

**PURPOSIVISM AND THE “REASONABLE LEGISLATOR”:  
A REVIEW ESSAY OF JUSTICE STEPHEN BREYER’S  
*ACTIVE LIBERTY***

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In this essay, I review the theory of statutory interpretation advanced in Justice Stephen Breyer’s *Active Liberty*.<sup>1</sup> The book received a good deal of press because the short work was interpreted as a liberal’s riposte to Justice Antonin Scalia’s *A Matter of Interpretation*.<sup>2</sup> Justice Breyer devotes a substantial majority of his treatise to constitutional interpretation. Other reviewers have focused principally upon that aspect of the book.<sup>3</sup> Yet I believe that

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1. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

2. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

3. See, e.g., Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675 (2006); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006); Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699 (2006); James E. Ryan, *Does It Take A Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623 (2006); Cass R. Sunstein, *Justice Breyer’s Democratic Pragmatism*, 115 YALE L.J. 1719 (2006); George F. Will, *Mr. Breyer’s Modesty*, NEWSWEEK, Sept. 26, 2005, at 72.

the ideas about how to interpret statutes that Justice Breyer discusses in *Active Liberty* are just as important as his thinking about the Federal Constitution. In this review essay, my goal is to show that Justice Breyer's theory of statutory interpretation routinely fails to achieve its objective: the identification of congressional intent. Along the way I outline my own theory of interpretation—a variation of textualism—to demonstrate that plausible and objective interpretations of legal text are possible without recourse to non-statutory materials.

## I. INTRODUCTION

### A. *A Quick Primer on Interpretation*

In recent years, the field of statutory interpretation has blossomed,<sup>4</sup> and there are almost as many theories about interpretation as there are professors to expound them. This review adds something new, but without changing the terms of the game. To understand exactly what Justice Breyer advocates in *Active Liberty*, this review essay uses the existing terms that govern scholarly debate about statutory interpretation.

Interpretive systems are commonly divided into the *purposivist*, *intentionalist*, and *textualist* camps.<sup>5</sup> These categories are not airtight, and there is considerable cross-over both in practice and on the theoretical level.<sup>6</sup> Generally speaking, a *purposivist* interprets

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4. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 241 (1992) (“[T]he past decade has probably been the most fruitful in history for legal academics in the field of legislation.”); see also Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9, app. at 23–29 (2000) (listing recent articles on statutory interpretation).

5. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990). My principal difference with Eskridge and Frickey is that intention and purpose, in this context, are essentially coterminous, and that “intentionalism” is a genus containing the species of textualism and purposivism, in contrast to Eskridge’s undoubtedly exotic and non-intentionalist “dynamic” hermeneutic. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 58–68 (1994).

6. Compare Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is An Impossibility*, 41 SAN DIEGO L. REV. 967, 972–82 (2004) (arguing that, because intention-free interpretation is a conceptual impossibility, even textualists must concede a role to legislative intent) with Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 82–83 (2000) (arguing that textualists and intentionalists are distinguishable based upon their differing interpretive goals). *But cf.* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91–92 (2006) (noting that important

statutory language in light of, and to effect, the statute's purpose, however that purpose is divined.<sup>7</sup> An *intentionalist* interprets legal text according to the intent of those who gave that text the force of law, relying upon a variety of statutory and non-statutory materials.<sup>8</sup> A *textualist* interprets statutes consistent with the common understanding of the words comprising the legal text at the time the text was enacted.<sup>9</sup>

*B. Categorizing Justice Breyer's Theory of Statutory Interpretation*

In *Active Liberty*, Justice Breyer contends that a judge should give effect to the will of the enacting legislature;<sup>10</sup> in appropriate circumstances, Justice Breyer would achieve that goal through purposivism. That mode of interpretation, as Justice Breyer understands it, requires the judge to give primacy in *doubtful* cases to the "purpose" of the statute, as that is ascertained through recourse to statutory text, legislative history materials, and non-statutory interpretive aids:

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differences between textualists and purposivists remain, notwithstanding recent scholarship to the contrary); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) (downplaying differences between textualists and purposivists); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 349–51 (2005) (noting that textualists and intentionalists differ in how they distinguish between "rules and standards," but not necessarily in their desire to vindicate legislative intent). A textualist is an intentionalist who seeks to effectuate a statute's "purpose" by adherence to its text. Purposivism, although conceivably intentionalist, breaks from textualism in that it attempts to induce from statutory and non-statutory sources the purpose animating a particular statute. It then interprets, through deductive reasoning, the terms of the statute through the lens of that purpose. Members of the intentionalist camp aim to effectuate the legislature's intent, but the textualist will normally end the search for intent with the text. In contrast, the purposivist may rely on extraneous aids to vindicate the legislature's authentic purpose, which at times may be inconsistent with the text. And yet textualists can be purposivists or intentionalists, differing from their colleagues only in that their search for purpose or intention is limited to the legal text.

7. See Eskridge & Frickey, *supra* note 5, at 332–39.

8. See *id.* at 325–32.

9. Professor Eskridge amusingly concludes that today "[w]e are all textualists." William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1090 (2001). Yet he also describes Justice Breyer as a "pragmatic textualist," which apparently means nothing more than a judge's gracious—but still pro forma—nod to the text before a non-textual interpretive jaunt. See *id.* at 1094–95.

10. See BREYER, *supra* note 1, at 101 ("[J]udicial use of the 'will of the reasonable legislator'—even if at times it is a fiction—helps statutes match their means to their overall public policy objectives, a match that helps translate the popular will into sound policy.").

At the heart of a purpose-based approach stands the “reasonable member of Congress”—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem. The judge will ask how this person (real or fictional), aware of the statute’s language, structure, and general objectives (actually or hypothetically), would have wanted a court to interpret the statute in light of present circumstances in the particular case.<sup>11</sup>

For the non-purposivist textualist, on the other hand, inquiries into what the legislature would have wanted from the court’s interpretation are unnecessary because of the nearly irrebuttable presumption that the plain meaning of the words used in the statute best captures the legislature’s intent.<sup>12</sup> To the extent that a statute’s plain meaning produces an “absurd”—as opposed to a merely undesirable—result, the non-purposivist is empowered to interpret in a manner seemingly inconsistent with the text. But these opportunities are much less frequent for the textualist than for the purposivist.

As mentioned above, purposivist judges interpret statutory language in light of the purposes of the statute. They vindicate those purposes through their interpretation. Although Justice Breyer is a purposivist, he also sings the praises of intentionalism.<sup>13</sup> Intentionalist judges interpret statutory language to give effect to the intentions of the enacting legislature. To the extent that two persons can agree that the best (and largely conclusive) evidence of a statute’s text is the plain and ordinary meaning of the words used, the distinction between textualists and intentionalists is minimal. Traditional intentionalists hold that legislators mean what they say and say what they mean by voting on particular language;<sup>14</sup> and that the legislature as a corporate body says what it means through the text of the statutes it enacts.<sup>15</sup> Justice Breyer apparently has no

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11. *Id.* at 88.

12. *See* Eskridge & Frickey, *supra* note 5, at 340.

[S]everal judges of the law and economics school have responded to the critique of purposivism by urging as a grand theory the return to some version of the old “plain meaning rule”: The beginning, and usually the end, of statutory interpretation should be the apparent meaning of the statutory language.

*Id.*

13. *See* BREYER, *supra* note 1, at 87–88.

14. *See* *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

15. In doing so, perhaps one can avoid Judge Easterbrook’s criticisms of the

quarrel with these principles.<sup>16</sup> Where he parts company with jurists such as Antonin Scalia is in those doubtful cases where textual meaning is not obvious.<sup>17</sup>

Justice Breyer espouses a “purposive” approach because, he argues, it is “more consistent with the framework for a ‘delegated democracy’ that the Constitution creates.”<sup>18</sup> He describes textualists as those jurists who have frequent recourse to the canons of statutory interpretation and who “prefer[] the language and structure of the law whenever possible over its legislative history and imputed values.”<sup>19</sup> Textualists are “to avoid invocation of vague or broad statutory purposes and instead . . . consider such purposes at ‘lower levels of generality.’”<sup>20</sup>

Opposed to the textualist is the purposivist, whose methods Justice Breyer describes in the following passage:

Other judges look primarily to the statute’s purposes for enlightenment. They avoid the use of interpretive canons. They allow context to determine the level of generality at which they will describe a statute’s purpose . . . . They

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“intent of the legislature.” See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”). See generally Kenneth Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992). Professor Shepsle contends that “[l]egislative intent is an internally inconsistent, self-contradictory expression . . . [that] has no meaning.” *Id.* at 239. In its place, he proposes:

only partially in jest . . . the establishment, along the lines of the Congressional Budget Office (CBO), of a legislative agency organized to transmit to the courts, either informally in consultant reports or formally in amicus briefs, a detailed procedural history of a statute. Unlike more conventional legislative histories, this report would highlight exercises of agenda power, procedural practices (like restrictive rules) that determine what is and is not brought to a vote, and expressions of individual legislative intent.

*Id.* at 254 n.27 (explaining what would be quite considerable legislative history).

16. “Most judges start in the same way. They look first to the statute’s language, its structure, and its history in an effort to determine the statute’s purpose. They then use that purpose . . . to determine the proper interpretation. Thus far, there is agreement [between purposivists and textualists].” BREYER, *supra* note 1, at 86.

17. *But see* Ryan, *supra* note 3, at 1656–57 (casting the “active liberty” criterion as “a form of originalism, albeit at a higher level of generality than the originalism espoused by Justice Scalia” and characterizing Breyer’s opinions in the Ten Commandments cases as being essentially originalist in tenor).

18. BREYER, *supra* note 1, at 85 (quoting Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 28–29 (2002)).

19. *Id.* at 87 (quoting Easterbrook, *supra* note 15, at 64).

20. *Id.*

speaking in terms of congressional “intent,” while understanding that legal conventions govern the use of that term to describe, not the intent of any, or every, individual legislator, but the intent of the group . . . . And they examine legislative history, often closely, in the hope that the history will help them better understand the context, the enacting legislators’ objectives, and ultimately the statute’s purposes. At the heart of a purpose-based approach stands the “reasonable member of Congress”—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem. The judge will ask how this person (real or fictional), aware of the statute’s language, structure, and general objectives (actually or hypothetically), *would have wanted* a court to interpret the statute in light of present circumstances in the particular case.<sup>21</sup>

Thus, for Justice Breyer, the “reasonable legislator” is at the heart of statutory interpretation.

Using the foregoing framework, we can now approach the analytic heart of this review essay, which aims (1) to demonstrate the unworkability of Justice Breyer’s “reasonable legislator” criterion,<sup>22</sup> and (2) to show (only slightly tongue-in-cheek) how a particular brand of textualism (felicitously termed Blackstone Variant Textualism (BVT)) produces the better result and more closely hews to the democratic foundation of our government.<sup>23</sup>

## II. THE CASES

In *Active Liberty*, Justice Breyer provides three cases that show, in his opinion, the superiority of the reasonable legislator criterion to the textualist method.<sup>24</sup> Each case is reviewed below to demonstrate how the non-purposivist method produces the better

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21. *Id.* at 87–88. *Cf.* SCALIA, *supra* note 2, at 18.

When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean . . . .

*Id.* For sharp criticism of a theory of interpretation that places results over process, see ROBERT H. BORK, *THE TEMPTING OF AMERICA* 261–65 (1990).

22. *See infra* Part II.

23. *See infra* Part III.

24. BREYER, *supra* note 1, at 88–101.

result,<sup>25</sup> and how a full-blown purposivist analysis does not reliably capture the enacting legislature's purpose.

A. *Dole Food Co. v. Patrickson*<sup>26</sup>

*Dole Food Co.* concerned the Foreign Sovereign Immunities Act (FSIA)<sup>27</sup> and the right of instrumentalities of foreign sovereigns to remove cases to federal court.<sup>28</sup> The FSIA defines an "agency or instrumentality of a foreign state" as an entity, "a majority of whose shares or other ownership interest is owned by a foreign state."<sup>29</sup> The instrumentalities at issue—the Dead Sea Companies—were not directly owned by the State of Israel.<sup>30</sup> At least one tier of corporate governance separated them from the state.<sup>31</sup> In other words, the Dead Sea Companies were indirect subsidiaries.<sup>32</sup> Applying basic principles of American corporate law, the Court concluded that the Dead Sea Companies were not instrumentalities of the State of Israel for the purposes of removal because at no time did the Israeli government own a "majority of the shares" in the Companies.<sup>33</sup> The Court refused to read the phrase "other ownership interest" to include the indirect interest that the Israeli Government had in the Companies.<sup>34</sup> The better reading, according to the Court, was to interpret the phrase "other ownership interest" in relation to the immediately preceding word "shares."<sup>35</sup> The Court thus read the phrase to include the possibility that a state's direct ownership of corporate entities may take forms different from the traditional "shares" concept.<sup>36</sup> To read the phrase to encompass indirect ownership would render superfluous<sup>37</sup> the use of the term

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25. In the sense of being truer to original intent, or least likely to be the interpreter's disguised policy preferences.

26. 538 U.S. 468 (2003).

27. 28 U.S.C. § 1603 (2000).

28. 538 U.S. at 470–72.

29. 28 U.S.C. § 1603(b)(2) (2000).

30. *Dole Food Co.*, 538 U.S. at 473 (the Dead Sea Companies were subsidiaries of a parent owned by the State of Israel).

31. *Id.*

32. *Id.* at 473–74.

33. *Id.* at 474–75.

34. *Id.* at 476.

35. *Id.* ("The words 'other ownership interest,' when following the word 'shares,' should be interpreted to refer to a type of interest other than ownership of stock.").

36. *Id.*

37. The "superfluity" canon is another window to purposefulness that the textualist will look through upon occasion. It is based on the same limited

“shares.”<sup>38</sup>

Writing in dissent, and joined by Justice O’Connor, Justice Breyer urged that the correct reading of the phrase “other ownership interest” includes the type of indirect “ownership” (in a colloquial sense) that the Israeli Government maintained in the Dead Sea Companies.<sup>39</sup> Justice Breyer noted that the phrase is patently ambiguous because the term “ownership” does not have a precise meaning.<sup>40</sup> He rehearsed the case law in which the Court had interpreted indirect ownership to fall under “ownership.”<sup>41</sup> Justice Breyer disagreed with the majority’s conclusion that the use of the word “shares” settled the matter because the majority was also concerned about foreign methods of ownership, which might have nothing to do with “shares.”<sup>42</sup>

Justice Breyer cautioned that “[s]tatutory interpretation is not a game of blind man’s bluff,” and he emphasized that “[j]udges are free to consider statutory language in light of a statute’s basic purposes.”<sup>43</sup> He concluded that the majority’s reading would frustrate the statute’s purpose and therefore should be rejected.<sup>44</sup>

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conclusion that we shall not presume the legislature to waste words when enacting laws. See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 644 (2d ed. 1995) (considering superfluity canon as part of “whole act” rule).

38. *Dole Food Co.*, 538 U.S. at 476–77.

39. *Id.* at 481–83 (Breyer, J., dissenting in part). Justice Breyer noted that “Congress is most unlikely to characterize as ‘better’ a rule tied to legal formalities that undercuts its basic jurisdictional objective.” *Id.* at 486.

40. Justice Breyer described ownership as a *nomen generalissimum*—that is, “its meaning is to be gathered from the connection in which it is used.” *Id.* at 481–82 (citing BLACK’S LAW DICTIONARY 1049, 1105 (6th ed. 1990)).

41. *Id.* at 482. Justice Breyer relied heavily upon *Flink v. Paladini*, 279 U.S. 59 (1929), which concerned federal statutes that limited shipowners’ liability to their proportional interests in their vessels. There the Court interpreted the statutes’ purpose as “encourag[ing] investment by exempting the investor from loss in excess of the fund he is willing to risk in the enterprise.” *Id.* at 62 (internal quotations omitted) (citation omitted). Justice Holmes, speaking for the majority, concluded that “[f]or this purpose no rational distinction can be taken between several persons owning shares in a vessel directly and making the same division by putting the title in a corporation and distributing the corporate stock.” *Id.*

42. *Dole Food Co.*, 538 U.S. at 483.

43. *Id.* at 484.

44. *Id.* at 486–87. Justice Breyer asks rhetorically, “[w]hy place greater weight on the [superfluity] canon suggesting a need to give every statutory word a separate meaning than upon the statute’s overall purpose?” BREYER, *supra* note 1, at 125. Two answers come to mind. First, the canon against superfluities is as old as the hills and can fairly be presumed to be within Congress’s collective ken when enacting legislation. See, e.g., *Wash. Mkt. Co. v. Hoffman*, 101 U.S. 112 (1879). There the Court stated:

The available legislative history revealed that Congress wanted to ensure that claims against foreign sovereigns were adjudicated in federal court.<sup>45</sup>

Given these purposes, what might lead Congress to grant protection to a Foreign Nation acting through a Corporate Parent but deny the same protection to the Foreign Nation acting through, for example, a wholly owned Corporate Subsidiary? The answer to this question is: In terms of the statute's purposes, *nothing at all* would lead Congress to make such a distinction.<sup>46</sup>

Justice Breyer thus concluded that a purposivist reading should lead the Court to permit the Dead Sea Companies to remove the action to federal court.<sup>47</sup>

The main problem with Justice Breyer's analysis is that it leads to question-begging. Purpose is always at the heart of the interpretation, yet to presume to know the purpose of the statute from a text that is admittedly ambiguous<sup>48</sup> suggests circularity.<sup>49</sup>

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[i]t is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times.

*Id.* at 115–16 (emphasis added); *see also* Postmaster Gen. v. Early, 25 U.S. (12 Wheat) 136, 148 (1827) (Marshall, C.J.) ("And it is, we think, a rule, that words which have a meaning, are not to be entirely disregarded in construing a statute.").

Second, judges are professionally trained to interpret legal text and are less likely to be entranced by the "dark side" of tenure in interpreting statutory text than in divining statutory purpose. *Cf.* Frank Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004). Judge Easterbrook writes that,

[a]lthough judges are more apt to be dispassionate than are political officials, their dispassion need not lead them to be more faithful to either old decisions or the median view of today's legal culture; it may lead them to be more faithful to their own views. This is the dark side of tenure. Like the Force in Star Wars, tenure has both a good side and a dark side. Just as with the Force, the dark side is self-indulgence; if contemporary opinion and politics do not sway the judge, then the judge's own druthers become more important.

*Id.* at 9–10 (footnote omitted).

45. *Dole Food Co.*, 538 U.S. at 485 (noting that federal jurisdiction "should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have an adverse foreign relations consequences") (citation omitted).

46. *Id.*

47. *Id.* at 486–87.

48. One commentator posits that whether an interpreter is likely to find ambiguity in the text is not a function of his being textualist or purposivist, but

Justice Breyer's legislative history notwithstanding,<sup>50</sup> one can posit several reasons why Congress *would* want to limit the scope of the FSIA to corporations in which the state maintains a direct majority ownership interest. First, perhaps Congress wanted to provide the courts (and foreign sovereigns) an easy method of determining whether any particular entity, despite a Byzantine legal structure, enjoys the protections of the FSIA. Second, in attempting to balance on the one hand the potentially adverse foreign policy consequences of not affording FSIA protection to certain foreign state instrumentalities, and on the other hand the potentially adverse consequences on *plaintiffs* who seek to have their claims adjudicated in state courts and instead must change forum, Congress may have decided to draw the line between those entities so closely associated with the foreign state that they are in fact directly owned by the state, and those entities which, although perhaps very much controlled by the state, are not owned directly. Third, Congress may have considered that even though an indirect subsidiary of a foreign state will not enjoy the protections of the FSIA, the judgment creditor, should he wish to pierce the corporate veil, will still have to combat the FSIA as against the corporate parents directly owned by the foreign state.

Instead of asking Justice Breyer why Congress would limit the FSIA to direct subsidiaries, one might as well ask why Congress would limit the FSIA to those subsidiaries in which the foreign state owns a *majority* of the shares. The policies of the FSIA as Justice Breyer sets them forth (especially the policy against international *contretemps*) are equally implicated in a suit against a direct

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rather of "how much confidence the interpreter has in textual meaning and how aggressively he employs tools of interpretation." Molot, *supra* note 6, at 42.

49. Justice Breyer writes in *Active Liberty* that the "purpose of the [FSIA's] jurisdictional provision is to bring into federal court cases in which a foreign government owns a commercial defendant." BREYER, *supra* note 1, at 90. This too seems to be question-begging if the focus of disagreement is over the meaning of "ownership." Justice Breyer argues that it is all about ownership; indeed, but *what kind of ownership?* Direct or indirect? Shares or otherwise? Majority or minority? By phrasing the purpose as he does, Justice Breyer assumes that ownership in the statute should be interpreted colloquially. That is certainly, *in vacuo*, a defensible position, but it by no means demands assent to his conclusion regarding the statute's purpose. As usual, journeys into purpose tend to degrade into debates about levels of generality. See BORK, *supra* note 21, at 149-51, 237.

50. Reliance upon which necessarily raises the red flag. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 872 (1930) ("A legislative intent, undiscoverable in fact, irrelevant if it were discovered . . . is a queerly amorphous piece of slag.").

subsidiary in which the state does not own a majority interest but over which the state exercises substantial control, as in a suit against an indirect subsidiary of a foreign state. Would Justice Breyer then read “majority of whose shares or other ownership interest” to be coterminous with “substantial control?” That reading would effectuate the purpose of the statute as he sees it, yet this “would be judicial legislation,—*jus dare*, not *jus dicere*.”<sup>51</sup>

Like all legislation, the FSIA seeks to balance competing concerns.<sup>52</sup> It is a misunderstanding of the nature of lawmaking in a democratic system to assume that each statute will, like a good work of art, show forth consistent and well-developed themes.<sup>53</sup> In fact, democratic legislation is more often than not a hodgepodge of competing special interests.<sup>54</sup> The FSIA is no different. Is the FSIA in favor of foreign states? Against them? Or both? The question cannot be answered, and trying to answer it leads to what might be termed *interpretive creep*. By that phrase I mean the process of interpreting particular provisions of a statute in light of the

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51. *Peck v. Jenness*, 48 U.S. (7 How.) 612, 623 (1849) (lawmaking, not interpretation).

52. *See, e.g.*, *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000) (“Legislation often results from a delicate compromise among competing interests and concerns.”).

53. *But see* BREYER, *supra* note 1, at 7 (citing Learned Hand for the proposition that interpretation of a statute is like interpretation of a musical score). “Theme-based” interpretation, or even the accuracy of Hart and Sack’s famous description of a legislature as a group of reasonable people pursuing reasonable purposes reasonably—see 2 HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1415 (tentative ed. 1958)—appears at least to have been called into question by modern public choice theory. *See* Eskridge & Frickey, *supra* note 5, at 335. There the authors note that

[i]t seems clear not only that reasonable people in the legislature do not always produce reasonable results, but that in some cases that is the last thing they want to do. Some statutes are little else but backroom deals. Judicial attempts to fancy up those deals with public-regarding rhetoric either are naïve or simply substitute the judge’s conception of public policy for that of the legislature.

*Id.*

54. Thus is revealed one of the principal shortcomings of purposivism: “that it tends to override legislative compromises.” Posner, *supra* note 3, at 1710. *See also* *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (plurality opinion) (Scalia, J.). There Justice Scalia wrote:

And as for advancing “the purpose of the Act”: We have often criticized that last resort of extravagant interpretation, noting that no law pursues its purpose at all costs, and that the textual limitations upon a law’s scope are no less a part of its “purpose” than its substantive authorizations.

*Id.* at 2232.

statute's supposed purpose such that, after a series of interpretations, the statute as a whole, as judicially interpreted, falls decidedly more to one side of the policy balance than would have been possible given the ideological make-up of the enacting legislature.

One federal environmental law susceptible to interpretive creep is the Endangered Species Act (ESA).<sup>55</sup> The ESA's chief purpose is the preservation of endangered flora and fauna.<sup>56</sup> The Supreme Court long ago determined that, through the ESA, Congress wished to give the preservation of species the highest priority.<sup>57</sup> But obviously not everyone believes that these goals should be pursued at all times and at all costs. Each substantive provision of the ESA undoubtedly represents a particular legislative compromise between those who wanted more species protection and those who wanted to preserve more freedom for development. In other words, each ESA provision reflects a purpose, but the degree to which each provision *vindicates* that purpose necessarily varies, and the best (and likely only) way of finding out just how much the provision pursues the general purpose is by close attention to the provision's text. Not to follow this course eventually will upset each of the ESA's legislatively brokered compromises (and the compromises found in all legislation). A purposivist interpretation will cause a statute to morph over time so that it reflects more and more a particular lobby in the enacting Congress, thereby giving effect to that lobby's views to a degree not democratically justifiable. Interpretive creep is an unavoidable and undesirable consequence of purposivism.

*B. Circuit City Stores, Inc. v. Adams*<sup>58</sup>

The second example Justice Breyer offers is *Circuit City*, a recent Supreme Court case dealing with the exclusion provision of the Federal Arbitration Act (FAA).<sup>59</sup> The Ninth Circuit had held, contrary to every other circuit to have addressed the question, that employment contracts do not fall within the FAA's ambit.<sup>60</sup> The relevant statutory text states that the FAA does not apply to

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55. 16 U.S.C. §§ 1531–1544 (2000).

56. *Id.* § 1531(b).

57. *See* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

58. 532 U.S. 105 (2001).

59. *Id.* at 109.

60. *See id.*

“contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>61</sup> All but the Ninth Circuit had interpreted the phrase “other class of workers” to be limited by the examples of workers preceding it;<sup>62</sup> in other words, the courts had narrowed the scope of the phrase using the well-established canon *ejusdem generis*.<sup>63</sup> Under that canon, words of potentially broad scope are read narrowly so as to make them consistent with the class of things enumerated in preceding clauses. Thus, most courts had construed the broad language in section 1 of the FAA to be restricted to other types of transportation workers.<sup>64</sup>

The Supreme Court reversed the Ninth Circuit and held that section 1 of the FAA should be read consistent with *ejusdem generis*.<sup>65</sup> The Court reasoned that the Ninth Circuit’s interpretation did not give independent effect to the particular types of transportation workers described in the preceding clauses: the broad reading of “other class of workers” would encompass those classes already enumerated, thus rendering the preceding portion of the statutory text superfluous.<sup>66</sup> The Court also noted that its interpretation was consistent with Congress’s use of the term of art “engaged in commerce,” which indicates a less-than-full exercise of the Commerce Clause power.<sup>67</sup> The respondent had argued that the “engaged in commerce” phrase, when used in the FAA at its enactment in 1925, expressed very nearly the limits of the Commerce Clause power as then understood and should be interpreted as a sign that Congress believed it was constitutionally *required* to exempt all employment contracts from the FAA.<sup>68</sup>

The Court rejected the contention that the meaning of the phrase “engaged in commerce” must change over time just as Commerce Clause jurisprudence has changed since the FAA’s

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61. 9 U.S.C. § 1 (2000).

62. *Circuit City*, 532 U.S. at 112.

63. “Of the same kind, class, or nature.” BLACK’S LAW DICTIONARY 608 (4th rev. ed. 1968).

64. *See Circuit City*, 532 U.S. at 112 (explaining that “[m]ost [c]ourts of [a]ppeals conclude the exclusion provision is limited to transportation workers, defined, for instance, as those workers ‘actually engaged in the movement of goods in interstate commerce’”).

65. *Id.* at 115 (holding that “[t]he application of the rule *ejusdem generis* in this case . . . is in full accord with other sound considerations bearing upon the proper interpretation of the clause”).

66. *Id.* at 114–15.

67. *See id.* at 115–16.

68. *Id.* at 116.

enactment in 1925.<sup>69</sup> The opinion emphasized that it “would be unwieldy for Congress, for the Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment.”<sup>70</sup> The Court also noted, perhaps gratuitously, that its narrow reading of section 1 was consistent with the FAA’s unquestioned purpose, i.e., overcoming judicial hostility to arbitration agreements.<sup>71</sup>

The case produced two dissenting opinions, one by Justice Stevens, the other by Justice Souter, both joined by Justice Breyer. Justice Stevens’s dissent argued that the legislative history of the FAA makes clear that the statute was designed to remedy judicial hostility to commercial arbitration.<sup>72</sup> Organized labor feared that the FAA might be used against its concerns.<sup>73</sup> Chief among the labor opponents was the International Seamen’s Union of America.<sup>74</sup> In response to labor’s concerns, the American Bar Association, principal sponsor of the FAA, suggested that the problem could be avoided by adding the text of section 1, which would purportedly exempt all employment contracts.<sup>75</sup> In response to the majority’s “surplusage” argument, Justice Stevens argued that “it is not ‘pointless’ to adopt a clarifying amendment in order to eliminate opposition to a bill.”<sup>76</sup> He excoriated the majority for “its refusal to look beyond the raw statutory text” and thus its “disregard[ing of] countervailing considerations that were expressed by Members of the enacting Congress.”<sup>77</sup>

Justice Souter’s dissent also emphasized that the correct interpretation of section 1, like that of section 2 of the FAA, required a “correspondingly evolutionary reading.”<sup>78</sup> Justice

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69. *Id.* at 118.

70. *Id.*

71. *See id.* The Court also noted that the FAA’s legislative history was sparse and unhelpful. *Id.* at 119–20.

72. *Id.* at 125 (Stevens, J., dissenting).

73. *See id.* at 126–27.

74. *Id.* at 126.

75. *Id.* at 127.

76. *Id.* at 128.

77. *Id.* at 132.

78. *See id.* at 134 (Souter, J., dissenting).

The question here is whether a similarly general phrase in the [section] 1 exemption, referring to contracts of “any . . . class of workers engaged in foreign or interstate commerce,” should receive a correspondingly evolutionary reading, so as to expand the exemption for employment contracts to keep pace with the enhanced reach of the general enforceability provision.

Souter's dissent endorsed the temporally sensitive interpretive theory of the Commerce Clause that the majority rejected.<sup>79</sup> As for the majority's use of *ejusdem generis*, Souter characterized the canon as a "fallback"<sup>80</sup> whose admonition was trumped by Congress's particular desire in the FAA to exempt, out of an abundance of caution,<sup>81</sup> seamen and rail workers for whom legislation governing employment contracts already existed.<sup>82</sup>

Describing the majority's method as a "more literal, text-based approach,"<sup>83</sup> Justice Breyer in *Active Liberty* considers the dissents to evince "a more directly purposive approach."<sup>84</sup> Justice Breyer rehearses the legislative history, detailing the seamen union's opposition and the ABA's suggested remedy.<sup>85</sup> Assuming that this legislative history accurately described the purpose of the section 1 exemption, Justice Breyer concludes that the majority's narrow reading is inconsistent with that purpose.<sup>86</sup> He reasons that it makes sense that the exemption should be read broadly: at the time of the FAA's enactment, Congress understood its Commerce Clause power to be far narrower than it is now; and in any event, the express mentioning of seamen and rail workers in section 1 can be chalked up to Congress's desire to assuage the fears of an especially important interest group.<sup>87</sup>

As for the temporally sensitive interpretive method, Justice Breyer notes that courts have read the FAA's principal regulatory provision, section 2, more broadly as the scope of the Commerce Clause power has expanded.<sup>88</sup> So why, Justice Breyer questions provocatively, "would Congress not have wanted an expanding exception of similar scope?"<sup>89</sup> Conceding that the result of the majority's opinion—more labor contracts subject to arbitration—may actually be desirable as a policy matter,<sup>90</sup> Justice Breyer nevertheless bemoans the majority's analysis for its indifference to

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*Id.*

79. *See id.* at 136–37.

80. *Id.* at 138.

81. *Id.* at 140.

82. *Id.* at 139.

83. BREYER, *supra* note 1, at 92.

84. *Id.* at 93.

85. *Id.*

86. *Id.* at 93–94.

87. *Id.* at 94.

88. *Id.*

89. *Id.*

90. *Id.* at 94–95.

Congress's clearly established purpose of providing for arbitration in commercial disputes yet exempting employment contracts.<sup>91</sup>

The error in Justice Breyer's analysis is, again, not so much in the application, but in first principles. He assumes that the purpose of the statute is evinced by the substance of subcommittee hearing testimony. He reasons that because the majority's result is inconsistent with that testimony, the analysis has necessarily frustrated Congress's intent. Justice Breyer and the two *Circuit City* dissents simply ignore that the purpose of section 1 is in fact evident on its face: to exempt what would otherwise be within the scope of the FAA. Sparse citations to legislative history to establish legislative purpose do not, at first blush at least, help to answer the interpretive question of the *extent* of the section 1 exemption. Further, both Justice Breyer and the dissents are indifferent to the fact that *ejusdem generis* (which neither Justice Breyer nor the dissents dispute is applicable in *Circuit City*) is a well-established canon that likely was within the mind of Congress when enacting the FAA.<sup>92</sup> By contrast, during the 1920s, courts' use of legislative history<sup>93</sup> was not nearly as common as it is today. Thus, one is left

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91. *Id.* at 95.

92. *See, e.g.*, *Caminetti v. United States*, 242 U.S. 470, 487 (1917) (applying canon to Mann Act); *United States v. Bitty*, 208 U.S. 393, 402 (1908) (same); *United States v. Austin Nicholls & Co.*, 186 U.S. 298, 300 (1902) (applying canon to Customs Administrative Act of 1890); *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U.S. 290, 295 (1902) (applying canon to certiorari provisions of 1891 appellate jurisdiction act). *Cf.* *Mid-Northern Oil Co. v. Walker*, 268 U.S. 45, 49 (1925) (noting canon's inapplicability where preceding specific classes exhaust genus); *Mason v. United States*, 260 U.S. 545, 554 (1923) (same).

93. It is not "incoherent" to accord "law" status to text and not to legislative history materials, notwithstanding ardent pleas about the need for "context" to understand "text." *But see* Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267, 1268-69 (2005). Obviously, a word of multiple meanings (or shades of meaning) cannot be understood in isolation, but the question is one of degree. The level of context "employed" should be the lowest (or narrowest) required to produce a non-absurd result. In other words, if the statutory text itself is sufficient to produce an intelligible and rational principle, then the interpretive endeavor should be over; that is all the "context" required. The *Circuit City* dissents' (and Justice Breyer's) desire to raise the level of context to include non-statutory materials unnecessarily complicates the search for the legislature's intent. Raising the level of context fails to recognize the *supra*-contextual character of legal principles that can be derived from a "contextual" statute. And nothing prevents these principles from being applicable to new and different contexts. Professor McGreal criticizes Justice Scalia (whom he takes as the avatar of the anti-legislative-history crowd) for ignoring context. *See, e.g., id.* at 1277 ("Implicit in [Justice Scalia's] argument is that statutory text has some meaning on its face, and that congressional committees may not alter that meaning through legislative history. However, the statute's so-called facial

with a 1925 Congress that reasonably would have been aware of (1) *ejusdem generis*, (2) the canon's potential application to section 1, and (3) the distinct unlikelihood that a reviewing court would disregard the text (as clarified by the canon's application) in favor of a statement made in a subcommittee hearing in 1923.<sup>94</sup> Is Justice Breyer really the advocate of the reasonable interpretation?

Further, both Justice Breyer's and the dissents' fondness for a temporally sensitive interpretative methodology is fundamentally at odds with the notion that the Supreme Court interprets but does not legislate.<sup>95</sup> That is to say, although the Court's interpretation of

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meaning necessarily assumes a context within which that meaning makes sense."). Yet the Professor is fairly subject to criticism for ignoring *levels of context*. Legislative history is acceptable to Professor McGreal because it is part of the bicameralism and presentment process; but in a democracy it is not enough that merely the legislators know what the law means. Legislative history may be considered broadly to be part of the lawmaking process, but the Constitution accords law status only to the voted-upon text. See *Conroy v. Aniskoff*, 507 U.S. 511, 518–28 (1993) (Scalia, J., concurring in judgment).

94. This conclusion can be supported on several grounds. First, the "plain meaning rule," i.e., judges are bound to apply the ordinary meaning of the text (barring absurdity) and cannot look beyond that text for interpretive guidance, was even more a judicial *cri de coeur* than now. See, e.g., *Caminetti*, 242 U.S. at 485; *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409–10 (1914); *Dewey v. United States*, 178 U.S. 510, 521 (1900); *Lake County v. Rollins*, 130 U.S. 662, 670–71 (1889). It is true that courts would occasionally look to legislative history, most famously in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), and earlier, see generally Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991). But even so, the rule was that "[r]esort to journals and committee reports was permissible; resort to legislative debates was not," *id.* at 1084, and a similar circumspection would have likely been accorded the hearing transcript cited by Justice Breyer and the *Circuit City* dissenters. See *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 498–99 (C.C. Me. 1843) (No. 9662). Further, the plain meaning rule was a strong counterweight in the early decades of the twentieth century against use of legislative history. See Baade, *supra*, at 1087.

Second, as Justice Jackson noted, access to legislative history in the early twentieth century was not easy; it was rather a luxury enjoyed by big firms in big cities. Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948). Congress would have been leaning on a slender reed indeed to expect the Bar to delve into the nearest federal depository to seek support for an interpretation at odds with the text and the canon.

Third, legislative history did not receive the Supreme Court's imprimatur until well into the twentieth century. See *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543–44 (1940) ("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.'") (footnotes omitted).

95. Cf. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

the Commerce Clause in 1925 was far more limited than it is today, that fact has little or nothing to do with the constitutional calculus as worked out in statutes. It is enough for Congress to say in year 1, “We legislate to the maximum (or someplace short of that) of our Commerce Clause power,” to fix the *meaning* of the statutory text. Perhaps in year 2 or year 20 the Court’s interpretation of the Commerce Clause will have changed, but that fact does not alter the statutory text’s meaning (as opposed to its scope).

Lastly, Justice Breyer’s analysis of *Circuit City* reveals the (perhaps ironic) tunnel vision of the purposivist. Justice Breyer laments the majority’s ignoring of the “*only* evidence available” of Congress’s purpose in passing the FAA, i.e., to address the problem of commercial arbitration while at the same time exempting employment contracts from the solution.<sup>96</sup> Yet Justice Breyer does not acknowledge that the text of section 1 of the FAA, clarified by *ejusdem generis*, provides evidence of Congress’s intent in enacting the exemption. He ignores the textual evidence and is attracted to the non-statutory evidence presumably because the latter permits higher levels of generalization as to purpose; and the higher the level of purpose, the more that can be fit under the purposive umbrella. Contrariwise, the lower the level of generality, the more specific the purpose becomes, until at some point legislative purpose becomes identified with the text’s plain meaning. The further judges travel from that point, the more likely it will be that their “conclusion as to legislative purpose will be unconsciously influenced by the judges’ own views or by factors not considered by the enacting body.”<sup>97</sup> The closer they hew to the identity point, the more likely their interpretation will approximate that of the legislature, assuming of course that legislative intent is best understood through the statutory text. And that is the purposivist irony: in seeking interpretive help from nontextual sources, the purposivist ignores the probative value of traditional interpretive aids and unconsciously pursues personal predilection.<sup>98</sup>

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96. BREYER, *supra* note 1, at 95.

97. *Am. Trucking Ass’ns*, 310 U.S. at 544. Justice Reed goes on to discount this fear. *Id.*

98. See Posner, *supra* note 3, at 1716 (“[Active liberty] is the name [Justice Breyer] has given to his own, eclectic collection of policy preferences.”). Posner ascribes to the theory that all justices, past or present, essentially rule based on their policy preferences. *Id.*

C. *Duncan v. Walker*<sup>99</sup>

The third in Justice Breyer's purposivist case-law trio, *Duncan* concerned the interpretation of the tolling provision of the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>100</sup> Under the AEDPA, the time during which a federal habeas petitioner must file a federal habeas corpus petition is tolled during the pendency of a "properly filed application for State post-conviction or other collateral review."<sup>101</sup> The timeliness of the *Duncan* petitioner's federal habeas request depended upon how the Court would read the AEDPA tolling provision. Specifically, if the phrase "other collateral review" encompassed both state *and* federal habeas requests, then the petitioner's instant habeas would be timely; but if "other collateral review" referred instead to other types of *state* post-conviction review, then the petitioner's habeas request would be untimely.<sup>102</sup>

The majority began its analysis noting, unsurprisingly, that the Court's interpretation must begin with the statutory text.<sup>103</sup> The majority then set forth a particular application of the canon *inclusio unius est exclusio alterius* (inclusion of one thing implies exclusion of others): where Congress uses the phrase "State and Federal" in some provisions of the AEDPA, and just "State" in other provisions (as is the case with section 2244(d)(2), the tolling provision at issue), a congressional purpose to exclude "Federal" matters from those clauses dealing with "State" matters may be inferred.<sup>104</sup> The majority's analysis drew support from a corollary to the above-mentioned canon: "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."<sup>105</sup> The majority further noted that the superfluity canon counseled against reading the phrase "other collateral review" to include federal

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99. 533 U.S. 167 (2001).

100. BREYER, *supra* note 1, at 95–101.

101. 28 U.S.C. § 2244(d)(2) (2000) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

102. *See Duncan*, 533 U.S. at 172.

103. *Id.*

104. *See id.* at 172–73.

105. *Id.* at 173 (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997)).

review.<sup>106</sup> That reading would render the clause's use of the phrase "State post-conviction" unnecessary, as that type of review either would be included within "other collateral review" or would make the phrase "post-conviction or other collateral review" the functional equivalent of "State post-conviction or other collateral review."<sup>107</sup> The majority also took several pages to show how its analysis was consistent with the AEDPA's purpose of furthering the principles of federalism and finality.<sup>108</sup>

Writing in dissent, Justice Breyer began his opinion by showing *why* a habeas petitioner would want a federal habeas petition to qualify as "other collateral review" and thus toll the limitations period.<sup>109</sup> He noted that, oftentimes, petitions are denied not on the merits but rather for failure to exhaust administrative remedies.<sup>110</sup> The majority's interpretation would produce inconsistent results for similarly situated prisoners because of the varying amount of time habeas review requires depending upon the district court wherein the petition was filed.<sup>111</sup> Justice Breyer contended that the AEDPA tolling provision, section 2244(d)(2), has no plain meaning, and that the text will bear more than one interpretation.<sup>112</sup> He dismissed the majority's inferences drawn from other parts of the Act as proving only that Congress could have spoken more clearly in section 2244(d)(2), and that the contextual examples "cannot prove the statutory point."<sup>113</sup> Rejecting the majority's *use* of the superfluity canon, Justice Breyer argued that, had Congress intended just to include state post-conviction proceedings, it could have stated "State collateral review" because state post-conviction proceedings are a subset of collateral review.<sup>114</sup>

Justice Breyer then moved to his purposivist analysis, the focus

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106. *Id.* at 173–74.

107. *Id.* at 174–75. The Court also noted that its reading would not render "other collateral review" meaningless, because not all types of state custody are the result of criminal conviction and because some states have multiple forms of post-conviction review, including direct and collateral attacks. *See id.* at 176–78.

108. *See id.* at 178–81.

109. *See id.* at 185–86 (Breyer, J., dissenting).

110. *Id.*

111. *Id.* at 186–87.

112. *Id.* at 187.

113. *Id.* at 188.

114. *Id.* at 188–89. Although conceding that the majority's reading would include state civil proceedings, Justice Breyer concludes that Congress likely did not have them in mind because other AEDPA provisions reveal that "Congress saw criminal proceedings as [section 2244(d)(2)'s] basic subject matter." *Id.* at 189.

of which is the resolution of the unexhausted petition problem that the majority's reading created.<sup>115</sup> Justice Breyer would "ask whether Congress would have intended to create th[is] kind of 'unexhausted petition' problem."<sup>116</sup> His response was no, because Congress "would not have intended to shorten th[e] time [to seek habeas review] dramatically, at random, and perhaps erase it altogether."<sup>117</sup> Justice Breyer spent the rest of the dissent attacking the merits of the majority's purposivist analysis.<sup>118</sup> He concluded by criticizing the majority's hermeneutic:

Language, dictionaries, and canons, unilluminated by purpose, can lead courts into blind alleys, producing rigid interpretations that can harm those whom the statute affects. If generalized, the approach, bit by bit, will divorce law from the needs, lives, and values of those whom it is meant to serve—a most unfortunate result for a people who live their lives by law's light.<sup>119</sup>

Although Justice Breyer, in his dissent, appeared more willing to dispute the majority's application of canons, in his book he concedes that a "literal reading" of the statute "supported by various linguistic canons" argues for the majority's interpretation.<sup>120</sup> He also admits that it is unlikely that anyone in Congress actually thought about the unexhausted petition problem.<sup>121</sup> But he contends that the text does not *foreclose* his interpretation, and though perhaps less plausible, his version is more consonant with the purposes of the reasonable legislator.<sup>122</sup> By reading "other collateral review" to exclude prematurely filed habeas petitions, the Court imputes to Congress the intention to deny access to the Great Writ on a random basis, i.e., on the basis of whether a petitioner who has prematurely requested federal habeas relief has filed his petition with a relatively faster or slower docket-managing district court.<sup>123</sup> Because that intention is inconsistent with the reasonable legislator, and because the purposivist interpretation avoids the unexhausted petition problem, Justice Breyer concludes

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115. *See id.* at 190.

116. *Id.*

117. *Id.*

118. *See id.* at 190–93.

119. *Id.* at 193.

120. BREYER, *supra* note 1, at 96.

121. *Id.*

122. *Id.* at 96–98.

123. *See id.* at 97–98.

that the latter interpretation is the better.<sup>124</sup>

There are several problems with Justice Breyer's analysis. First, Justice Breyer concedes that the exhausted petition problem was not likely contemplated by Congress, and he argues for the propriety of his analysis on the basis of statistics regarding habeas processing in the federal courts,<sup>125</sup> which Congress likely did not consider when enacting the AEDPA. Instead of asking whether the text can be read to produce a legitimate (non-absurd)<sup>126</sup> principle of broad application that happens, on occasion, to produce a seemingly inequitable result, Justice Breyer simply disregards the principle and seeks *independent* justification for another principle—not directly justified by the text—to avoid that occasional inequity that was not the chief (or even peripheral) concern of Congress. Second, he favors one purpose, the desire to avoid the occasional denial of habeas review on a random basis, to another purpose, the desire to afford tolling to persons in state custody because of civil proceedings (which cannot fit within “post conviction review”).<sup>127</sup> Third, he concludes without explanation that a reasonable legislator would not prefer to create incentives for *all* habeas petitioners to file only timely petitions at the cost of an occasional random denial of a petition based upon where the petition was filed.<sup>128</sup>

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124. *Id.* at 98.

125. *Id.* at 96.

126. *Cf.* INTRODUCTION TO ST. THOMAS AQUINAS 611 (Anton C. Pegis ed. & trans., Random House 1948).

But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law; or otherwise the sovereign's will would savor of lawlessness rather than of law.

*Id.* Contrast St. Thomas's position with that of John Austin, founder of modern legal positivism, who famously contended that law is merely the command of the sovereign backed by sanction. See generally JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 197 (1832), for a discussion of legal positivism and the role of the sovereign.

127. BREYER, *supra* note 1, at 96–97. It is not clear whether Justice Breyer's reading of the clause would exclude state civil custody petitioners. If seeking relief from state civil custody is not classifiable under the “post-conviction” part of the clause, and if “State” does not apply to the “other collateral review” part of the clause (which one would have to concede so as to avoid rendering “State” superfluous, assuming that post-conviction relief is a subset of collateral review), then state civil custody petitioners would be targeted for exclusion from section 2244(d)(2)'s tolling. Would Congress have any reason for singling out that class of (by definition) non-criminals?

128. BREYER, *supra* note 1, at 97–98.

But Justice Breyer's principal error is his criticism of the *Duncan* majority's textualist analysis, which he believes "will divorce law from the needs, lives, and values of those whom it is meant to serve."<sup>129</sup> Is it not the province of the legislature to ascertain whether law has become outmoded, or passé, or archaic, or simply ceases best to serve the common good? It is, after all, principally for the legislature to determine whether the law is serving the needs, lives, and values of the people. The regulated public has an excellent means of telling the legislature whether, in fact, the law is serving its needs: the voting booth. That avenue of communication does not run to the courthouse.<sup>130</sup>

Justice Breyer argues that citizens (and presumably legislators) think in terms of general purposes.<sup>131</sup> Therefore, to promote legislative accountability, courts should interpret statutes according to their purposes, so that the electorate will know, in Justice Breyer's example, whom to blame for misinterpreting the FAA.<sup>132</sup> Justice Breyer is wrong on two points. First, Justice Breyer misconceives the relevant concern. It does not matter whether citizens think in terms of generalities (although assuredly they do), or whether legislators think about policies in terms of generalities (which assuredly they also do), but rather whether the Constitution, or more broadly a democratic system, vests in the legislature or the judiciary the responsibility to reduce general purposes into specific commands embodied in rules. This duty rests with the legislature. And if the legislature has failed adequately to reduce its general policies into specific rules that sufficiently serve those policies, then the best service the judiciary can render the electorate is to interpret those specific rules so as not to serve the general policies, and thereby demonstrate the flaws in the statutes.<sup>133</sup>

Second, Justice Breyer's contention that the electorate is not able to draw meaningful conclusions about the policies embodied

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129. *Duncan v. Walker*, 533 U.S. 167, 193 (2001).

130. *Cf.* Sunstein, *supra* note 3, at 1729 (arguing that Breyer's statutory interpretation is flawed because he gives too little deference to administrative agencies and too little respect to canons); Ryan, *supra* note 3, at 1655 ("Trying to make good policy may be a worthwhile project for federal judges, but it remains essentially unjustified in Justice Breyer's book.").

131. BREYER, *supra* note 1, at 99.

132. *Id.* at 100.

133. *But see* Ryan, *supra* note 3, at 1658 ("It must be right that most American citizens know and care almost nothing about interpretive methodology. Presumably, they care about results.").

in law from court decisions that hew to the text and the canons is erroneous. The electorate can easily infer the proper conclusions based upon a statute's text and its plain meaning, which of course is the principal *public* meaning of the law. The canons are simply the crystallized form of common-sense observations about *purpose* as expressed in the written word.<sup>134</sup> The layman reading a legal text is likely to perform the same analysis as the canon-minded judge, just not explicitly. To the extent that a court decision varies in result from that which is dictated by a law's text, the electorate becomes more prone to confusion, for now it cannot be sure whether (1) the decision is based upon Congress's bad purpose, (2) Congress's maladroit drafting, or (3) the court's erroneous understanding of Congress's purpose. At least with the method advanced in this essay, the studious electorate is only confronted by possibilities (1) and (2).<sup>135</sup>

### III. A THIRD WAY?

A review essay is not the most auspicious place for setting forth a coherent and universal theory of interpretation,<sup>136</sup> but it seems only fair to offer up some alternative to Justice Breyer's proposal. That alternative I call Blackstone Variant Textualism (BVT). This brand of textualism not only differs markedly from the purposivism of Justice Breyer and produces a process (as opposed to results) more in tune with the democratic system than does Justice Breyer's theory; it also adheres faithfully to historical practices in interpretation<sup>137</sup> which, one expects, were at least within the

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

[C]anons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements . . . . So far as valid, they are what Mr. Justice Holmes called them, axioms of experience . . . . Insofar as canons of construction are generalizations of experience, they all have worth. *Id.*, quoted in Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 n.164 (1989).

135. For a criticism of Justice Breyer's theory based upon his insufficient regard for canons of interpretation, see Sunstein, *supra* note 3, at 1736.

136. See Ryan, *supra* note 3, at 1655.

137. Which include the canons. See Eskridge, *supra* note 9, at 1099-1100 ("One thing that can be said with assurance is that judges and lawyers throughout the framing and consolidating periods understood the importance of the canons of statutory construction . . . . They were the lingua franca of statutory interpretation.") (footnote omitted).

contemplation of those ratifying the Constitution.<sup>138</sup>

Generally, the framers—and the ratifiers learned in the law—were very familiar with the work of William Blackstone,<sup>139</sup> and an exemplar of sound statutory interpretation can be found in Blackstone's Commentaries.<sup>140</sup> For the great Vinerian professor, “[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable.”<sup>141</sup> Those signs include words, context, subject matter, effects and consequence, and the “spirit and reason” of the law.<sup>142</sup> These “signs” remain valid interpretative criteria, in descending order of importance,<sup>143</sup> and form the basis of BVT.

First, as to words, I contend, with Blackstone, that the ordinary meaning is generally dispositive,<sup>144</sup> unless the words are a term of art.<sup>145</sup> Second, if there be doubt, recourse may be had to other

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138. Professor Eskridge has offered a tenable *originalist* understanding of the Article III “judicial power” that would afford federal judges what he terms “ameliorative, suppletive, and voidance” powers. *Id.* at 996. Eskridge contends that these non-textual powers to respectively limit, expand, or ignore statutory text were used to varying degrees during the founding period and thereafter. *See id.* at 1009–30. He also comes to the somewhat remarkable conclusion that “the Framers practiced and preached a highly contextual approach [to interpretation],” one “sophisticated [and] cosmopolitan” and thus “much more like that of Justice Stevens” than that of originalists. *Id.* at 1087. But Eskridge nevertheless concedes that even his originalist theory may be open to criticism. *See id.* at 993 n.13. In any event, the matter cannot be resolved in a book review (let alone a footnote), and lest the author be guilty of “history-in-law,” i.e., a sort of slapdash farrago of citations meant to convince (or hoodwink) the unsuspecting and untrained reader—see Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI. KENT L. REV. 909, 917 (1996)—I shall decamp from the field of battle without conceding the war.

139. *See* BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 28–34 (2d ed., Transaction Publishers 2006).

140. Reliance upon Blackstone is not meant to imply that textualism as known today was the hermeneutic of choice for all English jurists. *See* Heydon's Case, (1584) 76 Eng. Rep. 637, 638 (Q.B.).

141. WILLIAM BLACKSTONE, I COMMENTARIES \*59.

142. *Id.* How little the interpretive endeavor has changed in 250 years!

143. Blackstone would have agreed. In discussing these signs, Blackstone was careful to note that their relevance was predicated upon an ambiguous text of *doubtful* meaning. *See id.* at \*60 (“If words happen to be still dubious . . .”), \*61 (“But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious . . .”).

144. Rather than agree with Professor Eskridge's contention that “[t]he many faces of words should stand as a caution that Logos (textualism, old or new) is a Janus-faced god,” Eskridge, *supra* note 9, at 1106, one ought instead to hold fast to Saint John's affirmation of objective intelligibility, *see John* 1:1.

145. BLACKSTONE, *supra* note 141, at \*59.

sections of the law, or to other laws;<sup>146</sup> and a word having two or more meanings will be accorded that meaning which best harmonizes with the manifest purpose of the statute.<sup>147</sup> Third, if the plain meaning produces an absurd—as opposed to merely an undesirable—outcome, the meaning of the words may be varied ever so slightly.<sup>148</sup> In short, BVT holds that: (1) words have meaning, both ordinary and (sometimes) specialized; (2) these meanings can be ascertained by non-specialist judges and applied to a variety of factual scenarios presented before them;<sup>149</sup> (3) word meaning can also be ascertained without recourse to socio-cultural context; (4) ambiguous language can be clarified with interpretive canons of especially long standing;<sup>150</sup> (5) recourse to non-statutory

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146. *Id.* at \*60.

147. By “manifest” purpose, it is meant a purpose much more easily discerned than what Justice Breyer sets forth. For example, the word “tender” in a banking law should be interpreted as pertaining to the legality of script and coin and not to the doneness of a cut of beef. *See id.*

148. *Id.* But no provision should be made for the “reason and spirit” of the law. Even for Blackstone, that theory of interpretation was essentially no longer law but equity. *See id.* at \*61. It is interesting to note that Blackstone mentions the canon *cessante ratione, cessat lex* (the reason for the law having ceased, the law itself ceases), to which Justice Breyer himself has recently cited. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (citing 1 COKE’S INSTITUTES \*70b).

149. Thus I disagree strongly with Professor Tribe (surprise!), who seems to turn originalism and textualism into a cramped hermeneutic that would preclude judges from applying the law to a factual scenario not expressly contemplated in the text. *See* Lawrence Tribe & Michael Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1061–62 (1990). In a word, Professor Tribe would have textualists do without their deductive powers. *See id.* Heaven forbid!

150. Not included are those canons that relate to legislative intent only by the fiction that the legislature prefers one policy to another. Among these are the avoidance canon, see, for example, Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397 (2005), where the courts will construe a statute so as to avoid constitutional questions (because Congress by policy choice opts not to push the edges of its regulatory envelope *sub silentio*) and the appropriations canon, see generally Matthew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669 (2005), where the courts will not infer legislative change based upon budgetary changes (because Congress by policy choice opts not to legislate indirectly through the purse), or even further removed, the policy canons such as the rule of lenity, ESKRIDGE & FRICKEY, *supra* note 37, at 655 (ambiguities in criminal statutes will be construed in favor of the defendant), or the (wretched) rule against implied tax deductions, see, e.g., *INDOPCO, Inc. v. Comm’r*, 503 U.S. 79, 84 (1992) (tax deductions are to be strictly construed). Included are only those linguistic canons that, although distantly based upon purpose, are more directly concerned with divining meaning through accepted custom and word usage.

The canons are sound tools of interpretation, although much criticism

materials is both insupportable in theory and unreliable in practice;<sup>151</sup> (6) rules extracted from statutory text should be defined at the lowest level of generality—conversely, the highest level of specificity—that the language will bear;<sup>152</sup> and (7) ambiguous statutory language not susceptible of interpretation through canons should be treated either under the rubric of the “inkblot” theory<sup>153</sup> or should not be enforced on the grounds that Congress has unconstitutionally delegated lawmaking power to the judiciary.<sup>154</sup>

The application of BVT to the cases discussed above

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has been leveled against them. See, e.g., 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 (1950) (for every canon there is an equal and opposite canon); Stephen N. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?*, 45 VAND. L. REV. 561 (1992) (concluding that canons are used by judges to reach preferred policy results); Sunstein, *supra* note 134, at 452 (“Almost no one has had a favorable word to say about the canons in many years.”). Perhaps the whole conundrum about the propriety of judges’ use of canons can be avoided through congressional adoption of selected canons. See generally Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (challenging the argument that the courts should adopt canons of statutory interpretation, and arguing instead that Congress should use its authority to adopt such canons).

151. See SCALIA, *supra* note 2, at 35–37. See also Jackson, *supra* note 94, at 124.

I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession. . . . And, after all, should a statute mean to a court what was in the minds but not put into the words of men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it?

*Id.* at 124.

152. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 127–28 n.6 (1989) (plurality opinion) (Scalia, J.) (opining that courts should select “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”). See Easterbrook, *supra* note 44, at 6–7, for an interesting discussion of generality versus specificity in statutory interpretation. See also *id.* at 11–12 for the argument that purposivist analysis (and thus higher levels of generality) do not necessarily capture real intent. See also Frank Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 351–52 (1992) (noting that debates about constitutionally protected fundamental rights turn upon the level of generality with which the right is defined or placed in the “tradition,” be that legal, cultural, or historical).

153. See BORK, *supra* note 21, at 166 (“A provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it.”).

154. See, e.g., *United States v. L. Cohen Grocery Corp.*, 255 U.S. 81, 89 (1921).

consistently produces different results from those provided by Justice Breyer's reasonable legislator criterion. In the FSIA case, BVT would reach the majority's result, but on the ground that the meaning of the word "ownership," within the context of a statutory provision regarding corporate proprietary relationships, is plain. Ownership should be equated with possession of a majority of shares, and thus direct subsidiary status. An interpreter should not bother to investigate whether reading ownership as a very general term (*nomen generalissimum*) might produce a preferred policy result. As for the employment-contract exception under section 1 of the FAA, BVT would again side with the majority's result on the ground that the canon *ejusdem generis* is dispositive, and the BVT-directed judge would not trouble with the temporally sensitive interpretive concerns of the dissenting opinions and Justice Breyer. Lastly, BVT would coincide in result with the majority opinion in the AEDPA case on the ground that the canon *inclusio unius exclusio alterius* and the rule against superfluities are determinative.

There is always room for debate as to whether BVT has been properly applied, for in all these cases the dissents and Justice Breyer contend that the text is not plain and that the canons produce equivocal results. But that fact does not call into question the integrity of BVT as an interpretive tool. It merely confirms that reasonable people may reach reasonable yet differing results using BVT analysis, and this can happily be attributed to the law's wonderful complexity. But once Justice Breyer and his purposivist colleagues throw up their hands and declare that the text can no longer help and that recourse must be had to purpose, then we have reached a dialectical impasse of sorts. In the long run, wrong BVT results are preferable to right purposivist analysis precisely because (1) identification of meaning through plain language is usually easier than divination of purpose, and (2) BVT is far less likely to become, either consciously or inadvertently, a mask to conceal the implementation of judges' policy preferences.

#### IV. CONCLUSION

Justice Breyer declares that "[l]aw is tied to life, and a failure to understand how a statute is so tied can undermine the very human activity that law seeks to benefit."<sup>155</sup> Indeed, law is tied to life; but the question for Justice Breyer and us is better put as,

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155. BREYER, *supra* note 1, at 100.

“Who has primary responsibility for determining when the law is no longer accurately enough tied to Life?” And further, “Whose responsibility is it to change the law when it does not track to Life?” Surely, the framers and ratifiers of the Constitution, and most Americans today, would consider it to be the peculiar province of the people, through their elected representatives, to make both determinations, and not the province of the judiciary. And this, one suspects, is the ultimate divide between purposivists of Justice Breyer’s stripe and adherents of BVT: may the American federal judiciary seek to improve statutory law through reasonable, justifiable, yet ultimately *creative* interpretation, or should it resign itself, in all humility, to the role of the legislature’s faithful agent? Justice Breyer has offered us, in *Active Liberty*, a sustained and well-constructed if not ultimately convincing harmonization of these two options. I would urge the Justice, and his adherents, at least to recognize the incommensurability and to choose which path they shall take.