist on this issue. Thus, if a party is to argue ambiguity based on the "language itself," it must do so on some other ground. As discussed above, it is possible to bypass the language of the statute in isolation and argue ambiguity on the basis of the "broader context of the statute as a

whole."[138] This approach, however, may concede too much. In theory, a textualist judge might be willing to accept an argument based on a contextual analysis. In practice, however, failing to identify some ambiguity in the literal words themselves could be fatal. Textualists are not fond of any argument that requires a judge to supplement or modify the language of a statute. It is one thing to extend the coverage of a statute by construing ambiguous language. It is another thing to extend coverage by construing language that, on its face, seems clearly to foreclose coverage. The textualist judge must be given a certain comfort level. To do so, it helps immensely that, context aside, the "language itself" is ambiguous.

Is there an argument that the language of the anti-retaliation provision, by itself, is ambiguous with respect to third-party retaliations? Perhaps. The statute refers to retaliation against an employee because "he" has engaged in protected activity. This suggests that the protection of the provision extends only to individuals who have engaged in protected activity themselves. Yet, to reach that conclusion, one must infer that Congress used these terms in an exclusive sense. That is a fair inference but not an immutable one.

It is generally understood, under the maxim of "*expressio unius est exclusio alterius*," that where "the persons and things to which [a statute] refers are designated, there is an inference that all omissions should be understood as exclusions."[139] That maxim, however, simply supports an "inference" of exclusivity. Courts have emphasized that, because "not every silence is pregnant," expressio unius is "an uncertain guide to interpreting statutes."[140] Courts have cautioned that the expressio unius maxim is "often a valuable servant, but a dangerous master to follow in the construction of statutes or documents."[141] That the anti-retaliation provision does not specifically refer to third-party retaliations does not, by necessity, rule out the possibility that Congress intended to cover such retaliations.

Further, the exclusive reading of the statute rests entirely on the term "he." "He" may not be ambiguous in the same way that "employee" was ambiguous in *Robinson*. Yet, the term may be broad enough to encompass at least some cases of third-party retaliation. For example, if an employer retaliates against a husband because his wife has filed a

138. Robinson v. Shell Oil Co., 519 U.S. 397, 341 (1997).

139. 2A NORMAN J. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 47.23, at 304-05 (6th ed. 2001).

140. Ill. Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983).

141. Ford v. United States, 273 U.S. 593, 612 (1927).

charge of discrimination, one could plausibly say, due to the closeness of the relationship, that retaliation against one is retaliation against the other. The "he," in that context, is interchangeable. In a similar vein, where an employer retaliates against Employee A because Employee B has acted on Employee A's behalf in opposing discrimination in the workplace, Employee A has not, himself, engaged in protected activity. Yet, another employee, acting as Employee A's representative has. Could it not be said that Employee A is the "he" referenced in the statute, in the sense that someone engaged in protected activity on his behalf?

Certainly, these are not the strongest textual arguments. And if there were nothing more to it, these arguments might well fail. The point here, however, is not to win the case on these arguments alone, but to pave the way for the context-based arguments to follow. To use a boxing metaphor, these points serve to soften the opponent, in this case, the hard-line textualist judge. Having accomplished that, the question is whether the party can deliver the knockout punch on the basis of a textual argument rooted in the broader context of the statute.

As it turns out, the broader context of the statute strongly points against the restrictive reading of the anti-retaliation provision. The restrictive reading of the anti-retaliation provision reflects an "every man for himself" perspective, where the scope of statutory protection for unlawful retaliation is coterminous with an individual's own protected activity. However, Title VII rejects such a "first person" view of the enforcement process. Title VII expressly authorizes the filing of charges on behalf of third parties.[142] Moreover, under Title VII an individual who has not timely filed a charge can rely on the timely charge of another employee in pursuing a claim that arises out of "'similar discriminatory treatment in the same time frame.'"[143] Reflecting a holistic approach to enforcement of the statute, Title VII encourages individuals to file charges on behalf of their fellow workers and extends the protection of the statute to individuals who have not participated in the enforcement process themselves.[144]

These features of Title VII are critical. The anti-retaliation provision does not stand alone. It is part of a statutory framework that seeks

142. *See* 42 U.S.C. § 2000e-5(b) (2001).

143. Tolliver v. Xerox Corp., 918 F.2d 1052, 1056-57 (2d Cir. 1990) (quoting *Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986)).

144. *See generally* EEOC v. Cosmair, Inc., 821 F.2d 1085, 1089 (5th Cir. 1987) (noting that the "purpose of the charge . . . is not to seek [individual] recovery from the employer but rather to inform the EEOC of possible discrimination").

to root out discrimination through a process of informal complaint, administrative dispute resolution and litigation. Why in the world would Congress outlaw retaliation, permit employees to benefit from the protected activity (*e.g.*, charge-filing) of others and then leave the employer free to retaliate with impunity against those employee-beneficiaries? At the very least, there is an uncomfortable fit between the restrictive reading of the anti-retaliation provision and the Act's enforcement provisions. This supports an argument that the statute is ambiguous on the precise issue of whether the anti-retaliation provision protects against third-party retaliation.

Assuming the statute is ambiguous, the case for coverage becomes compelling because the manifest purpose of the anti-retaliation provision is to maintain "unfettered access to statutory remedial mechanisms."[145] The "filing of charges and the giving of information by employees" is essential to the enforcement of Title VII and "the carrying out of the congressional policy embodied in the Act."[146] If an employer was permitted to engage in third-party reprisals with impunity, the employer could end run the anti-retaliation provision and subvert the enforcement objectives of Title VII. An employer could discharge workers in retaliation for organized opposition activities, thereby undermining the ability of unions or other organizations to wage campaigns against discriminatory practices. Further, to the extent that the workers had not engaged in opposition activity themselves, they would not be protected by the statute. Additionally, an employer could adopt a policy of seeking reprisals in any case where an employee protested discrimination, filed a charge with the Equal Employment Opportunity Commission or otherwise participated in the enforcement process. That policy could require the termination of any relative, friend, or co-worker of the individual engaging in the protected activity. It makes no sense for Congress to have left such a gaping hole in the protections of the anti-retaliation provision.

The observant reader will note that, at this point, the argument for coverage is not unlike the argument one would make under the textual end run approach. The difference is that, under the textual bypass approach, the party reaches this point of the argument only *after* first distilling the text and persuading the court that the statutory language is ambiguous. The lesson here is obvious. The end point, in either case, is the same. The question is how to get to that end point in a way that meets the demands of the now-prevailing textualist paradigm.

145. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

146. Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969).

V. CONCLUSION

The shift to a more textualist approach to statutory interpretation places new demands on the practitioner. In prior eras, a party seeking to expand the scope of protection under a federal statute could do so without much regard for text; the party could invoke the remedial purpose of the statute, talk a lot about the limits of literalism, and argue the case as a matter of statutory policy and logic. The new textualism has changed the legal landscape. Yet, the new textualism may have given back with one hand what it has taken with the other.

This article has attempted to show how one can use textual rhetoric to achieve a result that, at first blush, may appear contra-textual. It constructed this argument by using the road map provided by the Supreme Court itself. Textualism may be here to stay, but, within the textualist framework, there is a surprising amount of give in the joints. It is the job of the practitioner, seeking to overcome the literal terms of a statute, to find that give.