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The Death and Reincarnation of Plain Meaning in Connecticut: A Case Study

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Judges have been required to interpret statutes for as long as there have been legislative enactments. To perform this task, courts have adopted various canons to guide their analytical paths. One of these judicially-created canons, the plain meaning rule, has been subjected to praise as an indication of the court's subordination to legislative will and criticism as wooden and inadequate to the task of implementing legislative intent. Until mid-twentieth century, the debate about the efficacy of the plain meaning rule largely took place in opinion writing and legal scholarship. But as the debate has shifted to a broader discussion of the role of the court in the legislative process, Connecticut and seven sister states' legislatures have joined the fray to assert a legislative primacy in statutory interpretation.

In 2004, the Connecticut Supreme Court in State v. Courchesne*, was required to interpret a portion of the State's death penalty statute, and, even though unnecessary to its holding, the court expressly abandoned the plain meaning rule in favor of a purposive approach. In the process, the court formulated a strict version of the rule unlike its recent application in either Connecticut or U.S. Supreme Court decisions and postulated the canon as a rule of law. In quick order, the Connecticut General Assembly enacted a plain meaning rule akin to the textualism espoused by Supreme Court Justice Antonin Scalia. As a consequence of this legislative response, Connecticut judges are now constrained by a legislative mandate forbidding judges from consulting beyond the facially plain and unambiguous text of statutes. Whether this legislative response to* Courchesne *will be an aid to sound statutory interpretation in Connecticut remains to be seen.*

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THOMAS A. BISHOP [*]

I. INTRODUCTION

In 2003, the Connecticut Supreme Court renounced the plain meaning rule as a guide to statutory interpretation[1] in *State v. Courchesne*,[2] and adopted, in its place, a purposive path to interpretation against a strong dissent that argued for adherence to a rigid form of the plain meaning rule.[3] Perceiving the *Courchesne* opinion to reflect judicial disrespect for its legislative primacy, the Connecticut General Assembly quickly enacted a plain meaning statute requiring courts to adhere to a rigid form of the plain meaning canon not previously embraced by either the Connecticut or U.S. Supreme Courts.[4] In doing so, the Connecticut General Assembly elevated a loosely based guide to a rule of law, and adopted an approach to statutory interpretation most notably associated with the textualism of Justice Antonin Scalia.[5] As a consequence, Connecticut became the eighth state whose judiciary operates under a legislative mandate to follow a version of the plain meaning rule. This swift and pointed legislative reaction to *Courchesne* reflects a competitive sensitivity to the court's role in statutory

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[*] Judge of the Connecticut Appellate Court. I am grateful to Attorneys Kristi Mallett and Kirsten Rigney for their assistance in the preparation of this Article, for their wise suggestions and graceful subtractions without which this Article would have been longer and less useful.

[1] This Article uses the terms "construction" and "interpretation" interchangeably in accordance with the practice of most current writers.

[2] State v. Courchesne, 816 A.2d 562, 568, 582 (Conn. 2003), *superseded by statute*, CONN. GEN. STAT. § 1-2z (2007), *as recognized in* Gonzalez v. Surgeon, 937 A.2d 24, 33 n.12 (Conn. 2007).

[3] *See Courchesne*, 816 A.2d at 609–18 (Zarella, J., dissenting) (arguing for adherence to the plain meaning rule and outlining the disadvantages of a purposive interpretation approach as embraced by the majority).

[4] *E.g.*, CONN. GEN. STAT. § 1-2z (2007) ("The meaning of a statute shall . . . be ascertained from the text of the statute itself . . . ."); *see also Courchesne,* 816 A.2d at 576–77 ("For at least a century, this court has relied on sources beyond the specific text of the statute at issue to determine the meaning of the language as intended by the legislature.").

[5] Textualism, as espoused by Justice Scalia, is the notion that the meaning of a statute is to be understood by its language and by its statutory context without reference to legislative history, because that is an unreliable guide to the meaning of enacted language. *See, e.g.,* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73–75 (explaining Justice Scalia's textualist interpretation philosophy). An alternative approach, known as purposivism, holds that although the language of a statute may have primacy, judges in their interpretative role may consult extrinsic sources, including legislative history, to understand what the legislature intended in enacting the legislation under scrutiny. *Id.* at 85–109 (describing the main differences between purposivism and textualism while also noting the similarities between the two methods of statutory interpretation).

interpretation without regard to whether rote adherence to statutory text is, in fact, the most effective approach to determining legislative intent. Nevertheless, the adoption by Connecticut and seven sister states of plain meaning statutes is a telling indication of legislative intervention in what historically has been an ongoing and lively dialogue among judges and scholars regarding the best approach to statutory adjudication in an increasingly statutory age.[6]

This Article reviews the majority's formulation and rejection of the plain meaning rule in *Courchesne*, and compares the version of the rule articulated by *Courchesne* with the rule's historic treatment in U.S. Supreme Court and Connecticut Supreme Court opinions. The Article then explores the nature of the plain meaning rule as an interpretative canon, observing that the debate about the usefulness of the canon as a linguistic guide has been superseded by a more philosophical debate about the role of courts in statutory cases. Next, the Article examines the swift proscriptive response to *Courchesne* by the Connecticut Legislature, while noting that other states have enacted plain meaning legislation as well. The Article concludes with questions that legislative adoption of plain meaning statutes leave unanswered regarding the role of courts in statutory interpretation and, more generally, in the legislative process.

II. *STATE OF CONNECTICUT V. COURCHESNE*

In 2003, the Connecticut Supreme Court decided a significant question that arose in the case of *State v. Courchesne*.[7] Robert Courchesne was convicted by a three judge panel of two counts each of murder and capital felony in connection with the stabbing deaths of a mother and her unborn child who, subsequent to the stabbing, was delivered by cesarean section, but was pronounced dead forty-two days later due to oxygen deprivation to the brain.[8] In conjunction with its prosecution, the state filed notice with the court that it intended to present evidence in the penalty phase that, as an aggravating factor, the defendant committed the "offense" of capital felony in an especially heinous, cruel or depraved manner, thus making the defendant eligible for the imposition of the death penalty.[9] Although the court denied the defendant's motion to dismiss this aggravating factor, it

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[6] This Article discusses the enactment of plain meaning statutes in Connecticut and other states. While observing this phenomenon, the Article refrains from any discussion of the constitutionality of such statutes.

[7] State v. Courchesne, 816 A.2d 562, 567 (Conn. 2003).

[8] *Id.* at 566–68. In Connecticut, a capital felony includes the "murder of two or more persons at the same time or in the course of a single transaction." CONN. GEN. STAT. § 53a-54b(7) (2007).

[9] *See Courchesne*, 816 A.2d at 566–67 (noting the main issue before the court in interpreting the State's death penalty statute). Connecticut's death penalty statute provides, in part, that one of the aggravating factors to be considered in death penalty litigation is evidence that "the defendant committed the offense in an especially heinous, cruel or depraved manner." CONN. GEN. STAT. § 53a-46a(i)(4).

ruled that the imposition of the death penalty required proof that each murder was committed in the aggravated manner.[10]

On appeal, a divided Connecticut Supreme Court held that the state was required only to prove that the defendant killed one of the victims in an especially heinous, cruel or depraved manner in furtherance of its intention to seek the death penalty.[11] Turning initially to the language of the statute, the court observed that literal application of the term "offense," as "a purely linguistic matter," favored the defendant's argument that in order to be eligible for the death penalty, the state would have to prove that each murder was committed in the aggravated manner claimed because the offense for which the defendant was convicted was the murder of two persons.[12] Reciprocally, the court noted that the state's plain language argument was not as "linguistically appealing."[13] Nevertheless, the court concluded:

> Although the language of the statute, viewed literally and in isolation, suggests a conclusion consistent with the interpretation offered by the defendant, when viewed in its context and history leads us to conclude, to the contrary, that when § 53a-46a(i)(4) refers to 'the offense,' as applied in the circumstances of the present case, it means the murder of either of the 'two' persons referred to in § 53a-54b(8), and does not mean both murders.[14]

Following this determination, the court surveyed Connecticut's statutory scheme for death penalty eligibility, and noted that most of the predicate conduct for death penalty eligibility involved one underlying offense.[15] The court concluded that there could be no legislative rationale for making one eligible for the death penalty who had committed one

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[10] *See Courchesne*, 816 A.2d at 567 ("In the course of its decision . . . the [trial] court . . . ruled that . . . the state . . . would be required to prove . . . both murders were committed in an especially heinous, cruel or depraved manner.").

[11] *E.g., id.* at 568 ("We conclude that, under our death penalty statutory scheme, if the defendant's mental state and conduct meet these requirements with respect to one of his victims, the aggravating factor is satisfied."). Although, generally, the State has no right of appeal in a criminal matter, the trial court in Connecticut has the discretion to permit the State to appeal upon motion. *E.g.,* CONN. GEN. STAT. § 54-96 (2001) ("Appeals from the rulings of the . . . superior court, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court or to the appellate court . . . ."). Additionally, Connecticut has a statutory procedure enabling a party to seek review of an interlocutory order under specified circumstances. *E.g.,* CONN. GEN. STAT. § 52-265a (2005) ("[A]ny party . . . who is aggrieved by an order . . . of the superior court . . . in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal . . . to the supreme court . . . .").

[12] *Courchesne*, 816 A.2d at 569.

[13] *Id.*

[14] *Id.* at 570.

[15] *See id.* at 570–72 (outlining the statutory context of state provisions providing for imposition of the death penalty in finding that most underlying predicate conduct need only arise from a single offense).

underlying offense in an aggravated manner, but not one who had committed the offense of two murders in a similar manner.[16] The court determined that a literal application of the statute's language would result in a bizarre outcome because double murderers might not be exposed to the death penalty even though those guilty of one underlying offense could be made eligible by proof of a requisite aggravating factor.[17] Thus, the court concluded that the legislature intended that one who commits double murder in an aggravated manner is eligible for the death penalty without proof that each of the underlying murders was committed in that manner.[18]

Following its resolution of the issue at hand, the Connecticut Supreme Court launched an attack against the plain meaning rule.[19] Even though the court recognized that it had previously applied various versions of the rule,[20] the court postulated a rigid formulation of the rule as its essence.[21] Then, finding this approach to statutory interpretation to be untenable, the court renounced the plain meaning rule in any of its various manifestations as a viable approach to statutory interpretation.[22] Additionally, and contrary to previous decisional law, the court characterized the plain meaning canon as a rule of law.[23] The court posited that:

> Although we have used many different formulations of the plain meaning rule, all of them have in common the fundamental premise, stated generally, that, where the statutory language is plain and unambiguous, the court must stop its interpretive process with that language; there is in such a case no room for interpretation; and, therefore, in such a case, the court must not go beyond that language.[24]

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[16] *Id.* at 572 ("We can conceive of no rationale for the legislature to have set a higher bar to the imposition of the death penalty when the underlying capital felony involved, not one, but two underlying serious felonies . . . .").

[17] *See id.* at 572–73 (discussing the counter-intuitive result that would accompany a literal interpretation of the statute's meaning in these circumstances).

[18] *Id.* at 574 ("We decline, therefore, to apply [strict] rules so as to yield the result that the aggravating factor must apply to both murders.").

[19] *See id.* at 576–77 ("We take this opportunity to clarify the approach of this court to the process of statutory interpretation. For at least a century, this court has relied on sources beyond the specific text of the statute at issue to determine the meaning of the language as intended by the legislature.").

[20] *See id.* at 577 ("We have not been consistent in our formulation of the appropriate method of interpreting statutory language.").

[21] *See id.* at 580–82 ("Although we have used many different formulations of the plain meaning rule, all of them have in common the fundamental premise, stated generally, that, where the statutory language is plain and unambiguous, the court *must* stop its interpretive process with that language . . . .") (emphasis added).

[22] *Id.* at 582 ("We now make explicit what is implicit in what we have already said: in performing the process of statutory interpretation, we do not follow the plain meaning rule in whatever formulation it may appear.").

[23] *See id.* (describing the authoritative implications of the plain meaning rule in relation to judicial review of statutory language).

[24] *Id.* at 580.

The court added:

> The plain meaning rule means that in a certain category of cases—namely, those in which the court first determines that the language at issue is plain and unambiguous—the court is *precluded as a matter of law* from going beyond the text of that language to consider any extratextual evidence of the meaning of that language, no matter how persuasive that evidence might be. Indeed, the rule even precludes reference to that evidence where that evidence, if consulted, would *support or confirm* that plain meaning.[25]

The court recapped its view of the plain meaning rule as follows:

> If the language of the statute is plain and unambiguous, and if the result yielded by that plain and unambiguous meaning is not absurd or unworkable, the court must not *interpret* the language (i.e., there is no room for construction); instead, the court's sole task is to apply that language literally to the facts of the case, and it is precluded as a matter of law from consulting any extratextual sources regarding the meaning of the language at issue. Furthermore, in deciding whether the language is plain and unambiguous, the court is confined to what may be regarded as the objective meaning of the language used by the legislature, and may not inquire into what the legislature may have intended the language to mean—that is, it may not inquire into the purpose or purposes for which the legislature used the language. Finally, the plain meaning sets forth a set of thresholds of ambiguity or uncertainty, and the court must surmount each of those thresholds in order to consult additional sources of meaning of the language of the statute. Thus, whatever may lie beyond any of those thresholds may in any given case be barred from consideration by the court, irrespective of its ultimate usefulness in ascertaining the meaning of the statutory language at issue.[26]

While acknowledging by footnote that it had not always utilized this formulation of the plain meaning rule, the court concluded this portion of the opinion declaring: "We now make explicit what is implicit in what we have already said: in performing the process of statutory interpretation, we do not follow the plain meaning rule in whatever formulation it may

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[25] *Id.* at 581.
[26] *Id.* at 582.

appear."[27]

In place of the plain meaning rule, the Connecticut Supreme Court adopted a purposive approach to statutory interpretation by following the analytical pathway it had earlier enunciated in the case of *Bender v. Bender*.[28] There, the court opined:

> The process of statutory interpretation involves a reasoned search for the intention of the legislature. In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of this case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.[29]

To this formulation, the *Courchesne* court added the following: "We also now make explicit that we ordinarily will consider all of those sources beyond the language itself, without first having to cross any threshold of ambiguity of the language."[30] By footnote, the *Courchesne* majority noted: "We acknowledge at the outset that the particular approach to the judicial process of statutory interpretation, as formulated and explained herein, that we now specifically adopt, has not been adopted in the same specific formulation by any other court in the nation."[31] In response, the dissent observed: "[T]he majority's abandonment of the plain meaning rule in favor of an alternative and novel method of statutory interpretation represents an incorrect deviation from our traditional mode of statutory

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[27] *Id.*

[28] *Id.* at 585 ("[I]n applying the *Bender* formulation, we necessarily employ a kind of sliding scale: the more strongly the bare text of the language suggests a particular meaning, the more persuasive the extratextual sources will have to be in order for us to conclude that the legislature intended a different meaning.") (citing Bender v. Bender, 785 A.2d 197 (Conn. 2001)).

[29] *Bender*, 785 A.2d at 205 (citations omitted).

[30] State v. Courchesne, 816 A.2d 562, 578 (Conn. 2003). It is noteworthy that the court's assault on the plain meaning rule had no apparent connection to its holding. And, as can be noted from the review of cases discussed in this Article, the case could have been decided with the same result by application of the plain meaning rule as it traditionally has been utilized in Connecticut and by the U.S. Supreme Court because the plain meaning rule, in any formulation, permits resort to extrinsic sources if a literal application of the statute's language would lead to an absurd result. The court's finding that the application of the term "offense" in the manner suggested by the defendant would lead to a bizarre result would have permitted the court's search of extrinsic sources without the need to renounce the plain meaning rule. *Id.* at 573.

Similarly, in none of the cases cited in *Courchesne* for "eschewing" plain meaning analysis does it appear that the statute under scrutiny had either plain or unambiguous meaning. One could reasonably conclude that, in those cases, the court did not deal with the plain meaning rule because its inapplicability was plain.

[31] *Id.* at 576 n.19.

interpretation and an impermissible usurpation of the legislative function."[32]

Neither the majority's postulation of the plain meaning rule and its statement of the uniqueness of its purposive approach, nor the dissent's characterization of the majority's approach as a novel deviation from the court's traditional analytical pathway find support in the history of U.S. Supreme Court or Connecticut Supreme Court statutory interpretation jurisprudence.

III. STATUTORY INTERPRETATION IN THE UNITED STATES SUPREME COURT

A survey of U.S. Supreme Court statutory interpretation cases reveals no consistent philosophical thread. At times, the Court appears to have adhered to one version or another of the plain meaning rule. In other cases, the Court appears to have taken a purposive approach without regard to the plain meaning rubric.

An early expression of the plain meaning rule by the U.S. Supreme Court can be found in *United States v. Wiltberger*.[33] There, Chief Justice John Marshall commented in regard to the construction of statutes:

> The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.[34]

In *Wiltberger*, Marshall followed this analytical pathway in determining that the ordinary meaning of the term "high seas" did not encompass a river in a foreign country.[35] As a consequence, the Court did not have cognizance over an alleged murder committed upon another country's river since a river is not, in common parlance, a part of the "high seas."[36]

Notwithstanding *Wiltberger*, and without reference to it, Justice

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[32] *Id.* at 597 (Zarella, J., dissenting).

[33] United States v. Wiltberger, 18 U.S. 76, 95–96 (1820).

[34] *Id.*

[35] *Id.* at 103–06.

[36] *Id.* at 105–06. In its adherence to plain meaning, the Marshall Court adopted the "faithful agent theory" through which the Court viewed itself as being the agent of Congress to carry out its express intent. One commentator observed that Marshall's approach at this juncture in the Court's history was a departure from colonial decisions in which many courts carried over from England the notion that the interpretative task of the court was to construe language in a manner to make the outcome equitable, an idea rooted in much earlier English jurisprudence. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 79 (2001) (discussing federal courts that applied the equity of the statute to construe statutory meaning).

Harlan, speaking for the court fifty-nine years later in *Oates v. National Bank*, suggested that: "The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction."[37] The Court further opined,

> A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the meaning of the makers.[38]

It is noteworthy that both the Marshall and the Harlan Courts were unanimous in their seemingly contradictory analytical routes.

The Court, in 1917, returned to a view of statutory construction more consonant with Marshall's expression in *Wiltberger*. In *Caminetti v. United States*, the Court was called upon to construe the language of the White Slave Trade Act, and, in particular, the meaning of the phrase, "any other immoral purpose."[39] Eschewing an argument that the phrase should not be accorded its plain meaning but should be read more restrictively, the Court embraced the plain meaning rule, stating:

> [A]s we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.[40]

Just eleven years later, in *Boston Sand & Gravel Co. v. United States*, the Court appeared to retreat from this approach in assessing whether the government should be liable for interest on damages due to a private ship owner involved in an at-sea collision with a naval destroyer.[41] Declining to accord the statute its plain meaning, Justice Holmes spoke for a divided Court in commenting:

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[37] Oates v. Nat'l Bank, 100 U.S. 239, 244 (1879).
[38] *Id.* (citation omitted).
[39] Caminetti v. United States, 242 U.S. 470, 476 (1917).
[40] *Id.* at 490.
[41] Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928).

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute.[42]

Writing for a minority of four, Justice Sutherland decried the majority's approach as inconsistent with prior jurisprudence:

> To refuse interest in this case, in my opinion, is completely to change the clear meaning of the words employed by Congress by invoking the aid of extrinsic circumstances to import into the statute an ambiguity which otherwise does not exist and thereby to set at naught the prior decisions of this Court and long established canons of statutory construction.[43]

Notwithstanding the rhetoric of *Boston Sand*, one year later the Court, in *United States v. Missouri Pacific Railroad Co.*, opined: "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."[44]

If *Caminetti* and *Missouri Pacific* can be seen as the high-water mark for plain meaning, the doctrine was dealt a severe blow just eleven years after *Missouri Pacific* in *United States v. American Trucking Associations*,

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[42] *Id.* Justice Holmes' characterization of the plain meaning rule as an "axiom of experience" is an often-repeated phrase, frequently cited by courts seeking an analytical path not constrained by strict adherence to either a rigid formulation of the rule or to the notion that it is a rule of law at all. *See e.g.,* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 455 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.") (internal quotations and citations omitted); *see also* Hayden v. Pataki, 449 F.3d 305, 315 (2d Cir. 2006) (discussing and implementing the principle of axiom of experience as proposed by Justice Holmes); Sigmon Coal Co. v. Apfel, 226 F.3d 291, 312 (4th Cir. 2000) (quoting Justice Holmes' language); Rhode Island v. Narragansett Indian Tribe, 19 F.3d. 685, 700 n.17 (1st Cir. 1994) (discussing Supreme Court plain meaning precedent); Slaven v. BP America, Inc., 973 F.2d 1468, 1473 (9th Cir. 1992) (beginning its legislative history analysis with the "axiom of experience" language); *In re* Continental Airline, Inc., 932 F.2d 282, 287 (3rd Cir. 1991) (justifying the addition of "extrinsic aids to interpretation" based on Justice Holmes' language); United States v. Avant, 907 F.2d. 623, 625 (6th Cir. 1990) (noting that statutory analysis does not end at the language of the statute based on Justice Holmes' language); United States v. Wallington, 889 F.2d 573, 577 (5th Cir. 1989) (considering evidence beyond the plain meaning of the statute by reason of Justice Holmes' understanding of the law).

[43] *Boston Sand & Gravel Co.*, 278 U.S. at 55 (Sutherland, J., dissenting).

[44] United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 278 (1929).

in which Justice Reed, writing for a majority of five, declined to accord the term "employee," as used in the 1935 Motor Carrier Act, its common meaning on the basis that such a reading of the term would cause a result at variance with the policy of the act.[45] Speaking of the Court's interpretative function, Justice Reed reasoned:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination. The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts

[45] United States v. Am. Trucking Ass'n., 310 U.S. 534, 553 (1940).

> available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, excepting as a different purpose is plainly shown.[46]

Given the scope of Justice Reed's language, it is understandable that *American Trucking* has become a vanguard opinion for those who espouse a purposive analytical route.

In the same Term, the Court decided *United States v. Dickerson*, in which, once again, the Court's manner of statutory interpretation was at issue.[47] There, the Court implicitly rejected a formalistic plain meaning approach to interpretation and commented:

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.[48]

This purposive approach, or a variant of it, prevailed for several years in U.S. Supreme Court decisions.

In 1976, a unanimous Court in *Train v. Colorado Public Interest Research Group, Inc.*, reversed a decision of the Second Circuit, in part, on the basis that the appeals court had refused to review the legislative history of the act in question.[49] Speaking for the Court, Justice Thurgood Marshall commented:

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the

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[46] *Id.* at 542–44 (internal quotations and citations omitted).
[47] United States v. Dickerson, 310 U.S. 554, 561–62 (1940).
[48] *Id.* at 562 (citation omitted).
[49] Train v. Colo. Pub. Int. Research Group, 426 U.S. 1, 23–25 (1976).

> words may appear on superficial examination.[50]

In reversing the Second Circuit, the Supreme Court appeared to be saying that the appeals court had committed legal error by espousing the view that the plain meaning rule, by its terms and coercive effect, prevented the court from looking at relevant legislative history.

This review of U.S. Supreme Court cases on statutory interpretation also reveals a number of cases in which the Court appears to have taken a middle ground, adopting what could either be called a soft variant of the plain meaning rule or a linguistically slanted purposive approach. They are cases in which the Court, while purporting to follow the plain meaning rule, also consulted extrinsic aids to confirm its view of the legislation under scrutiny. In addition, they belied the notion that an integral part of the plain meaning rule, as traditionally understood, operates to prevent the court from consulting extrinsic materials. For example, in *Maine v. Thiboutot*, Justice Brennan, in speaking for the majority, found certain language of the Civil Rights Act to have plain meaning, thus giving to private citizens the right to bring redress against the state. But in finding the language of the legislation to be plain, the Court also reviewed the legislative history of the act to confirm its view.[51] In dissent, Justice Powell, joined by Justice Rehnquist, rejected the Court's alleged reliance on the plain meaning rule, espousing, instead, a more holistic approach, stating:

> [T]he 'plain meaning' rule is not as inflexible as the Court imagines. Although plain meaning is always the starting point, this Court rarely ignores available aids to statutory construction. We have recognized consistently that statutes are to be interpreted not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.[52]

What is particularly noteworthy about this case is that neither the majority nor the dissent followed a narrow formulation of the plain meaning rule.[53]

A year later, in *Watt v. Alaska*, the Court rejected the canon's application as a binding rule.[54] In construing a portion of the statute at

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[50] *Id.* at 9–10 (internal quotations omitted).

[51] Maine v. Thiboutot, 448 U.S. 1, 4–11 (1980); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (illustrating that even though the Court took pains to attend to the plain meaning of the statute at hand, its reading comported with the clear legislative purpose).

[52] *Thiboutot*, 448 U.S. at 13–14 (Powell, J., dissenting) (internal quotations and citations omitted).

[53] *Id.* at 8–14. Similarly, in *Mohasco Corp v. Silver*, the Court consulted legislative history while finding that the language of the statute in question was not ambiguous and that applying the language in accordance with its plain meaning would not lead to an absurd or futile result. *Mohasco Corp v. Silver*, 447 U.S. 807, 823–24 (1980).

[54] Watt v. Alaska, 451 U.S. 259, 265–67 (1981).

hand, the Court opined:

> We agree with the Secretary that [t]he starting point in every case involving construction of a statute is the language itself. But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.
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> Sole reliance on the plain language of § 401(a) would assume the answer to the question at issue . . . . Our examination of the legislative history is guided by another maxim: repeals by implication are not favored. The intention of the legislature to repeal must be clear and manifest. We must read the statutes to give effect to each if we can do so while preserving their sense and purpose.[55]

It is interesting that while the *Watt* majority engaged in weighing the value of applying the plain meaning rule with the application of other maxims of construction and, in this case, found other canons more persuasive than the application of plain meaning, the minority complained that the majority had disregarded the plain meaning rule.[56] *Watt* demonstrates the willingness of the Court to consult other canons of construction as an aid to construction where, in the Court's view, application of the plain meaning rule would cause an unintended outcome.

History demonstrates, as well, the Court's willingness to venture beyond the language of the statute to reveal a latent ambiguity in the meaning of otherwise plain language. One example is the 1989 case of *Public Citizen v. United States Department of Justice*,[57] in which Justice Brennan, speaking for the majority, called upon precedent in resolving the issue of statutory interpretation before the Court:

> As we said in *Church of the Holy Trinity v. United States*, "[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the

[55] *Id.* (internal quotations and citations omitted).
[56] *Id.* at 265; *id.* at 279–80 (Stewart, J., dissenting).
[57] Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989).

> words, makes it unreasonable to believe that the legislator intended to include the particular act."
>
> Where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope. The circumstances of the enactment of particular legislation, for example, may persuade a court that Congress did not intend words of common meaning to have their literal effect. Even though, as Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless" it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.[58]

Finally, even though one rigid formulation of the rule posits that if a statute's language is clear and unambiguous, a court is prohibited from consulting extrinsic sources, the Court has indicated that, under such circumstances, it has no need to look elsewhere.[59] The language "no need" can fairly be read to reflect a matter of prudence and not limitation. This view is consistent with Joseph Story's formulation of the rule in his seminal work on American law:

> Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. It is only when there is some ambiguity or doubt arising from other sources that interpretation has its proper office. There may

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[58] *Id.* at 453–55 (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892); Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945)) (internal quotations and citations omitted).

[59] For example, in *Ex Parte Collett*, the Court opined: "there is no need to refer to the legislative history where the statutory language is clear." *Ex Parte* Collett, 337 U.S. 55, 61 (1949). More recently, in *Department of Housing and Urban Development v. Rucker*, the Court, in overturning a circuit court's finding of ambiguity, stated: "Given that the en banc Court of Appeals' finding of textual ambiguity is wrong, there is no need to consult legislative history." Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 132–33 (2002) (citation omitted).

> be obscurity as to the meaning, from the doubtful character of the words used, from other clauses in the same instrument, or from an incongruity or repugnancy between the words and the apparent intention derived from the whole structure of the instrument or its avowed object. In all such cases interpretation becomes indispensable.[60]

When Justice Antonin Scalia joined the Court in 1986, he had an early impact on its interpretative process as well as on the tenor of the debate as he took aim at the Court's habit of consulting legislative history to confirm its plain meaning analysis.[61] For example, in a concurring opinion in *INS v. Cardoza-Fonseca*, while agreeing with the court's conclusion that the language of the statute at hand was clear, Justice Scalia took the majority to task for its searching review of the act's legislative history to confirm its view, and he urged the Court to adopt textualism as its interpretive regimen.[62] In spite of Justice Scalia's objections, however, the Court has continued to look beyond the language of a statute under scrutiny on numerous occasions despite a determination of a statute's plain meaning.[63]

In a number of cases, Justice Scalia has urged the Court to adopt a textualist approach to statutory interpretation which, as noted, looks to statutory language and context for meaning. On the other hand, Justices Stephen Breyer and John Paul Stevens[64] have been the chief proponents of a purposive approach through which a court looks not only to statutory language but also to extrinsic resources, including legislative history, if doing so will aid in discerning legislative intent.[65] A visit to recent Court

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[60] 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 306 (Melville M. Bigelow ed., William S. Hein & Co. 5th ed. 1994) (1891) (footnote omitted).

[61] JOSEPH L. GERKEN, WHAT GOOD IS LEGISLATIVE HISTORY? JUSTICE SCALIA IN THE FEDERAL COURTS OF APPEALS 105 (2007).

[62] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in judgment) ("Although it is true that the Court in recent times has expressed approval of [questioning the legislature's choice of language], that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.").

[63] *See, e.g.*, Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 482–83 (1992) (looking beyond the language of a statute to interpret that statute); Union Bank v. Wolas, 502 U.S. 151, 159 (1991) (rejecting an argument that the Court should construe a statute in the limited way that Congress intended when it enacted the exception); Bus. Guides, Inc. v. Chromatic Commc'ns Enters., 498 U.S. 533, 540–41 (1991) (stating that an inquiry into legislative intent is not complete if there may be some ambiguity).

[64] *See supra* note 5. In 2004, Justice Stevens, joined in concurrence by Justice Breyer, had this to say about the strict adherence to text:

> In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product. Common sense is often more reliable than rote repetition of canons of statutory construction.

Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65–66 (2004) (Stevens, J., concurring).

[65] As further noted *infra* Part III, underlying these different approaches are significantly different views of the role of the court and Congress in lawmaking. Justice Scalia and Justice Breyer have

opinions finds Justice Stevens referring to textualism as "Justice Scalia's cocktail-party textualism,"[66] while Justice Scalia, in turn, assailed Justice Stevens' purposive approach to interpreting the Controlled Substance Act, claiming that his "question-begging conclusion is obscured by a flurry of arguments that distort the statute and disregard settled principles of our interpretive jurisprudence."[67]

This brief overview of U.S. Supreme Court opinions demonstrates that there has been an ongoing dialogue on the Court regarding the proper methodology for interpreting statutes and, even among those Justices who claim adherence to the plain meaning rule, its manifestations have been various.[68] When purporting to adhere to the plain meaning rubric, the Court has often consulted external sources to confirm its understanding of the meaning of the text and, at times, when the Court has declined to look beyond a statute's language, it has done so for prudential reasons. Additionally, those Justices who have propounded a more purposive approach to interpretation have not found the need to renounce the plain meaning rule but, rather, have limited its usefulness by emphasizing that the plain language of a statute can become ambiguous in context. None of them has claimed that the plain meaning rule is a legally binding constraint. To the contrary, the Court has often repeated the notion that there can be no rule of law preventing the court from referring to external sources so long as the court remains true to its quest for legislative intent. In sum, the U.S. Supreme Court has never viewed the plain meaning rule as legally binding, and the many manifestations of the rule discussed in decisional law reflect that the Court has never perceived it as a one-size-fits-all rule.

IV. STATUTORY INTERPRETATION IN CONNECTICUT BEFORE *COURCHESNE*

Until *Courchesne*, the Connecticut Supreme Court had not expressly adopted or rejected any particular analytical pathway to statutory

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outlined their respective approaches to constitutional and statutory interpretation in separate texts. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) (advocating for a plain meaning interpretation of the Constitution and statutes); *see also* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5–6, 8 (2005) (discussing his belief that courts should interpret the Constitution with an emphasis on the democratic nature of government).

[66] Johnson v. United States, 529 U.S. 694, 706–07 n.9 (2000).

[67] Gonzales v. Oregon, 126 S. Ct. 904, 926 (2006) (Scalia, J., dissenting).

[68] Bradford C. Mank appears to attribute the Court's oscillation between theories of interpretation to changes in the composition of the court. *See* Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies,* 86 KY. L.J. 527, 531–34 (1998) (noting the differing views of the court from the nineteenth century to the current court). Adrian Vermeule argues that changes in interpretative philosophies are the result of the dynamics between the courts and the legislature. *See* Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV 149, 150–53 (2001) (discussing the impact of legislators and judges on the cycling mechanisms of interpretive theory).

interpretation. Rather, a brief survey of its decisions suggests that the court's approach has been varied and rarely dogmatic.

In 1899, in *Brown's Appeal,* the court took an approach that we have now come to regard as purposive. The court opined: "The letter of a statute cannot prevail against the plainly indicated intent of the legislature," even though finding in that instance that the letter of the statute and the intention of the legislature were in harmony.[69]

In a decision apparently balancing the values of plain meaning and intent, the court, in *D'Amato's Appeal*, found that strict adherence to the language of the statute under scrutiny was justified not only by the application of the rule but by reference to the evident purpose of the act.[70]

A few years later, in *Hazzard v. Gallucci*, while the court incorporated some plain meaning language in its opinion, it suggested that strict adherence to the plain meaning of a statute should be subordinate to the court's overarching need to discern legislative intent:

> The fundamental rule for the construction of statutes is to ascertain the intent of the Legislature. This intention must be ascertained from this act itself, if the language is plain. But, when the language used is doubtful in meaning, the true meaning may be ascertained by considering it in the light of all its provisions, the object to be accomplished by its passage, its title, pre-existing legislation upon the same subject, and other relevant circumstances.
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> A statute is to be construed so as to carry out the intent of the Legislature, though such construction may seem contrary to the letter of the statute.[71]

This unanimous opinion of the *Hazzard* court reflects a pragmatic view of interpretation, one by which the court first examines the language of the statute, but also evinces a willingness to review the policy of the legislation to insure that strict adherence to the language of the act would not defeat its evident purpose. It is noteworthy in the context of this Article that the *Hazzard* court did not feel compelled to reject the plain meaning rule; it simply expressed a view of interpretation it believed was more likely to achieve its objective of applying the legislation in the manner the legislature intended.

Similarly, in *City of Stamford v. Town of Stamford*, the Connecticut Supreme Court espoused the plain meaning rule but noted, nevertheless, that application of even the plain language of a statute could not prevail

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[69] Brown's Appeal, 44 A. 22, 22 (Conn. 1899).
[70] D'Amato's Appeal, 68 A. 445, 447 (Conn. 1907).
[71] Hazzard v. Gallucci, 93 A. 230, 231 (Conn. 1915) (quotation omitted).

over plainly indicated and definitely ascertained legislative intent.[72] Citing the earlier *Brown's Appeal*, the court commented:

> A statute is to be so construed as to carry out the intent of the Legislature, this [is] to be ascertained from the act itself, if the language is plain, otherwise by considering it in the light of all its provisions, the object sought to be accomplished, pre-existing legislation upon the same subject, and other relevant circumstances. If this intent is plainly indicated and definitely ascertained, the letter of the statute may not prevail against it.[73]

A few years later, in 1922, the court in *Chambers v. Lowe* took a purposeful analytical approach. The court opined: "In determining the legislative intent we must look beyond the literal meaning of the words to the history of the law, its language considered in all its parts, the mischief it was designed to remedy, and the policy underlying it."[74]

Although there are other cases in the mid-twentieth century in which the Connecticut Supreme Court echoed the view that readily ascertained intent could trump plain language, during this same time period the court also expressed a more restrictive version of the plain meaning rule. For example, in *Stone v. Rosenfield*, the court declined to depart from the plain meaning of the mechanics lien statute to extend its reach beyond the statutory words, despite the appeal of its application in the particular circumstances.[75] In that case, the court acknowledged that it should construe the statute at hand in some way to provide value to the lien it provided for. Nevertheless, the court concluded: "We cannot, however, depart from the plain meaning of the words of the statute."[76]

Similarly, in *Niedzwicki v. Pequonnock Foundry*, the court stated:

> [W]here the plain meaning of a word is not contradicted by other provisions in the same instrument, that meaning is not to be disregarded because we believe the framers of the instrument could not have intended what they said. We are bound by the legislative fiat as expressed in the statute.[77]

The court has, however, frequently evinced a willingness to consult legislative history either to confirm the plain meaning of statutory language or to discover whether the language of a statute is at variance with its

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[72] City of Stamford v. Town of Stamford, 141 A. 891, 894–95 (Conn. 1928).
[73] *Id.* at 894 (citation omitted).
[74] Chambers v. Lowe, 169 A. 912, 913 (Conn. 1933).
[75] *See* Stone v. Rosenfield, 104 A.2d 545, 547 (Conn. 1954).
[76] *Id.*
[77] Niedzwicki v. Pequonnock Foundry, 48 A.2d 369, 371 (Conn. 1946) (citation omitted).

intent.[78] And, even while espousing adherence to a plain meaning rubric, the court has reflected a willingness to consult legislative history where the application of a statute's seemingly plain and unambiguous language to a particular factual circumstance reveals a latent ambiguity.[79]

Finally, the Connecticut Supreme Court's history reflects an unwillingness to consult legislative history in certain circumstances but not a rule-bound preclusion from doing so. This view was expressed, for example, in *Anderson v. Ludgin*, and cases cited therein, in which the court commented: "If the language of the statute is clear, it is assumed that the words themselves express the intent of the legislature and thus there is no need to construe the statute."[80]

This brief sampling of Connecticut cases reveals that, mainly, the court has dealt with statutory interpretation cases in a pragmatic, non-ideologically driven manner. From time to time the court has expressly adhered to the plain meaning rule, but, when it has done so, the contours of the rule have varied. Additionally, when the court has taken a purposive approach to statutory interpretation without regard to plain meaning, one cannot reasonably conclude that such cases represent a departure from adherence to the rule because there is no indication that the language under scrutiny was either clear or unambiguous in those instances. It simply may not have been in play.

The varying results from the U.S. Supreme Court and the Connecticut Supreme Court could be seen as anomalous if the plain meaning rule is, indeed, a rule of law and not merely a guide to interpretation.[81] As we have seen, however, the Supreme Court has often repeated with approval the notion that the rule is no more than an axiom of understanding. This view is generally consistent with the role of canons of interpretation as

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[78] *See* Krafick v. Krafick, 663 A.2d 365, 371 (Conn. 1995) ("Nothing in the legislative history . . . indicates an intent to narrow the plain meaning of the term 'property . . . .'" (citation omitted)); Town of North Haven v. Planning & Zoning Comm'n, 600 A.2d 1004, 1007–08 (Conn. 1991) (bolstering the court's conclusion in light of the plain meaning of the statute by examining the legislative history); Univ. of Conn. v. FOIC, 585 A.2d 690, 693 (Conn. 1991) (noting that a review of legislative history suggests no reason to depart from plain meaning of the statute); Kneeland v. Adm'r, 88 A.2d 376, 378–79 (Conn. 1952) (reviewing legislative history to determine whether there was any legislative intent to limit or modify the statute's language from its evident meaning, despite the plain meaning of the statute under scrutiny).

[79] *See* Conway v. Town of Wilton, 680 A.2d 242, 249 (Conn. 1996) (creating ambiguity by applying the statute to specific facts and also upon a review of the legislative history and the public policy of the statute under scrutiny); *Univ. of Conn.*, 585 A.2d at 693 (announcing that the court may turn to the legislative history to resolve a latent ambiguity discovered upon attempting to apply apparently clear language of a statute to particular facts); State v. Champagne, 538 A.2d 193, 197 (Conn. 1988) (allowing a court to resolve a statute's latent ambiguity by reference to legislative history and the purpose of the statute at hand).

[80] Anderson v. Ludgin, 400 A.2d 712, 717 (Conn. 1978) (citations omitted).

[81] For purposes of this Article, there is little to be gained by arguing whether there is, in fact, only one true version of the rule, but that it has been unevenly applied or that the rule is simply a loosely based guide whose particular application depends on the circumstances at hand. As a judge, I would like to think it is the latter, for the former would imply a reckless inattention to a solitary rule.

tools in judicial decision making.

V. PLAIN MEANING AS A CANON

Canons of construction, including the plain meaning rule, have existed in one form or another as analytical tools for as long as there have been texts to interpret. Linguistic canons, including a formulation of the plain meaning rule, were used as early as 500 B.C. as aids to understanding the Hindu text, *Mimansa of Jaimini*, and later to interpret the Talmudic commentary on the Old Testament and in medieval Christian commentary.[82] Courts also used canons during America's formation to keep legislation within the bounds of common sense and reason.[83]

As interpretive guides, canons have been categorized into three types: (1) linguistic canons; (2) rules of deference, and; (3) substantive canons.[84] Linguistic canons generally deal with grammar, syntax and logical inference.[85] The plain meaning rule is an example of a linguistic canon.[86] While the plain meaning rule is one of several linguistic canons, or canons of construction, it occupies a place of primacy among all canons because its application where statutory language is clear and unambiguous generally makes resorting to other canons of construction inappropriate.[87] For plain meaning adherents, therefore, application of the rule suggests that there is no need for interpretation if the statutory language at hand is clear.[88]

Even though the plain meaning rule, and the canons of construction more generally, have a substantial pedigree, their value as useful tools of interpretation has received substantial criticism. In a now famous essay on canons, Karl Llewellyn questioned their value as interpretative aides by

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[82] *E.g.,* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183 (1990).

[83] Alexander Hamilton viewed canons as judge-made rules of common sense and reason available to be used by judges to mitigate legislative excesses. *See* John Choon Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L. J. 1607, 1612 (1992) (discussing Hamilton's view of canons as a judicial check on congressional power). It should be noted, however, that Hamilton spoke during a period in which many judges still viewed themselves as guardians of the equity of the law, a view not universally held today.

[84] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 276 (1994).

[85] *Id.*

[86] *Id.* at 323.

[87] Conn. Nat'l Bank v. Germain, 503 U.S. 247, 253–54 (1992) (internal citations omitted) ("[I]n interpreting a statute a court should always turn to one, cardinal canon before all others . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.").

[88] Michael Sinclair, *"Only A Sith Thinks Like That:" Llewellyn's "Dueling Canons," Eight to Twelve,* 51 N.Y.L. SCH. L. REV. 1002, 1004, 1007 (2006–2007) [hereinafter Sinclair, *Eight to Twelve*] (observing that the plain meaning rule is "not so much a canon of construction as a condition on construction").

attempting to demonstrate that for every canon there is a counter canon.[89] Llewellyn criticized the notion of legal formalism as over-reliant on canons, and instead of using canons as prescriptive guides, he urged the bench to use "situation sense," or judgment that comes from legal and life experiences.[90]

William Eskridge has characterized the canons of interpretation as "a homely collection of rules, principles and presumptions[,] . . . a collective security blanket for lawyers and judges because they combine predictability and legitimacy in statutory interpretation."[91] In this comment, it appears that Eskridge offers both positive and negative criticism of canons. To be sure, the canons are a collection of judicially-fashioned rules, principles, and presumptions intended to guide judicial decision making. Proponents of canons argue that to the extent canons enhance predictability and give notice, they advance the rule of law, thus serving a more useful function than simply providing cover and legitimacy to judicial decision making.[92] These advocates argue that if judges

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[89] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395, 401–06 (1949–1950). While this article is credited with casting substantial doubt on the utility of canons, it has also received negative criticism. In a series of articles, Michael Sinclair set out to demonstrate that Llewellyn's "dueling pairs" of canons were not, in fact, contradictions of each other, but rather refinements and exceptions built into the rules. Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y.L. SCH. L. REV. 919, 991–92 (2005–2006) [hereinafter Sinclair, *One to Seven*]; Sinclair, *Eight to Twelve*, *supra* note 88, at 1007. Thus, for example, Sinclair argues that Llewellyn's assessment of the plain meaning rule as contradictory is incorrect. While Llewellyn finds incompatibility in a rule that exhorts the reader not to look beyond the plain meaning of a statute unless literal interpretation would lead to an absurd or mischievous consequence or thwart manifest purpose, Sinclair concludes that the rule, read as a whole, simply gives primacy to clear text while allowing for resort to extrinsic sources in limited circumstances. *Id.* at 1018. Similarly, in his critique of Llewellyn's article, Justice Scalia argues that dueling canons are not, in fact, contradictory, but rather that the existence of exceptions to canons simply demonstrates that a canon's exhortations or prescriptions are not absolute. SCALIA, *supra* note 65, at 27.

[90] *See* Llewellyn, *supra* note 89, at 401 ("[T]o make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and the *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language*.").

[91] ESKRIDGE, JR., *supra* note 84, at 275; *see also* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Natural Reasoning*, 58 VAND. L. REV. 1, 7, 10 (2005) (noting that canons "encompass a set of background norms and conventions" and serve the "dual role of making interpretation more predictable," thereby encouraging congress to draft laws in a more consistent and precise manner); Michael Sinclair, *The Proper Treatment of "Interpretative Choice" in Statutory Decision-Making*, 45 N.Y.L. SCH. L. REV. 389, 453 (2002) (arguing that though courts should be more selective in employing canons on a statute-specific basis, a canon's primary function is to provide consistency and continuity and as a result of their use, congress may employ language more carefully in anticipation of how judges are likely to interpret a statute).

[92] As noted by Judge Posner:

> [C]anons do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained. A standard defense of judicial activism, in the words of a defender, is that it is, in most instances, not activism at all. Courts do not relish making such hard decisions and certainly do not encourage litigation on social or political problems. But . . . the federal judiciary . . . has the paramount and the continuing duty to uphold the law. By making statutory

consistently utilize certain canons in the task of statutory interpretation, that fact will, over time, become known to legislative bodies and provide an understanding to legislatures of the manner in which their enactments are going to be read.[93] For example, the canon that maintains that penal statutes are to be construed narrowly and remedial statutes broadly serves this purpose. Some argue that the consistent use of canons by judicial decision makers also enhances effective governance by limiting judicial discretion and, thereby, enhancing legislative accountability.[94]

On the other hand, critics of canons have argued that canons are of little use because a judge can always find a canon to support a particular outcome, and that reliance on them is a poor substitute for the sound reasoning required for actual judging.[95] But if the canons of construction are no more than norms or conventions, as one scholar observed,[96] or simply "wise saws backed by experience and intuition"[97] and not rules of law, how do they accomplish their purpose of providing notice and continuity? In other words, if a canon is not a rule of law, the question arises whether an appellate court's use or rejection of a canon has any precedential value either on the court or in relation to lower courts.

As a general proposition, the policy of *stare decisis* binds the deciding court and all lower courts in the same system to the court's holding in a statutory construction case. In most cases of statutory interpretation,

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> interpretation seem mechanical rather than creative, the canons conceal, often from the reader of the judicial opinion and sometimes from the writer, the extent to which the judge is making new law in the guise of interpreting a statute or a constitutional provision.

Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom,* 50 U. CHI. L. REV. 800, 816–17 (1983) (internal quotations and footnotes omitted).

[93] Adrian Vermeule refers to canons as "prepackaged default rules" and argues that the principal value of canons to the legislature is their predictability. Adrian Vermeule, *Interpretative Choice,* 75 N.Y.U. L. REV. 74, 140–41 (2000). For Vermeule, it is more important that courts adopt and consistently apply a known set of canons than that the canons actually be correct. *Id.*

[94] CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 154 (1990).

[95] In a dissenting opinion in *Young v. Community Nutrition Institute*, Justice Stevens castigated the majority's use of a canon of interpretation giving deference to the administrative interpretation of a statute where he believed the language of the statute was abundantly clear. Young v. Cmty. Nutrition Inst., 476 U.S. 974, 985–88 (1986) (Stevens, J., dissenting). He noted, "The Court, correctly self-conscious of the limits of the judicial role, employs a reasoning so formulaic that it trivializes the art of judging." *Id.* at 988. Justice Stevens cited with approval Justice Frankfurter's view that statutory interpretation is not "a ritual to be observed by unimaginative adherence to well-worn professional phrases . . . . Nor can canons of construction save us from the anguish of judgment." *Id*. at 988 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947)); *see also* Arthur W. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1317 (1975) (arguing that the plain meaning rule had outlived its usefulness not only because of its inconsistent application but because the use or rejection of the rule does not answer the deeper question of the court's role in the legislative process; such questions cannot be answered by the simple-minded formulae often advanced, including the plain meaning rule).

[96] Brudney & Ditslear, *supra* note 91, at 7.

[97] Sinclair, *One to Seven*, *supra* note 89, at 921.

however, the analytical route taken by the court is at most dicta and not part of its holding.[98] Presumably, the U.S. Supreme Court or a state's highest court could embed a canon of construction into its procedure pursuant to its supervisory authority.[99] But, more likely, lower courts follow the lead of a system's highest court in this regard as a matter of deference.[100]

As to the U.S. Supreme Court, history makes it clear that the Court's use or rejection of a canon is not a matter of *stare decisis*. If it were, the Court's ongoing debate regarding statutory interpretation would be marked by claims that the last utterance on the subject is binding on the Court. But, to the contrary, the claim of *stare decisis* as to adherence to a statute's plain meaning has not been made in any of the Court's statutory interpretation cases.

As noted in the review of U.S. Supreme Court opinions, the debate regarding the utility of the plain meaning rule has largely been superseded by the ongoing debate between textualists and purposivists concerning their competing approaches to statutory interpretation.[101] Advocates of both approaches claim that their quest is to determine legislative intent in enacting the statute at hand.[102]

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[98] "Even the English courts, which hold to a doctrine of *stare decisis* more rigid than our own, hold that obiter dicta are in no wise controlling. Surely the rule of *stare decisis* should not preclude consideration of whether such dicta were originally supported by logic and have withstood the test of time." Gillespie v. U.S. Steel Corp., 379 U.S. 148, 162 (1964) (Goldberg, J., dissenting).

[99] The U.S. Supreme Court has stated: "This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." Intel Corp. v. Advanced Micro Devices, Inc. 542 U.S. 241, 272–73 (2004) (quoting Dickerson v. United States, 530 U.S. 428, 437 (2000)). As the U.S. Supreme Court occupies a supervisory position vis-à-vis lower federal courts, so too must a state's highest court in regard to the state's lower courts. *See* State v. DeJesus, 288 Conn. 418, 457–60 (2008) (describing how state high courts review and correct the legal errors of the lower courts, which have "general jurisdiction with ultimate authority over the trial of causes").

[100] One scholar has observed that if a higher court's use of a particular interpretive methodology does not have the force of *stare decisis*, the higher court's view of the correct analytical path to statutory interpretation does have powerful socio-psychological impact. Sinclair, *supra* note 91, at 404 & n.68.

[101] Justice Jackson first used the word textualism in his 1952 concurrence in which he favored a more flexible interpretive theory allowing "some latitude of interpretation for changing times" over the "rigidity dictated by a doctrinaire textualism." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) [hereinafter *Steel Seizure*].

[102] See Mank, *supra* note 68, at 528, for a discussion of the parameters of the competing theories of statutory interpretation. Mank asserts that textualism is an outgrowth of the plain meaning jurisprudence and that its more recent formulation, new textualism, permits resort beyond the text of a statute to the statutory scheme in order to glean legislative intent. *Id.* at 534. In his treatise on statutory interpretation, William Eskridge, Jr. makes the case for an intentionalist approach to interpretation. He argues that this approach permits the court to update statutes to make them germane to situations not within the contemplation of original drafters but within the spirit of the law. ESKRIDGE, JR., *supra* note 84, at 276; *see also* Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J. L. & PUB. POL'Y 401, 410 (1994) (discussing new textualism's willingness to look at the broader statutory context of an enactment to determine a statute's meaning and contrasting this approach, espoused by Justice Scalia, with the older more rigid form of textualism that was more akin to the plain meaning rule).

As Judge John Walker has indicated, these varying schools of interpretative theory reflect not merely differences among jurists on how to read statutes, but also one's concept of the law and view of a judge's role in the interpretative process.[103] Thus, in any case in which there are competing opinions, the statutory interpretation dispute may reveal a chasm between judges about their respective roles or lack of roles in the lawmaking process.

While the rule that the meaning of a statute should be gleaned from its clear language may be rooted in linguistics, its current rationale as incorporated in a textualist approach includes the notion that judges should not seek to take part in the legislative process. According to this theory, a judge who forsakes the clear language of a statute in order to carry out its intent as revealed by its legislative history is acting in a constitutionally impermissible manner because, by acting in such a way, the judge is participating in the law making process. For a textualist, therefore, a judge's role in statutory interpretation is to determine what the legislature said, not what it intended to say by the words it used, because judges have no role in the legislative process except to state the law. Additionally, textualism rests on the idea that once a bill is enacted, it has its own autonomous existence apart from the negotiations that led up to it and, therefore, resorting to legislative history to understand the meaning of even an unclear statute is inappropriate.

On the other hand, judges and theorists who adhere to a purposive approach believe that language is inherently indeterminate and therefore, they argue that consulting extrinsic sources in order to further understand the import of even clear language is always appropriate.[104] A useful exposition of this view can be found in Judge Posner's comment that,

> [J]udges realize in their heart of hearts that the superficial clarity to which they are referring when they call the meaning of a statute 'plain' is treacherous footing for interpretation. They know that statutes are purposive utterances and that language is a slippery medium in which to encode a purpose. They know that legislatures, including the Congress of the United States, often legislate in haste, without considering fully the potential application of their words to novel

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[103] *See* John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge,* 58 N.Y.U. ANN. SURV. AM. L. 203, 205–06 (2001) (discussing two competing conceptions of statutory law). Judge Walker notes that one view holds that the law is complete once legislation is enacted. Another holds that the command of the law is not fully determined until applied in the process of adjudication. *Id.* Under the second view, Judge Walker notes, a statute should be read so as to give effect to its purpose in an interpretative process in which the court undertakes the role of a law giver or creator rather than a law communicator. *Id.* at 206.

[104] For a useful discussion of the competing approaches, see John F. Manning, *Competing Presumptions about Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2009–12 (2006).

settings.[105]

In assessing the state of the debate between the textualist and purposive interpretative theories, some commentators have observed that one thrust of textualism is to limit the reach of legislation by narrowly confining statutory terms, while a purposive approach tends to broaden legislation because the willingness to consider unexpressed legislative intent has an expanding effect.[106]

Despite sometimes fierce debate between these two theories, some commentators argue that there is a narrowing of these approaches. This narrowing, they contend, has occurred because the form of textualism espoused by Justice Scalia—known as new textualism—allows resort to the broader statutory context as an aid to interpretation and adherents of a purposive approach acknowledge the primacy of statutory language.[107] Researchers have found, by reviewing decisions, that there is no statistically demonstrated difference in outcomes between cases decided using textualist theory and those involving purposive reasoning.[108]

No matter the views of commentators, the dialogue continues to percolate in U.S. Supreme Court statutory interpretation jurisprudence. As can be seen from the actual decisions of the Court, the doctrinal debate continues. On the state level, however, legislatures have joined the fray in an assertion of legislative primacy. Connecticut is the most recent example of this development.

VI. CONNECTICUT'S LEGISLATIVE RESPONSE TO *COURCHESNE* AND OTHER STATES' ADOPTION OF PLAIN MEANING STATUTES

The Connecticut Supreme Court officially released its opinion in *Courchesne* on March 11, 2003. Shortly thereafter, the General Assembly attached an amendment regarding the plain meaning rule to an unrelated bill already pending before its judiciary committee.[109] The judiciary committee accepted the bill, as amended, on April 16, 2003, with

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[105] Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir.1989).

[106] *See* Mank, *supra* note 68, at 527–28 (arguing that conservative judges tend to employ a textualist analysis as a means to limit the reach of the legislative branch and thus minimize the role of government); *see also* GERKEN, *supra* note 61, at 105 (discussing the parameters and history of the dueling theories as applied in the United States Supreme Court).

[107] *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2–4, 36, 69 (2006) (arguing that doctrinal similarities exist but are rarely acknowledged). *But see* Manning, *supra* note 5, at 75 (disputing Molot's claim that more joins the doctrinal divide than separates them).

[108] Daniel Farber has suggested that, "[I]f every judge in the country took a sincere oath of allegiance to textualism and formalism—or to dynamic interpretation and pragmatism—it seems quite possible that little or no detectable effect would exist on the outcomes of statutory cases." Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1432 (1999–2000).

[109] *Proposed H.B. 5033 Before the Conn. S. Judiciary Comm.*, 2003 Sess. (2003), http://www.cga.ct.gov/2003/juddata/chr/2003JUD00331-R001300-CHR.htm; *Conn. S. Judiciary Comm. Bill 5033,* 2003 Sess. (2003), http://www.cga.ct.gov/2003/tob/h/2003HB-05033-R01-HB.htm.

unanimous support. A search of the brief legislative history of the bill confirms its genesis.[110]

During the public hearing on the bill, judiciary committee co-chair, State Senator Andrew McDonald, a principal supporter of the bill, responded to testimony opposed to the bill:

> As a general proposition, I think I would agree with you that it's important for the Legislature to step back and allow the judiciary to undertake its review and construction of statutes in accordance with normally accepted principles of statutory construction.
>
> I do have to say, though, that the *Courchesne* decision seemed to me to be such a remarkable departure from normally accepted rules of statutory construction as to say that what the Legislature does or does not put into its statutes ultimately will not control the court's determination of the import of those statutes.
>
> And it was a fairly broad proposition, as I have read this lengthy decision . . . . It's a pretty astonishing proposition that the plain language of a statute is not necessarily determinative of what the statute is intended to accomplish.[111]

Additionally, when the bill was taken up by the State Senate, Senator McDonald stated the following in favor of its passage:

> [T]his bill comes to us in the wake of a Supreme Court decision recently issued by the Connecticut Supreme Court in *State v. Courchesne* which raised an interesting issue and one that the Judiciary Committee thought was important for the Legislature to debate and vote upon.
>
> Historically, the courts of the State of Connecticut have interpreted our statutes under several rules of statutory construction. But one of the prime rules that has always guided court interpretation of statutes is something called the plain meaning rule.[112]
>
> And without going into great detail about the plain meaning rule, it essentially says that if a statute is on its face, clear and unambiguous, and interpreting it in light of that clear and unambiguous language would not yield absurd or

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[110] H.B. 5033, 2003 Sess. (Conn. 2003).

[111] *Hearing on H.B. 5033 Before the Conn. S. Judiciary Comm.*, 2003 Sess. (Mar. 31, 2003) (statement of Sen. Andrew McDonald).

[112] It is noteworthy that *Courchesne* was the first case in Connecticut to use the phrase "plain meaning rule." State v. Courchesne, 816 A.2d 562, 580 (Conn. 2003).

> unworkable results, the courts are not permitted to look beyond the language in the statute itself for purposes of determining what our legislative intent was in adopting that legislation.[113]

In closing, Senator McDonald made explicit his intentions in proposing the bill:

> And so, in case this bill does actually pass in accordance with the House's passage let me be very clear for the purpose of legislative intent, that if this bill passes it is the intent to overrule the portion of *State v. Courchesne* which recanted or retrenched from the plain meaning rule under the rules of statutory construction.[114]

The bill passed in the House by a vote of 144–0 and, on May 29, 2003, by a vote of 20–16, in the Senate.[115] General Statutes § 1-2z, titled "Plain Meaning Rule," states:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra-textual evidence of the meaning of the statute shall not be considered.[116]

A fair reading of this legislative history reveals that the judiciary committee believed *Courchesne* represented a radical departure from normative statutory interpretation and that the court's rejection of the plain meaning rule reflected judicial disrespect for legislative primacy in law making.[117] As a consequence of the Connecticut Supreme Court's

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[113] *Hearing on H.B. 5033 Before the Conn. S. Judiciary Comm.*, 2003 Sess. (May 29, 2003) (statement of Sen. Andrew McDonald).

[114] *Id.*

[115] H.B.-5033, 2003 Sess. (Conn. 2003), House Vote Tally, http://www.cga.ct.gov/2003/vote/h/2003HV-00159-R00HB05033-HV.htm; H.B.-5033, 2003 Sess. (Conn. 2003), Senate Vote Tally, http://www.cga.ct.gov/2003/vote/s/2003SV-00386-R00HB05033-SV.htm. Even though it is plain from this legislative history that the purpose of the General Assembly in enacting a plain meaning statute was to overrule *Courchesne*, it is noteworthy that nowhere in the discussion is there any indication of displeasure with the substantive holding of *Courchesne*. In short, the General Assembly reacted to the perceived assault on its legislative primacy by the Court in *Courchesne,* but not to the decision itself. *Hearing on H.B. 5033, supra* note 111.

[116] CONN. GEN. STAT. § 1-2z (2007).

[117] This is especially evident in Senator McDonald's declaration, in reference to the General Assembly, that, "We are the law. We have the right in our collective will to establish what the law of the state of Connecticut is. And we have the opportunity in this Chamber to pass legislation dictating

rejection of any version of the plain meaning rule, the General Assembly enacted legislation limiting, as a matter of law, the analytical tools available to judges in the interpretation of statutes. In doing so, even though it was the legislature's evident intent merely to overrule *Courchesne*, the General Assembly adopted a rigid one–size–fits–all formulation of the rule not historically applied in either Connecticut or U.S. Supreme Court decisional law.[118]

As noted, in the aftermath of *Courchesne*, Connecticut became the eighth state to legislate a version of the plain meaning rule. In this regard, this Article distinguishes plain meaning statutes from plain language statutes on the basis that the latter generally contain benign statements that words and phrases are to be construed according to common usage. Such language statutes are numerous.[119]

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how the courts shall operate." *Hearing on H.B. 5033 Before the Conn. S. Judiciary Comm.*, 2003 Sess. (2003) (statement of Sen. Andrew McDonald), http://www.cga.ct.gov/2003/juddata/chr/2003JUD 00331-R001300-CHR.htm.

[118] Further indication that the General Assembly's swift response to *Courchesne* had more to do with the legislative body's relationship to the judiciary than the analytical path taken by the court in *Courchesne* can be found in a legislative report made available to the General Assembly. CHRISTOPHER REINHART, OFFICE OF LEGISLATIVE RESEARCH, STATUTORY INTERPRETATION AND *STATE V. COURCHESNE* (May 6, 2003), http://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-R-0424.htm. This report demonstrates that in several post-*Courchesne* opinions, while the same justices who authored the majority and dissent in *Courchesne* continued their disagreement regarding the efficacy of the plain meaning rule, their disagreements arose in the context of concurring and not dissenting opinions. In other words, the question of which analytical approach to take had no impact on the actual decisions of the court. These results can be seen as an indication that one's ideological preference regarding statutory interpretation may often bear no relationship to decisional outcomes.

[119] *See, e.g.*, CONN. GEN. STAT. § 1-1 (2007) ("Words and phrases shall be construed according to the commonly approved usage of the language."); N.D. CENT. CODE § 1-02-02 (2008) ("Words used in any statute are to be understood in the ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained."); OKLA. STAT. tit. 25 § 25-1 (2008) ("Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained."); *see also* COLO. REV. STAT. § 2-4-101 (2008) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."); KY. REV. STAT. § 446.080(4) (2008) ("All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning."); N.H. REV. STAT. § 21:2 (2008) ("Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."); N.M. STAT. § 12-2A-2 (2008) ("Unless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage. A word or phrase that has acquired a technical or particular meaning in a particular context has that meaning if it is used in that context."); OHIO REV. CODE ANN. § 1.42 (West 2008) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."); TEX. GOV'T CODE ANN. § 311.011(a)–(b) (Vernon 2008) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.").

But while plain language statutes express legislative intent that words be given their ordinary meaning, plain meaning statutes purport to tell courts how to engage in the process of statutory interpretation. As noted *infra*, in addition to Connecticut, the legislatures of eight other states—Delaware, Louisiana, Minnesota, Montana, New Mexico, North Dakota, Oregon, and Pennsylvania—have passed statutes directing the courts of those states to limit their statutory analysis to the text of a statute when the text is unambiguous.

Delaware's legislature passed a plain meaning statute under circumstances similar to Connecticut. As a reaction to the Delaware Supreme Court's statutory analysis in *Evans v. State*,[120] that state's legislature adopted the following statute:

> (a) Delaware judicial officers may not create or amend statutes, nor second-guess the soundness of public policy or wisdom of the General Assembly in passing statutes, nor may they interpret or construe statutes and other Delaware law when the text is clear and unambiguous.
>
> (b) Notwithstanding § 203 of Title 11, Delaware judicial officers shall strictly interpret or construe legislative intent.
>
> (c) Delaware judicial officers shall use the utmost restraint when interpreting or construing the laws of this State.[121]

The language of the act evinces the Delaware legislature's disapproval of its Supreme Court's decision in *Evans v. State* because the legislature perceived that the court's statutory analysis deviated from the clear text and the legislative intent of the statute at issue.[122]

New Mexico's plain meaning statute contains the heading "Primacy of Text" and provides: "The text of a statute or rule is the primary, essential source of its meaning."[123] North Dakota's statute provides: "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."[124] Similarly,

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[120] Evans v. State, 872 A.2d 539, 552–53 (Del. 2005).

[121] DEL. CODE ANN. tit. 10 § 5403 (2005), *invalidated by* Evans v. State, 872 A.2d 539, 550 (Del. 2005).

[122] H.B. 31, 143d Gen. Assem., Reg. Sess. (Del. 2005).

[123] N.M. STAT. ANN. § 12-2A-19 (West 2008).

[124] N.D. CENT. CODE § 1-02-05 (2008). In addition to its plain meaning statute, North Dakota also has a statute outlining the sources a court may consult in construing an ambiguous statute. N.D. CENT. CODE. § 1-02-39 (1967).

Louisiana's legislature directed the courts as follows: "When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursing its spirit."[125] Minnesota's plain meaning statute provides in relevant part:

> The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.
>
> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.[126]

Finally, Pennsylvania's statute is almost identical to Minnesota's providing:

> (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
>
> (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.[127]

Both the legislatures of Montana and Oregon have adopted statutes circumscribing a judge's role when interpreting statutes and explicitly preventing the judge from inserting additional substance. These states have adopted this identical language regarding the construction of a statute:

> [T]he office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.[128]

All of these state plain meaning statutes are prescriptive and

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[125] LA. REV. STAT. ANN § 1:4 (2008).
[126] MINN. STAT. § 645.16 (2003).
[127] 1 PA. CONS. STAT. § 1921 (2008).
[128] MONT. CODE ANN. § 1-2-101 (2008); OR. REV. STAT. § 174.010 (2008).

proscriptive. They direct and limit a traditional judicial function in a manner that suggests a mistrust of the judiciary. Moreover, they represent an assertion of legislative primacy in the function of statutory interpretation.

VII. CONCLUSION

As a canon of construction, the plain meaning rule has taken a strange journey. First used as an approach to understanding legislative intent, its focus on text has now become the core of a theory of construction that has acquired significance beyond the process of interpretation, one that concerns, more broadly, the role of a judge in a statutory era. Furthermore, as the plain meaning rule concerns the interpretation of statutes, it, like other canons that guide statutory interpretation, has increasingly attracted the political attention of state legislatures.

In the early years of the Democracy, the Marshall Court's orientation toward statutory law was as a faithful agent whose purpose was to effectuate Congressional intent. Application of the plain meaning rule, as a canon of construction, was one vehicle utilized by the court for this purpose. This rule has been favored by those who believe that language is essentially determinate and that legislation is complete once enacted. It has been eschewed as wooden by those who view all language as indeterminate and who believe in the notion that the enactment of a statute marks only the beginning of its life.[129] As noted, a review of the literature and decisional law reflects this ongoing debate.

Since the middle of the twentieth century, however, the discussion about the proper method of statutory interpretation has taken on a political dimension implicating the role of the judiciary in the legislative process. Now, although the debate may speak in terms of the most effective manner to implement legislative intent, the forces that drive the debate have as much to do with the different notions of the judicial role in legislation as with interpretative methodology.

Justice Scalia is perhaps the most visible proponent of a textual approach to interpretation, one which he believes most fits the judicial role in a constitutional democracy where judges have no business participating in the creation of policy and which is premised on the idea that once legislation is enacted, it is complete.[130]

Conversely, there are those who view statutory interpretation as dynamic and believe that the court has a partnership role in the legislative

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[129] Walker, Jr., *supra* note 103, at 205–06.

[130] *See* SCALIA, *supra* note 65, at 13 (arguing that it is wrong for a common law judge to ask, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?").

process.[131] Adherents of this view generally subscribe to the belief that the role of the court in statutory cases is to discern the purpose of a statute and to apply it to the situation at hand, even if there is no evidence that such an application was actually contemplated at the time of enactment. In this light, legislation is dynamic, not static. It continues its relevance well beyond the period of enactment because it is updated from time to time by judicial interpretation. For those who adhere to this belief, exclusive reliance on a statute's plain language is not an aid to discerning a statute's purpose.[132]

While scholars and jurists have debated their varying views on the proper mode of statutory interpretation and, by implication, their respective views of the relationship between the judicial and legislative bodies, state legislatures, beginning in the mid-twentieth century, have introduced a new dynamic into the discussion by enacting proscriptive and prescriptive plain meaning statutes. The imposition of legislative direction in the area of statutory interpretation could have significant ramifications for judicial decision making because the legislation passed to date reflects no sensitivity to differences among classes of statutes, and because state plain meaning statutes generally purport to limit the scope of a court's inquiry into legislative intent.

As to the first point, there will, of course, be no difficulty in the case of statutory language that is plain and unambiguous on its face and where no ambiguity, absurdity or lack of workability is revealed by application of the statute to the particular facts at hand. But statutes with clear messages are not often the focus of judicial decision making. The fertile area for interpretation involves cases in which the statutory language is either patently unclear or ambiguous, or where application of the statute to a particular set of facts reveals an ambiguity or impracticality in application. In either situation, neither the plain meaning canon nor a legislative iteration of it is likely to aid judicial reasoning.

Nevertheless, there will be situations in which a plain meaning statute that prohibits resort to extrinsic sources as an aid to interpretation may be

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[131] In a far-reaching article, Aharon Barak, the former President of the Supreme Court of Israel, espouses the idea that Supreme Court justices are not merely agents of the legislature but "junior partners" in the legislative process. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 34–35 (2002). Barak states that when engaged in the process of statutory interpretation, a judge has a far grander role than simply stating the law. He asks rhetorically:

> But within the range of possible linguistic meanings, and taking account—to different degrees—of the intentions of the authors of the constitution and statutes, why do we not recognize that when judges interpret the constitution and statutes—just as when they create the common law—they have a role to play in protecting democracy and in bridging the gap between society and law?

Id. at 48.

[132] *See, e.g.*, ESKRIDGE, JR., *supra* note 84, at 5–6 (noting that statutory interpretation need not adhere to that which the legislature endorsed).

problematic, depending on the nature of the statute.[133] In a helpful article on this subject, Peter Tiersma has suggested that the choice of interpretative tools employed by a court should depend on the nature of the statute under scrutiny and the audience to whom it is directed.[134] As Tiersma notes, statutes directed to the public in general should be clear and comprehensive.[135] It is relatively easy to see that when confronting a penal statute, it would be appropriate for a court to base its interpretation solely on the language of a statute without resort to extrinsic aids—such as legislative history—simply because of the due process considerations applicable to penal laws. Reciprocally, as argued by Tiersma, if the statute at hand relates principally to the work of an administrative agency, the fullest understanding of the latest iteration of a statute pertinent to the agency's work may be best understood in the context of the statute's entire legislative history.[136] While these examples may represent two opposite ends of a spectrum, Tiersma's central thesis is that no one path to statutory interpretation fits all statutes and courts should employ interpretative analyses appropriate to the statutory contexts they confront. Legislative proscriptions applicable to all statutes may operate to prevent a court from following Tiersma's sound advice.

Ultimately, the task of a court in statutory interpretation is to apply the law to the circumstances at hand. Whether the increasing involvement of legislatures in the arena of statutory interpretation will prove to have an impact on correct judicial decision making in statutory interpretation cases remains to be seen. It is plain, nevertheless, that the ancient art of statutory interpretation has become a topic of political discourse and, increasingly, the focus of legislative activity.

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[133] For example, if the form of the plain meaning rule adopted by the Connecticut General Assembly were applicable to the facts in *Church of Holy Trinity v. United States,* 143 U.S. 457 (1892), it is likely the outcome would be different. There, the U.S. Supreme Court was called upon to interpret a Congressional enactment that prohibited the importation and migration of foreigners and aliens under contract or agreement to perform "labor or service of any kind" in the United States. *Id.* at 458. Notwithstanding the broad language of the statute, the Court determined that the law did not prevent the Church from contracting with a British citizen to serve as its minister. In reaching this conclusion, the Court looked beyond the admittedly clear language of the statute. The Court found:

> We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.

Id. at 465. The Court concluded: "It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute." *Id.* at 472.

[134] Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy and Statutory Interpretation*, 76 TUL. L. REV. 431, 434 (2001); *see also* Robin Kundis Craig, *The Stevens/Scalia Principle and Why it Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 965–66, 998 (2005) (critiquing the one–size–fits–all approach to statutory interpretation).

[135] Tiersma, *supra* note 134, at 431.

[136] *Id.* at 434.

In Connecticut, although the legislature's stated goal was to overrule *Courchesne*, the enactment of the plain meaning statute did not restore the method of statutory interpretation to the *status quo* that existed prior to the release of that opinion. Instead, without regard to the ongoing debate between the schools of statutory interpretation, the legislature adopted a rigid formulation of the plain meaning rule akin to Justice Scalia's textualism. One can hardly ignore the irony that such a textual approach is most often associated with political conservatism because, it has been argued, a textual approach tends to limit the reach of legislation while a purposive approach yields a more expansive reach for legislation.[137] Therefore, it could be argued that the enactment of plain meaning statutes may be counterproductive for a legislative body desiring that its legislation be given the broadest possible effect.

The legislative renewal of the plain meaning rule, in any form, reveals an inter–branch tension that may have some effect on the ongoing debate about the role of judges in a statutory era.[138] However, in the process of adjudication, once a determination has been made that a statute is either unclear or ambiguous, or that its application would reap an unworkable result, a court will likely carry out its interpretative function guided by its own best adjudicative judgment, resorting or not to extrinsic sources, unaffected by the once moribund, but newly resuscitated, plain meaning rule.

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[137] GERKEN, *supra* note 61, at 313–15.

[138] [E]ven generalized restatements from time to time may not be wholly wasteful. Out of them may come a sharper rephrasing of the conscious factors of interpretation; new instances may make them more vivid, but also disclose more clearly their limitations. Thereby we may avoid rigidities which, while they afford more precise formulas, do so at the price of cramping the life of law. To strip the task of judicial reading of statutes of rules that partake the mysteries of a craft serves to reveal the true elements of our problem. It defines more accurately the nature of the intellectual responsibility of a judge and thereby subjects him to more relevant criteria of criticism. Rigorous analysis also sharpens the respective duties of legislature and courts in relation to the making of laws and to their enforcement.

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544–45 (1947).