STRUCTURE AND STRUCTURALISM IN THE INTERPRETATION OF STATUTES

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I. INTRODUCTION AND OVERVIEW

Justice John Paul Stevens, in a recent address to practicing lawyers in Pennsylvania, pointedly linked the difficulties involved in interpreting legal texts to those of a literary work:

The Duke of Gloucester, later King Richard the Third, begins his opening soliloquy with the famous line: "Now is the winter of our discontent." The listener, who at first assumes that the word "now" refers to an unhappy winter, soon learns that war-torn England has been "[m]ade glorious by this son of York." It is now summer, not winter and "[g]rim-visag'd War hath smooth'd his wrinkled" forehead. Words—even a simple word like "now"—may have a meaning that is not immediately apparent.

Like the seasons, periods of war and peace come and go. As times change there is also a fluctuation in perceptions about the importance of studying humanistic values and their relation to rules of law.1

At about the same time, although surely by coincidence, the United States Court of Appeals for the Third Circuit, in Ballay v. Legg Mason Wood Walker, Inc.,2 threw down a revisionist gauntlet in the interpretation of the securities laws.3 In its opinion—thus far criticized with


Lest we are inclined to dismiss the invocation as an artistic license signifying no more than an erudite quibble, it is worth noting that, in an opinion by Justice Stevens, the power of the President of the United States to intercept on the high seas Haitians fleeing political turmoil in their country of origin—thereby denying to them the right to seek political asylum in the United States—hinged on the definition of the word "return." See Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549, 2558-67 (1993). Similarly, the determination as to whether a man should serve five or 20 years in jail revolved entirely on the construction to be given the word "use" when applied to firearms. See Smith v. United States, 113 S. Ct. 2050, 2053-58 (1993).


3. As Professor Louis Loss wryly observed in commenting on the Ballay decision: "Blessed are the securities lawyers. For they have demonstrated that members of the profession can play a devilishly revised game of chess." Louis Loss, Securities Act Section 12(2): A Rebuttal, 48 Bus. Law. 47, 47 (1992).

For other instances in which the Third Circuit has taken on the contrarian's role of going against conventional wisdom in the interpretation of the securities laws, see, e.g., In re Data Access Sys. Sec. Litig., 843 F.2d 1537 (3d Cir.) (concluding that appropriate statute of limitations period for claims arising under § 10(b) of Securities Exchange Act and Rule
virtual unanimity by commentators—the Third Circuit held that purchasers of securities claiming loss under the securities laws may not invoke section 12(2) of the Securities Act of 1933 if they made their purchases in the “aftermarket.” Rather, said the court, section 12(2) applies only if the plaintiff purchased the securities in an “initial distribution.” The opinion, as the first appellate decision to reject a long line of cases that applied section 12(2) to purchases in all markets,

10b-5 is one year after plaintiffs discovered facts constituting violation, as in analogous express provisions of Securities Exchange Act of 1934, **cert. denied**, 488 U.S. 849 (1988); Greenfield v. Heublein, Inc., 842 F.2d 751 (3d Cir. 1984) (finding liability under § 10(b) for failure to disclose premerger negotiations); Staffin v. Greenberg, 672 F.2d 1196 (3d Cir. 1982) (same); Sharp v. Coopers & Lybrand, 649 F.2d 175, 182-83 (3d Cir. 1981) (applying vicarious liability under securities laws to accounting firm that knew that investment decisions would be made on basis of its opinion); Collins v. Signetics Corp., 605 F.2d 110 (3d Cir. 1979) (finding requirement of privity in determining who is “seller” under § 12(2) of Securities Act); Rochez Bros. v. Rhoades, 527 F.2d 880, 884-86 (3d Cir. 1975) (finding liability based not on control, but on culpable participation).

4. See infra notes 265-68 and accompanying text.


6. Ballay, 925 F.2d at 684, 693. The terms “initial distribution,” “after-market,” and “secondary market” are not themselves unambiguous. See infra note 228. Moreover, at least one commentator has argued that the reach of § 12(2) should not only exclude “secondary trades,” but all offerings not involving an initial public offering. See Elliott Weiss, The Courts Have It Right: Securities Act Section 12(2) Applies Only to Public Offerings, 48 Bus. Law. 1, 6 (1993); accord Budget Rent A Car Sys. v. Hirsch, 810 F. Supp. 1253, 1256 (S.D. Fla. 1992).

commands attention in its own right. It is, however, especially noteworthy for another reason: its analytical method. Although invoking the conventional talisman of "ascertaining legislative intent," the Ballay court relied almost entirely on the structure of the securities laws, rather than on the more familiar interpretive tools of statutory language or legislative history. It held to be dispositive the placement of the words "oral communication" with the term "prospectus," and it found meaning in the placement of section 12(2) in relation to other sections within the securities laws.

Ideas of how legal instruments—especially those such as the Constitution and statutes that are involuntarily binding—are or ought to be interpreted proliferate. Extant "theories" tend to be highly abstract statements that borrow heavily from the humanistic disciplines of philosophy and literary criticism, or they are particularized mechanistic approaches developed in the course of intramural debates within sub-specialties of legal practice. But the study and practice of law cannot

8. See Ballay, 925 F.2d at 688.
9. See infra part III.A. But see Ballay, 925 F.2d at 684 (purporting to base decision on "language" and "legislative history" of § 12(2)). Compare Aaron v. SEC, 446 U.S. 680, 700 n.19 (1980) (relying exclusively on "text and history" and rejecting resort to structural analysis "[s]ince the language and legislative history of § 17(a) [of the Securities Act of 1933] are dispositive") with id. at 713 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun noted:

Although I disagree with the Court's textual exegesis and its assessment of history, I believe its most serious error may be a failure to appreciate the structural interrelationship among equitable remedies in the 1933 and 1934 Acts, and to accord that relationship proper weight in determining the substantive reach of the Commission's enforcement powers under § 17(a) and § 10(b) [of the Securities Exchange Act of 1934].


10. Ballay, 925 F.2d at 688-89; see also infra note 221 and accompanying text.
11. Ballay, 925 F.2d at 691; see also infra text accompanying notes 232-35. In doing so, the court appeared to be taking up a challenge posed by the then U.S. Solicitor General. See Kenneth W. Starr, Of Forests and Trees: Structuralism in the Interpretation of Statutes, 56 Geo. Wash. L. Rev. 703 (1988). As Starr put it:

[1] In the post-New Deal model of highly detailed statutes, the statute reader may fruitfully draw on the entirety of the statute, studying the whole rather than the solitary part (or parts) put before the court by the specific case at hand. Answers may emerge from a study of the whole that might not be suggested by a narrowly focused parsing of a solitary provision in a complex statute.

Id. at 708.
be undertaken exclusively in one or the other of these spheres. Contemporary lawmaking is neither solely the edicts or directives of the governmental branches—the courts, the legislatures, and administrators—nor is it the product of institutions over which human beings have little or no control. Rather, law emerges from a variety of sources whose common factor is the interaction of changing social needs and the institutions through which they are satisfied.

This Article is grounded on the proposition that legal ideas can be and frequently are derived from without law, and that they are "legal" by virtue of their translation in the practice of law. It explores the use of structural analysis as a methodology in effectuating the interpretation of statutes through such practical translation. The Article seeks to illuminate a method of interpretation whose theory embodies the practical roles played by various actors and whose aspiration is a holistic understanding of interpretation as an interactive function not simply among a narrow cadre of judges and lawyers, but broader social groupings that include those laypersons whom the law purports to regulate.

As a preliminary matter, it is worth observing that whatever position one takes on the outcome in Ballay,12 the opinion exemplifies a clear trend: resort to structure and structuralism13 as interpretive tools is

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13. For the explication of these terms, see infra parts II.A.3 and II.D. For the moment, the following should suffice as a working definition. "Structure" refers to the method of inferring meaning from the relationship or juxtaposition of words, terms, sections, etc. to one another within or across the linguistic text(s) of one or more statutes. See, e.g., Starr, supra note 11, at 706 ("[S]tatutes are to be studied carefully as a whole, and with due regard for the structure of the statutory edifice and the interpretive lessons to be drawn from that edifice."); see also Charles L. Black, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969).
increasingly becoming the approach of choice by judges on the bench—at least when faced with seemingly difficult issues of statutory interpretation. Strikingly, this approach has been more routinely employed to restrict the rights granted or protection afforded putatively aggrieved persons by relevant statutes than to expand such interests.\footnote{14}

Notwithstanding the trend, and despite pervasive references to structure both in judicial opinions and academic commentaries, there is a paucity of systematic accounts—theoretical or pragmatic—of the role of structure in the interpretive method.\footnote{15} In particular, can the various invocations of "structure" be reconciled? Is structure or structuralism any more responsive as an interpretive tool to the dual concerns of "determinacy"\footnote{16} and "legitimacy"\footnote{17} with which a defensible legal interpretive theory must come to grips?

"Structuralism," on the other hand, refers to a mode of employing structural analysis in the critique or understanding of social institutions, experiences, and practices. \textit{See, e.g.,} Thomas C. Heller, \textit{Structuralism and Critique}, 36 \textit{Stan. L. Rev.} 127 (1984); Donald H.J. Hermann, \textit{A Structuralist Approach to Legal Reasoning}, 48 \textit{S. Cal. L. Rev.} 1131 (1975). In this sense, then, I do not use "structuralism" in precisely the same fashion as former Solicitor General Starr. Rather, my use of the term is closer to that of Professor Hermann who has defined "structuralism" as "a method of analysis... [that] represents an attempt to discover the elements and relationship of elements which provide the basis for some practice or expression that is under study." \textit{Id.} at 1143.


15. Constitutional scholars appear to have paid more attention to the significance of both textual and institutional relationships for the interpretive process than have those who focus on the interpretation of statutes. \textit{See, e.g.,} \textit{Black}, supra note 13; Akhil R. Amar, \textit{The Bill of Rights As A Constitution}, 100 \textit{Yale L.J.} 1131 (1991); cf. William N. Eskridge, Jr., \textit{Dynamic Statutory Interpretation}, 135 \textit{U. Pa. L. Rev.} 1479 (1987) (observing that scholars of statutory interpretation, unlike constitutional scholars, have failed to explore the relevance of changing social norms and practices on the meaning of the texts with which they work).

16. As elaborated on in part IV.C, "determinate"—as I use the term—refers to the notion of a "rationally" or "logically" coherent statement, explanation, or application of an idea or concept within an acknowledged analytical framework, \textit{not} a fixed or immutable set of propositions or ideas within any particular field of law. While both definitions convey the notion of boundedness, the boundary involved in my use of the term is entirely temporal, being relevant at the moment of a representation, and taking into account all of
Structure, as a relatively unexplored facet of statutory interpretation, has a good deal to say to the theory and practice of statutory interpretation. It possesses utility for scholars and jurists alike as an elaboration and an alternative to the now over-determined use of text and history as tools of statutory interpretation. This Article posits that the use of structure in interpretive theory permits the functional alignment of "fluctuating humanistic values" to "rules of law." As such, structural analysis presents an effective bridge of the theoretical concerns that are the driving impulses behind the literary-based approaches of the deconstructive movement and the law as a humanities school, and the possible sources of information or arguments available to the proponent (or critic) of a contested idea or concept. Cf. John Stick, Can Nihilism Be Pragmatic?, 100 Harv. L. Rev. 332, 352-58 (1986) (explaining that law is determinate because it is cabined by epistemologically accurate deductive logic and based on the broader notion of predictive force of coherent sets of considerations).

17. By "legitimate," I do not mean the existence of a normative or prescriptive justification or explanation of socially sanctioned behavior. Cf. Alan Hyde, The Concept of Legitimation in the Sociology of Law, 1983 Wis. L. Rev. 379, 380-81 ("In the sense in which it is most commonly encountered, the 'legitimacy' of a social order is the effective belief in its binding or obligatory quality.") Rather, for reasons explained below, in the interpretive setting, I employ the term in the descriptive—and perhaps prescriptive—sense of the acceptability of a belief system among practitioners within a field. Cf. id. at 391 ("Instead of asking whether communication induces belief in legitimacy, one can analyze just as easily its appeal to reason and habit of the hearer."). In Professor Hyde's dichotomy, my use of the term more closely approximates Jürgen Habermas's than Max Weber's. See id. at 387 n.7, 399 n.45.

18. The explicit place of structure as a tool of statutory interpretation in the courts is far from clear. The Supreme Court has variably enlisted it and seemingly ignored it. Compare, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 207-13 (1976) (enlisting it) with Shearson/American Express v. McMahon, 482 U.S. 220, 227 (1987) (seemingly ignoring it on the ground that congressional intent must be "discernible from the text, history or purpose"). The frequency with which the Court has explicitly invoked "structure" in this last term suggests, however, that its use is on the ascendency. See supra note 9 (citing cases). Academic scholarship is not much more extensive. For some recent and stimulating exploration of the role of structure in helping establish meaning, see, e.g., Akhil R. Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499 (1990); Daniel J. Meltzer, The History and Structure of Article III, 138 U. Pa. L. Rev. 1569 (1990); see also Starr, supra note 11, at 703; cf. Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405 (1989) (noting significance of structure as contextual tool to statutory interpretation). The central claim of this piece is that even where not expressly adopted, "structure" has been central to judicial construction of the meaning of securities statutes.

19. These approaches include, notably, the "critical legal studies" movement and offshoots such as the "critical race theory" and "feminist critical theory" groups. See generally Mark Tushnet, Critical Legal Studies: A Political History, 100 Yale L.J. 1515 (1991).

20. This phrase is used in keeping with the disclaimer of a member of the school that it is not a "movement." See James Boyd White, What Can a Lawyer Learn from Literature?, 102 Harv. L. Rev. 2014, 2015 n.3 (1989) (book review). But see Robin L. West, Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement, 54 Tenn. L. Rev. 203 (1987). Judith S. Koffler is emphatic that proponents of law and literature constitute a
the ambivalent empiricism of the conventional schools of legal interpretation.21

Structural analysis affords substantial common ground for evaluating the moral and practical issues at the core of interpretive disputes. Indeed, examination of what theories say about structure and what practitioners do with it suggest that theories that initially appear abstract or ethereal may in reality be in operation in routine adjudication. Structure, when metamorphosed into structuralism (and I argue that it must) can and does function to bridge the purported chasm between academic theorizing on interpretive methodologies and the mundane practice of law by judges and lawyers.22

I support these claims through the exploration of the use of structural tools by the courts in a concrete practice-oriented setting—the federal securities laws. This development, which has entailed judicial undermining of the more familiar and purportedly solid ground of textualism and legislative history, appropriately rejects the illusory comfort of the constrained exercise of discretion through factionated inquiries.23 It would be unfortunate, however, if the technocratic impulse to eschew the unfamiliar confines the use of structural analysis to the demonstrably fallacious search for “legislative intent.” Rather, the methodology nascent in conventional structural analysis must be transposed into “structuralism.”

Part II reviews competing theories of statutory interpretation with a view to the proper placement of structure in the interpretive scheme. This undertaking is necessary to the purpose of the Article for two reasons. First, it juxtaposes the competing methodologies. The diver-

21. These schools are discussed infra parts II.A and II.B.

22. The complaint that much legal scholarship is barren for want of relevance to the workaday world of the practicing lawyer is a familiar one coming from legal practitioners. But somewhat more surprisingly, it now appears to be shared by legal scholars themselves, including those with some of the more prolific output of such purportedly increasingly unhelpful theoretical material. See, e.g., J.M. Balkin, Postmodern Constitutional Interpretation, 90 Mich. L. Rev. 1966, 1984-85 (1992); Pierre Schlag, “Le Hors De Texte, C’est Mais”: The Politics of Form and the Domestication of Deconstruction, 11 Cardozo L. Rev. 1631 (1990).

23. I thus share Professor Black’s view that structural analysis has the potential of freeing us to talk candidly about the actual forces that mold our reasoning, rather than the evasive and disingenuous hand-wringing protestation of institutional powerlessness that characterizes conventional reliance on textual and historical exegesis. Black, supra note 13, at 13-29; cf. Maxwell O. Chibundu, Delinking Disproportionality From Discrimination: Procedural Burdens as Proxy for Substantive Visions, 23 N.M. L. Rev. 87 (1993) (discussing and critiquing substitution of atomized inquiry in Title VII analysis for holistic understanding of substantive antidiscrimination norms); Hermann, supra note 13, at 1158 (“The fundamental tenet of structuralism is that analysis should consist of the study of the complex network of relationships between the elements of a cultural pattern or social institution rather than an examination of the individual elements of a whole.”).
gent views enumerated in the part are not discrete objects floating past each other—if only for the simple reason that they arise out of the same cultural milieu and shared experiential backgrounds—but are fusible elements readily appreciated when presented as structural arguments. Second, this presentation of competing arguments foreshadows the criticism and reconstruction that I undertake in parts III and IV, respectively.

Part III focuses directly on the use of “structure” in the interpretation of the securities laws. The Ballay decision reveals the distinctive attributes of an interpretive methodology that relies on structure and uncovers some traditionally unexplored assumptions in conventional structural analysis. The discussion demonstrates that resort to structural analysis under conventional statutory analysis shares much in common with the theoretical underpinnings of the radical critics’ preference for and recommendation of a holistic approach to interpretation.24

Part III develops the arguments for the transformation of structure into structuralism. Briefly stated, I defend the claim for viewing structure and structuralism as superior tools of statutory interpretation on the basis of their validity both as accurate reflections of what happens in reality and as possessing potentialities for the humane development of social practice. Interpretation occurs neither as a process of hierarchical direction and obedience—whether between legislatures and courts or between courts and regulated persons—nor is its proper functioning dependent on establishing the “writer’s intent” or on acceptance of a “reader-centered” orientation. Structure and structuralism, better than “textualism” or “historical analysis,” reflect the intersubjective impetus that drives statutory interpretation. Each participant in the process must internalize an understanding of the written text and must do so in a form that permits the retransmission of that understanding—by action or by words—to others who in turn will be required to internalize the received communication prior to retransmission. If the process of internalization is subjective—that is, dependent on the peculiar or unique make-up of a particular individual—then the requirement of retransmission ensures consideration by the sender of the subjective preferences of the intended recipient. Structure and structuralism thus permit and encourage intersubjective (not objective)25 communication as an essential element of inter-


25. The term “intersubjective” is a better description of the process because it recognizes the integral relevance of personal preferences to the ultimate choice.
pretation. Structural interpretivism, then, explains and promotes dynamism in legal interpretation, enhancing the social communal practice that is lawmakers.

II. CONSTRUCTION AND DECONSTRUCTION IN THE
INTERPRETIVE METHOD

Let me begin by making some categorical claims, the accuracy of which it is the ultimate function of this Article to demonstrate. Perhaps the least controversial of these is that “interpretation” is the search for meaning. The difficulty with the search arises from the fact that any communication potentially is both over- and under-inclusive. No word or set of words, no act or group of acts, can be confined to convey that and only that which either the sender intends or the recipient desires. The effort to convey and to receive the correct message involves the simultaneous expansion and contraction of communication by both the sender and the recipient. This interactive process occurs on at least two levels. At the first, the “interpreter” seeks to make intelligible to herself the body of information communicated by the speaker. This is necessary because all interpretation is but a prelude to further communication. At the next stage, she seeks and attempts to communicate that understanding intersubjectively to others, thereby invoking in the recipient the recommencement of the process.

This appraisal of the interpretive process underscores two features that have proved to be critical sources of controversy for theorists and reflective practitioners. Because intelligibility is possible only against a circumscribed background, the interpreter, whether she desires it or not, is constrained by the “determinacy principle.” She must engage in line-drawings or rule-makings that permit her to articulate (if only to herself) principles that inform her understanding of the body of information to be interpreted. At a general level, such principles might be that she ought to look only to the written text, or to the written text and background history, or to the structure of the written text and so on. At more specific levels, it might be that a catalogue

“Objective” posits a “neutral” or “impersonal” mechanism, while “intersubjective” suggests the need for coincidence of subjectively arrived-at decisions.


27. For a powerful description of the phenomenon, see Stanley Fish, Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies 57-67 (1989); cf. Dickerson, supra note 26, at 32-42.

28. Such information need not be confined to written or “oral text,” but may include “practice” and “relationships.”

29. See infra part II.A.
of general items is qualified by the more specific item in the catalogue. Whatever the case, the line-drawings or rules are not arbitrary in the sense that given the same problem again, the interpreter is likely to adopt her previously employed rule in making sense of the body of information. The extent to which these rules themselves can be articulated with any degree of preciseness, and communicated intersubjectively, is a major source of disagreement. Yet, any conception of the interpretive process must come to grips with the phenomenon, for interpretation cannot occur without the internalization in the interpreter of such rules.

The second set of constraints—which may be termed the "legitimacy principle"—flows from the requirement that the search for meaning is not limited to the internal comprehension of the interpreter, but that of no less significance is the communication of that understanding to others. This requirement is particularly critical in a field such as law, where the value of interpretation lies in no small measure in its capacity to coerce conduct. To permit the intersubjective translation of the determinacy principle, something other than the self-internalization of the rules is required. That "something" usually is the abstraction and presentation of the circumscribing rules in a "coherent" form that is more or less recognizable and acceptable to a significant segment of those involved in the interpretive process. The "legitimacy principle" is essential to interpretation because without it, transindividual understanding would be difficult, and the justification for legal coercion would be substantially undermined. Like determinacy, the origins of the circumscribing rules and the nature of their recognition and acceptance pose significant challenges to theories of interpretation.

This part outlines the character of the disagreements in interpretive theory by describing the main features of the dominant schools. By examining the role of structure in the analytical tools employed by the

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30. One of the more provocative and celebrated airings of that disagreement is found in Professor Fish's criticism of Professor Fiss' critique of the critical legal studies movement. See Fish, supra note 27, at 120-40 (discussing Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982)).

31. By this statement, I do not mean to suggest that "law" is alone in conditioning coercive consequences on interpretive capacity. Cf., e.g., Richard A. Posner, Law and Literature: A Misunderstood Relationship 4-14 (1988) (suggesting interpretation in literature is purely aesthetic and that legal interpretation has to be different than literary interpretation). But see Fish, supra note 27, at 294-98 (asserting that all interpretation—including that engaged in by literary scholars—entails cost/reward calculus). My point is that legal interpretation—certainly statutory interpretation—has the primary purpose of specifically regulating conduct, with the attendant consequence that misunderstanding of the intersubjective communication will more likely than not result in some form of enforceable sanction.
various schools, I seek to demonstrate not merely their differences, but to expose similarities that are rarely acknowledged. Appreciating the similarities is essential to the construction of an interpretive framework that is useful in the workaday world of the judge, practicing lawyer, broker-dealer, investor, or arbitrator, and provides the intellectual justification for recommending "structuralism" as a preferable alternative to "structure" in the interpretation of statutes.

Subpart A presents the conventional account of statutory interpretation, which asserts that the function of the judge is either to enforce the text of a statute or to divine legislative intent and to issue edicts that conform to such intent. Subparts A.1 and A.2 review the more commonly understood approaches of textualism and legislative history respectively as tools of statutory construction. Subpart A.3 discusses the place of structure within this scheme of "writer's intentionalism." Subpart B presents what I term the "transcendent institutional approach," which seeks to bridge the gap between "intentionalism" and "reader's autonomy" by advancing theories of interpretation that appeal to legal institutional objectives and interests as controlling. Subpart C discusses understandings of interpretation that borrow heavily from contemporary critical literary methodologies by investing meaning in the reader's perspectives and experiences. Subpart D pulls together the function of structure in these methodologies.

A. Interpretation as the Construction of Legislative Intent

Clearing a useful path through the contemporary thicket of ideas on interpretation is arduous. The conventional account of statutory interpretation—at least as proclaimed in judicial opinions—is that it is a quest for ascertaining the intent (or sometimes "purpose") of the

32. As I argue infra part IV, the process of interpreting statutes cannot be defined solely in terms of the relationship of a judge to the enacting legislature. Indeed, the privatization of the interpretive function under the auspices of the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1988), means that future development of the scope of the Securities Act, among other statutes, will be undertaken by nonjudicial persons. See, e.g., Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477 (1990).
34. I doubt that anyone would disagree with Judge Starr's observation that the "interpretation of statutes has tended to remain a rather ad hoc enterprise with basic rules of the game not firmly settled. To the contrary, there seems to be a bewildering variety of rules, as captured in the old saw about maxims of statutory construction . . . ." Starr, supra note 11, at 703; see also Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 852-53 (1989). More graphically, Professor Michael S. Moore introduced a recent article of his by quoting M. Devitt: "When someone starts talking about interpretation, reach for your gun." Michael S. Moore, The Interpretive Turn in Modern Theory: A Turn for the Worse, 41 Stan. L. Rev. 871, 871 (1990) (quoting William G. Lycan, Judgment and Justification 195 n.7 (1988)).
legislation. Although "legislative intent" and "purpose of legislation" are not necessarily the same, their differences are de-emphasized by contrasting the process of teasing meaning out of them to a search grounded on "judicial" or "reader" centered intent. The conventional accounts frame their disagreements in terms of how the appropriate "writer's intent" ought to be ascertained. All else being equal, there is general acceptance that the words employed in the legislation furnish the most reliable indicator of such "intent." Indeed, many jurists and scholars contend that, in most cases, such

35. For a different breakdown of the conventional approaches to the interpretive process, see T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20 (1988). Professor Aleinikoff classifies approaches as being either "archeological" (that is, searching for meaning extant at time of enactment) or "nautical" (that is, reconstructing meaning in light of present-day demands). *Id.* at 21. He notes that although "[t]raditional debates about statutory interpretation have usually been intramural debates within the archeological metaphor," attributes of "nauticalness" exist in textualism and the legal process schools of interpretation. *Id.* Because my interest in this Article is in the application of the interpretive methodologies, rather than in the canards advanced to justify them, I place somewhat less emphasis on the tension between "textualism" and "legislative intent" than does Professor Aleinikoff. *Cf. id.* at 22; *see also* William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321 (1990) (classifying legal interpretive methodologies as falling into "intentionalism," "purposivism," or "textualism").

36. See, e.g., Dickerson, supra note 26, at 87 (distinguishing between "intent" as articulated or immediate purpose, and "purpose" as "ulterior" purpose); Patrick O. Gudridge, *Legislation in Legal Imagination: Introductory Exercises*, 37 U. Miami L. Rev. 493, 496 (1983) (asserting that "[s]tatutory analysis ... may be both descriptive and precipitative of that which it describes"). Compare Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863 (1930) (concluding that interpretation should aim at ascertaining statutory purpose and giving effect to such) with Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of An Unlikely Pair*, 32 Rutgers L. Rev. 676, 687 (1979) (concluding that legislative intent is derived from statutory purpose and, with purpose being logically prior to intention, it "set[s] the context within which the semantic limits of the statutory language came into being") and James M. Landis, *A Note on "Statutory Interpretation,"* 43 Harv. L. Rev. 886 (1930) (concluding that statutory interpretation should aim at ascertaining legislative intent). Of course, this distinction does not explain how "purpose" is determined, and the facility with which conventional practitioners and theorists slip from one to the other is masterfully stated by Professor Radin in his follow-up essay. Max Radin, *A Short Way With Statutes*, 56 Harv. L. Rev. 388, 422 (1942) [hereinafter Radin, *A Short Way With Statutes*] ("It makes little difference whether it is called the 'program,' or the 'policy,' instead of the 'purpose.' If we wish to retain the traditional language, we may call it the 'mandate,' or the 'intent' of the legislature, provided we do not really mean 'intent.'").

37. "Legislative intent" is, in the context of federal legislation, "congressional intent." Traditional and new scholarship alike have tended to equate "judicial," "administrative," or similar authoritative decisionmaker's intent as exhausting the possibilities of "reader's" intent. As I suggest infra part IV, this is a mistake. *Cf.* David Cole, *Against Literalism: Heracles' Bow: Essays on the Rhetoric and Poetics of Law*, 40 Stan. L. Rev. 545, 549-50 (1988) (book review) (criticizing Professor White's otherwise commendable integration of law and narrative on related grounds that "the participants seem to be exclusively lawyers, judges and legal scholars" and, "[i]n a move unfortunately characteristic of much academic legal analysis, the parties—those most directly affected—are effaced from the process").
words in and of themselves are dispositive, and the search for meaning need not go beyond this stage. This approach is generally referred to as the "textualist" or "plain meaning" approach.

Other jurists and commentators contend, however, that it is the exceptional case where intent can ever be determined solely on the basis of the words employed. They contend that words have meaning only when placed in context. In virtually all cases, one must resort to extra-textual material to interpret and give meaning to any statute. Such extra-textual sources are generally of two categories: "legislative history" and "structure." In this scheme, legislative history is the preferred tool because, like the text, it is a more direct source of legislative intent than structure.

But there are those who do not view the search for the meaning of a statute as the same as ascertaining legislative intention. Under this view, focusing on legislative intent is misguided for both practical and normative reasons. As a practical matter, it is virtually impossible to ascertain the corporate intent of a body such as Congress which ought to (and generally does) portray and mirror diffused interests. Indeed, legislation in a pluralist democracy more often than not demands compromises that are not easily unravelled either by parsing the language of a statute, its legislative history, or structure. As a normative matter, the search for intent is misguided because, owing to such factors as changed circumstances, and temporal and cultural distance between the lawmaker and the regulated, the intent of the enacting Congress, even if it can be ascertained, may be inapposite to the resolution of a current problem. For these reasons, the role of the judge should not be viewed simply as that of a "congressional agent."

38. See infra part II.B. Professor Frederick Schauer appears to subscribe to an even stronger form of the "plain meaning" approach. Under this approach, the aim of statutory interpretation is not to ascertain the "purpose" of a statute, but rather the meaning of the statutory text and to give effect to the text without regard to the "purpose" of the legislation. See, e.g., Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991); Frederick Schauer, The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw, 45 Vand. L. Rev. 715 (1992) [hereinafter Schauer, Plain Meaning].

39. See, e.g., Stevens, supra note 1, at 1373. For a discussion of the historical development of legislative history, see infra text accompanying notes 67-79.

40. See, e.g., Sunstein, supra note 18, at 416. Some commentators, notably deconstructionists, contend that words, even when purportedly placed in context, do not provide any definitive guidance that is independent of the listener's preferences. See generally infra part II.C.3.


42. Sunstein, supra note 18, at 416.

43. This term is apparently traceable to Judge Learned Hand. See SEC v. Robert Collier & Co., 76 F.2d 939, 940-41 (2d Cir. 1935); see also Lehigh Valley Coal Co. v. Yensavage, 218
Rather, the judge as interpreter is an independent actor with the responsibility to render as good an interpretation of the statute as she can.

The contours of this role of the judge have received few elaborations and appear subject to significantly fewer institutional limitations. Two such approaches include the following. The judge, while an independent agent, is nonetheless engaged in a collaborative enterprise with the legislature. In interpreting a statute, the judge should give it the best meaning that it can bear.44 In doing so, she may of course call on a variety of conventions including those open to the legislative agent, canons of interpretation,45 and any other assets that her background, training, or experience as a member of a specialized community equips her to call on as part of the interpretive project.46 Alternatively, the “legal process” model, while limiting the judge to the quite traditional role of being an “agent” of the law, assigns her the task of ascertaining the “purpose” of the legislation and of interpreting the statute to fulfill that purpose.47 The judge is not a “congressional agent” in the sense of determining the “intent of Congress,” but she is also not free simply to give the statute any meaning she thinks it would bear, for she must subject her independent determination to her institutional role as a subordinate law-giver to the legislature within a constitutional democracy.

The following material fleshes out these contending perspectives.

F. 547, 558 (2d Cir. 1914) ("Such statutes are partial; . . . they should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."). The "congressional agent" theory asks that a judge put herself in the position of the enacting legislators and imaginatively figure out how those legislators would have resolved the problem if it had been presented to them. See Richard A. Posner, The Federal Courts 286-87 (1985) (suggesting alternative to viewing statutory interpretation under canons of construction, where judge places herself in shoes of enacting legislator); see also Sunstein, supra note 18, at 415; Note, Why Learned Hand Would Never Consult Legislative History Today, 105 Harv. L. Rev. 1005, 1005 (1992) (contrasting Learned Hand's "congressional agent" theory with Justice Scalia's "plain meaning" theory of interpreting statutes).

44. See Dworkin, supra note 41, at 314-16; see also infra text accompanying notes 113-14. Professor Dworkin analyzes the process to participation in the collective enterprise of weaving a story. Id. Each participant, taking up where the other left off, attempts to tell the story as best she can by interpreting the work preceding hers in the best light possible, given the nature of the overall enterprise.

45. For a good overview of sources that a judge may use to interpret statutes, see generally William N. Eskridge, Jr. & Phillip F. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 689-96 (1988) (discussing rules, presumptions, and canons of statutory interpretation that judges have formulated over time).

46. Cf. Sunstein, supra note 18, at 405.

1. Textualism

To the extent a legal claim is based on a statute—always a written document—any understanding of the implication of the statute for the claim must necessarily look to its text. Hence, all statutory interpretation begins with the text. That is an axiom subscribed to alike by the radical and the reactionary. To make the statement, however, only invites the pugilists into the ring.48 In this subpart, I focus on the relevance of “text” to proponents of the conventional approach to statutory interpretation.

Belief in the more or less self-revelatory characteristic of the written word is particularly strong among conventional textualists and appears to be on the rise in the United States Supreme Court.49 To such conventionalists, the “text” or “plain wording” of the statute derives legitimation as the starting point for any construction of law from three distinguishable sources. The first is grounded on homage to pedigree; in this case, the practice of resort to precedent.50 English courts were, by the early eighteenth century, explaining their decisions by pointing to words used in the statute and disclaiming any power to vary those words, or to deviate from their supposedly fixed meanings. A subsequent case was thus to be decided by no more than invocation of the prior case.51 This conception of the role of the

48. Frequently, the decisive issue is not whether the text should be the “starting point,” but whether it is also the “end-point”; that is, whether it is self-contained and dispositive of the interpretive process. See, e.g., Aaron v. SEC, 446 U.S. 680, 708 (Blackmun, J., concurring in part and dissenting in part); cf. Pinter v. Dahl, 486 U.S. 622, 653 (1988) (noting that, in interpreting provisions of securities laws, Court looks both to “language” and “the statutory scheme”).


Although by no means empirically sufficient, the results of a series of computer database searches are at least suggestive. Search of LEXIS, Genfed Library, US File (June 10, 1993). They disclose that between Jan. 1, 1990 and June 10, 1993, the Court or its members made references to Webster’s Dictionary in 46 cases and to “plain meaning” or “text” in 54 cases. Respective references for each of the decades of the twentieth century were: 1900-1909: 17, 59; 1910-1919: 10, 61; 1920-1929: 6, 37; 1930-1939: 13, 33; 1940-1949: 14, 42; 1950-1959: 6, 34; 1960-1969: 11, 44; 1970-1979: 28, 70; 1980-1989: 53, 158. Prior to the twentieth century, the relevant figures were 27 and 208.

50. Justice Scalia, the main proponent of plain meaning on the current Supreme Court, has frequently emphasized the importance of “pedigree” in adjudication, arguing that longevity alone is a good reason for holding onto a practice. See, e.g., Burnham v. Superior Court, 495 U.S. 604 (1990); see also infra note 192.

51. See generally Rupert Cross, Precedent in English Law 5-7 (3d ed. 1977) (discussing system of precedent, practices of courts, and court hierarchy in England). The English understanding of “precedent” is stated by Professor Cross as follows:

[A] rule laid down by a judicial decision is law because it is so laid down, the source of the judicial decision, whether it be another decision, a dictum in
judge became part of the lore of the courts of the new country, 52 and it is now generally legitimated by the assertion that precedent embodies "consistency," which both serves instrumental needs 53 and is a good in and of itself.

The second source, firmly grounded in the vision of the judge as a "congressional agent," is that the text provides the clearest statement of legislative intent. 54 It is those words, not some unframed "legislative purpose," "legislative intent," or "legislative history," that have survived the constitutional process of a majority vote in both houses of a bicameral legislature and the signature of the President. 55 Those

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52. See, e.g., Stephen B. Presser, The Original Misunderstanding: The English, The Americans and the Dialectics of Federalist Jurisprudence 29 (1991) (explaining that "judicial function, as it was to be exercised in the new American Republic, would simply be one of law finding, and not lawmaking. Judges were to guide their decisions only by the clear dictates of reason and common law precedent, and, ultimately, ... constitutions"); John Choon Yoo, Note, Marshall's Plan: The Early Supreme Court and Statutory Interpretation, 101 Yale L.J. 1607, 1607-12 (1992).


54. Justice Scalia has been the most persistent proponent of this rationale for strictly adhering to the text. See, e.g., West Virginia Univ. Hosp. v. Casey, 499 U.S. 83, 98 (1991) ("The best evidence of that purpose is the statutory text"); Pennsylvania v. Union Gas, 491 U.S. 1, 30 (1988) (Scalia, J., concurring in part and dissenting in part) ("It is our task, as I see it, not to enter the minds of the members of Congress . . . but rather to give fair and reasonable meaning to the text of the United States Code."); Kmart v. Cartier, Inc., 486 U.S. 281, 318, 319-25 (1988) (Scalia, J., concurring in part and dissenting in part) ("In my view, however, subsections . . . of the regulation are also in conflict with the clear language of [the statute]. I therefore join [parts of the Court's opinion]."); see also Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 471-73 (1989) (Kennedy, J., concurring) (agreeing with Court's invocation of exception to traditional rules of statutory interpretation, but noting that "I believe the Court's loose invocation of the 'absurd result' canon of statutory construction causes too great a risk that the court is exercising its own 'will instead of judgment,' with the consequence of 'substituti[ng] [its own] pleasure to that of the legislative body.'") (quoting The Federalist No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

55. See generally Dickerson, supra note 26, at 7 (discussing legislative supremacy and separation of powers). This rationale has been a mainstay of Justice Scalia's opposition to the use of legislative history. See Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2490-91 (1991) (Scalia, J., concurring) ("I am depressed if the Court is predicting that the use of legislative history for the purpose I have criticized [using legislative material to provide an authoritative interpretation of statutory text] 'will . . . reach well into the
words, in a government of delegated sovereignty and powers, ought to
be construed and given effect unless to do so would yield clearly ab-
surd results.56

(“Committee reports, floor speeches, and even colloquies between Congressmen . . . are
frail substitutes for bicameral vote upon the text of a law and its presentment to the
concurring in part and concurring in the judgment) (stating that meaning of terms within
statute should not be determined from legislative intent of majority of Congress, but rather
from context and ordinary usage of language most likely understood by Congress as a
whole).

It is not clear whether textualism is a response to the supposed evils of the use of
legislative history, or whether one ought to avoid legislative history because it otherwise
subverts the legitimate primacy of text. See, e.g., Blanchard v. Bergeron, 489 U.S. 87, 98-99
(1989) (Scalia, J., concurring in part and concurring in the judgment) (stating that use of
legislative materials can wrongly influence judicial opinions and cause judiciary to ignore
plain meaning); Hirschey v. Federal Energy Regulatory Comm’n, 777 F.2d 1, 7 n.1 (D.C.
Cir. 1985) (Scalia, J., concurring) (“I frankly doubt that it is ever reasonable to assume that
the details, as opposed to the broad outlines of purpose, set forth in a committee report
come to the attention of, much less are approved by, the house which enacts the
committee’s bill.”). But see INS v. Cardoza Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J.,
concurring) (contending that role of judge is to interpret text of statute, not to reconstruct
intentions of the legislature). Perhaps not surprisingly, then, Justice Scalia’s approach to
strict textualism has been far from consistent. See, e.g., T. Alexander Aleinikoff &
Theodore M. Shaw, The Costs of Incoherence: A Comment on Plain Meaning, West Virginia
University Hospitals, Inc. v. Casey and Due Process of Statutory Interpretation, 45 Vand.
L. Rev. 687 (1992); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990);
Nicholas S. Zeppos, Justice Scalia’s Textualism: The “New” New Legal Process, 12 Cardozo L.

56. See Hart & Sacks, supra note 47, at 1144 (quoting Lord Blackburn in River Wear
Comm’rs v. Adamson, 2 App. Cas. 742, 746 (H.L. 1877), from which the “Golden Rule”
originated). This so-called “Golden Rule” appears to be one concession that Justice Scalia
makes to complete reliance on the text of a statute. See Green, 490 U.S. at 527 (Scalia, J.,
concurring in part and concurring in the judgment) (“I think it entirely appropriate to consul . . .
the legislative history . . . to verify that what seems to us an unthinkible disposition . . .
was indeed unthought of. . . .”). But even in such a situation, the
affirmative construction of the statute is not to be based on legislative history, but on what
may be referred to as “structure.” See, e.g., Jet v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738-39
(Scalia, J., concurring) (“To hold that more general provisions of [a statute] establish a
mode of liability . . . that is excluded from the closely related statute . . . would violate the
rudimentary principles of construction that . . . where text permits, statutes dealing with
similar subjects should be interpreted harmoniously.”); Hirschey, 777 F.2d at 9 (Scalia, J.,
concurring) (stating that judge may, in face of ambiguity of text, engage in process of
“rationalizing the law” by making those adjustments that coexisting texts require in order
that corpus juris as whole make sense); see also Rowland v. California Men’s Colony, 113 S.
Ct. 716, 720 (1993) (concluding that where Congress fails to provide specific definition
and, in Court’s judgment, definition contained in Dictionary Act does not fit, Court may
rely on structure of statute to determine whether term should be given meaning other than
that in Dictionary Act).

In Bray v. Alexandria Women’s Health Clinic, 113 S. Ct. 753 (1993), Justice Scalia,
writing for the Court, suggested that past judicial construction of a statute may suffice to
override the plain text requirement, by relying entirely on precedent rather than legislative
materials. Justice Scalia’s strong antipathy to the use of legislative history appears to be
The third source of legitimation is the essentially practical one that statutory text, whatever its limitations, offers an essentially solid and corporeal grounding to anchor the exercise of discretion and subjectivity that are inherent attributes of the interpretive process.\textsuperscript{57} "Law," as the "command of the sovereign," is most effective when stated in direct, simple, and straightforwardly enforceable terms.\textsuperscript{58} Once a judge casts off from this anchor, there is no telling how far away from the shore of legislative intent or judicial accountability she might get washed. To avoid this slippery slope, it is better that the judge at all times be tethered to the restraint (some might say straight-jacket) of textualism. Indeed, it might be argued that the contemporary adherence to textualism flows not so much from an affirmative belief in the constitutional primacy of the legislative will, but from antagonism to legislative history based on the perception that it has been illegitimately employed to loosen the fidelity of judges to the textual moorings.\textsuperscript{59}

Despite these arguments, strict adherence to textualism has not been the norm.\textsuperscript{60} As already suggested, even the strongest propo-
ments of textualism concede that a judge need not strictly adhere to the wording of the text if to do so would yield absurd results. But there are additional reasons why textualism has not been the dominant force in statutory interpretation. Part of the answer again lies in history. In the first place, far from adopting a monolithic approach to statutory construction, English judges—predecessors to and bequeathers of the American judicial tradition—invoqué a melange of approaches that included both textual literalism and resort to extra-textual or contextual material, notably judge-made canons. Despite efforts to enshrine the literalist approach in the early years of the new republic, federal judges looked to extra-textual material to explain constructions they gave to statutory provisions. By 1892, the Supreme Court could assert that “[i]t is a familiar rule, that a thing


61. See supra note 56; see also Antonin Scalia, Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345, 381-82 (arguing that judges in interpretive setting bend statutory language in order to take cognizance of changed circumstances). Moreover, this attitude provides reconciliation between Justice Scalia's strong faith in textualism and his not infrequent willingness to depart from it under the guise of structural analysis. See supra note 56; see also United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor."); United States v. Fausto, 484 U.S. 439 (1988).

Alternatively, the use of similar language in other statutes may provide sufficient guidance for the court. See Pierce v. Underwood, 487 U.S. 552, 563-68 (1988); Kungys v. United States, 485 U.S. 759, 770 (1988) (establishing meaning of "material" as used in statute revoking citizenship by looking to meaning of word in federal statutes criminalizing false statements to public officials).

Professor Aleinikoff has observed that Justice Scalia's technique here seems quite at odds with other principles he holds equally dear. Aleinikoff, supra note 35, at 30 n.11 ("Well-schooled in public choice theory, Scalia knows that it is perilous to believe that similar terms used in different statutes refer to similar concepts. Thus, Scalia seems to be exchanging one fiction (legislative intent) for another (consistency of meaning across statutes.").


63. See, e.g., Priestman v. United States, 4 U.S. (4 Dall.) 28, 30 n.1 (1800) (summarizing Justice Chase's circuit opinion, endorsing conformity to legislative intent in American courts, with which Court's brief opinion appears to concur). For an interesting evaluation of the methods of interpretation in the early Supreme Court, see Yoo, supra note 52, at 1608-12; cf. Presser, supra note 52, at 171-72. Presser observes that early years, the Court was of "decidedly secondary institutional importance in America." Id. at 171. Spurred by the doctrines of early Justices like Chase and Marshall, an "independent and significant federal judiciary" was later created, responsible for "accomodat[ing] the Constitution to the changing economic and social needs of the country." Id. at 172.

64. See, e.g., Yoo, supra note 52, at 1610; see also Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2486 (1991) (using legislative materials to provide interpretation of
may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”

In short, the judicial mission as interpreter was not mechanically to provide lexical meaning to words, but to ascertain the intent embodied in the words.

2. Legislative History

The use (or “abuse”) of legislative history is at the core of contemporary debate over statutory interpretation primarily because once the wall of literalism is breached by reference to contextual material in a search for the “intent” or “will” of Congress, the statements of the statutory text). But see id. at 2490 (Scalia, J., concurring) (criticizing court’s technique of statutory interpretation).

65. Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) (noting that legislative purpose of statute must be kept in view when provision is considered and given effect); see also Riggs v. Palmer, 22 N.E. 188, 189 (N.Y. 1889). But see Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 HARV. L. REV. 417, 419 (1899) (“We do not inquire what the legislature meant; we ask only what the statute means.”).

66. With characteristic straightforwardness, Justice Holmes cut to the heart of the matter in Boston Sand & Gravel Co. v. United States, where he wrote that the supposed rule that when the “meaning of language is plain we are not to resort to evidence in order to raise doubts . . . is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.” 278 U.S. 41, 48 (1928); see also United States v. American Trucking Ass’n, 310 U.S. 554, 543-44 (1941) (“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.”) (quoting Helvering v. New York Trust Co., 292 U.S. 455, 456 (1934)); Harry W. Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes, 25 WASH. U. L.Q. 2, 28 (1939) (“[E]xtrinsic aids should be resorted to at the outset, in every case, in order to reveal, if possible, what the statute meant to those responsible for its enactment.”). Professor Aleinikoff has argued that “in an attempt to restrain interpreters, textualism accepts a substantial margin of error in identifying legislative will.” See Aleinikoff, supra note 35, at 37.


In brief, courts have not done well at achieving consistency in the process of employing this body of materials. At times, the Supreme Court suggests that repair to secondary materials will do only when there is, fairly read, real ambiguity in the statute. At other times, resort to legislative history seems rather quick, almost reflexive in nature.

Starr, supra note 11, at 706.
body as spoken through its members arguably provide as good a guide to that intent as any other extra-textual material.

Although the courts do not appear explicitly to have resorted to legislative history in the early years of the republic, it was more or less an established part of the arsenal of interpretive methodologies in the Supreme Court by the end of the nineteenth century. Resort to legislative history—particularly following the New Deal—became so pervasive that, by 1971, the Supreme Court appears to have inverted the traditional relationship between text and legislative history.

The attractiveness of legislative history to a court seeking to decipher and give content to the inherently amorphous concept of corporate intent is readily apparent. The strength of legislative history lies in its potential to address directly the putative interpretations that legislators, were they asked to sit as judges, would have given the claims of the litigants. As such, the plainspokenness and advocacy exhibited on the debating floor of a legislature provide better guides of the will of the people than the ambiguity-ridden legalese of the unvarnished text of a statute. Legislative history, reflected in its varied sources including floor debates, committee reports, interpretive memo-

68. According to a student Note, "A survey of the pre-Marshall Court's statutory interpretation cases did not uncover a single instance where a Justice resorted to legislative history." Yoo, supra note 52, at 1613 n.57. Another reviewer notes that the sort of material that informs inquiry into legislative history has been available in published form since 1774. Johnson, supra note 67, at 414 n.11. Federal judges in the nineteenth century, however, generally did not use them. Id. at 414.

69. See Holy Trinity Church, 143 U.S. at 459 (addressing "consideration of the whole legislation, or of the circumstances surrounding its enactment," when construing statute). See generally Johnson, supra note 67, at 420-27 (discussing federal judiciary's conversion to use of legislative history).

70. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.20 (1971) ("The legislative history of [the statutes at issue] is ambiguous. . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent."); see also Wald, supra note 67, at 195 ("No occasion for statutory construction now exists when the Court will not look at the legislative history.").


randa, and signing statements by the President and other members of
the executive branch,73 and even testimony by lobbyists,74 portray the
complexities of human problems and more authentically reflect the
absence of neatly packaged solutions.

Yet, it is precisely this true-to-life diversity of potential answers sug-
gested by the use of legislative history—the untidy mix of com-
promises, the absence of any decisive and dispositive resolution
offered up by legislative enactments—that has been the focus of the
attack on the use of legislative history. The claim is that the multiplicity
of elements available to the interpreter gives too much latitude to
unelected judges.

The claim that judicial reliance on legislative history undermines
the democratic system is usually framed in two ways. First, it is argued
that faithfulness to the democratic process requires that only those
words formally processed through the constitutionally prescribed
route of assent by a bicameral legislature and President are entitled
to construction by the judiciary.75 Second, the amorphousness of the
concept of legislative history renders it an arbitrary tool subject to un-
checked manipulation by judges according to their own agendas.76

(considering House conference committee report in determining meaning of "a
reasonable attorney's fee" as used in 42 U.S.C. § 1988); Wilder v. Virginia Hosp. Ass'n, 496
U.S. 498, 515 n.13 (1990) (citing to House and Senate reports for support of underlying
reasonable rate requirement in Boren Amendment); see also California v. American Stores
Co., 495 U.S. 271, 274 (1990) ("The inferences that American draws from its excerpts from
the subcommittee hearings simply are not confirmed by anything that has been called to
our attention in the committee reports, the floor debates, the conference report or con-
temporaneous judicial interpretations."). But see Ardestani v. INS, 112 S. Ct. 515, 520
(1991) (curtly dismissing statement in committee report as insufficient basis for
reaching contrary conclusion).

memorandum of the Justice Department); Griggs v. Duke Power Co., 401 U.S. 424, 433
generally UNITED STATES DEPT. OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A RE-
(report of the Attorney General from the Office of Legal Counsel); William D. Popkin,

industry witnesses); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 177 n.23 (1978)
(expressions of concern about endangered species from "Friends of the Earth" and
"Defenders of Wildlife").

75. See Note, supra note 43, at 1005. The answer to this contention, as this student
Note has sensibly pointed out, is that as long as legislative history is not viewed as
supplanting the text of the statute, but simply as offering "aid" in the interpretation of an
ambiguous text, the contention misses the point. It is not the legislative history that is
being construed, but the formally adopted text. See id. at 1007-08.

76. Although Justice Scalia is currently the most strident critic of legislative history on
this ground, see supra note 53, this basic criticism may be found in the writings of earlier
judges, notably Justices Frankfurter and Jackson. See, e.g., Schwengmann Bros. v. Calvert
Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring); Robert H. Jackson,
Judges are aided and abetted in this process by that cadre of unelected “power-brokers” derisively referred to as the “iron triangle”—legislative staffers, executive branch technocrats and the “liberal media”—that have been the butt of much lampooning by some conservatives in recent years.\(^77\)

These philosophical difficulties are usually buttressed by concrete problems in the use of legislative history. For example, should the relevant history be limited to the contemporaneous record at the time of enactment?\(^78\) What is the relevance of subsequent revisiting of the issue by Congress, or its failure to address the issue when it is brought

\(^{77}\text{Problems of Statutory Interpretation, 8 F.R.D. 121, 125 (1948) (legislative records are not always distinguished for candor or accuracy); Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 579 (1947) (stating that judicial construction should not create "an opportunity for a judge to use words as 'empty vessels into which he can pour anything he will ");}

\(^{78}\text{As Justice Scalia stated in Hirschey v. Federal Energy Regulatory Commission:}

I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee’s bill. And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription.

\(^{777}\text{F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring in the judgment); see also id. at n.1 ("The report itself is [sic] not considered by the Committee .... It was not subject to amendment to [sic] by the Committee .... It is not subject to amendment now by the Senate .... For any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let met [sic] just make the point that this is not the law. ....") (corrections in original) (quoting 128 Cong. Rec. 16, 918 (1982)) (statement of Sen. Armstrong).}

Along the same lines, the country’s most widely read conservative daily, the Wall Street Journal, has reported on and endorsed then-President Reagan’s reference to an “iron triangle” of the media, Congress, and special interest groups that blurs the correct constitutional balance and was partly responsible for the budget deficit. See, e.g., James Perry, Reagan’s Last Scene Blaming the ‘Iron Triangle’ for U.S. Budget Deficit Draws Mixed Reviews, Wall. St. J., Jan. 5, 1989, at A12; The Iron Triangle, Wall. St. J., Dec. 20, 1988, at A14. But see Popkin, supra note 73, at 699-700 (questioning criticism and asserting that congressional staffs are often very knowledgeable and are able to flesh out underlying statutory structure in legislative history without being politically manipulative). See also Starr, supra note 67, at 377 (discussing influence of those who are not politically accountable on the creation of legislative history).

\(^{78}\text{Compare, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560, 575 n.16 (1979) ("[The court’s] task is to discern the intent of Congress when it enacted § 17(a) in 1934 ....") and Leo Sheep Co. v. United States, 440 U.S. 668, 677 n.13 (1979) ("Of course, the reaction of the public or of Congress a decade after the enactment of the Union Pacific Act .... cannot influence our interpretation of that Act today.") (emphasis added) with Federal Election Comm’n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 36 n.12 (1981) (significance accorded post-enactment statement of sponsors of legislation) and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight."). Justice Kennedy appears to be stating the uneasy compromise on the current Court when he asserts:}
to its attention? These are challenging questions with no tidy answers, and they only multiply the potential for the abuse of discretion by an interpreting judge.

3. Structure

Unhappiness with the use of legislative history, coupled with acceptance of the reality that in certain circumstances the language of a statute is necessarily ambiguous, has resulted in the recommendation of and ready resort to structure as a tool of interpretation by many conservative judges. While references to structure in the interpretive process are pervasive, the method has received little explicit attention from commentators. It may be worthwhile at the outset, therefore, to define the term.

Structural analysis assumes that meaning can be derived from an examination of relationships. In conventional analysis, structure re-

Our task is not to assess the relative merits of the competing rules, but rather to attempt to infer how the [enacting] Congress would have addressed the issue . . . . We do this not as an exercise in historical reconstruction for its own sake, but to ensure that the rules . . . are symmetrical and consistent with the overall structure of the Act. . . .


80. See, e.g., Starr, supra note 11, at 706 (“In the midst of all [the schizophrenic use of legislative history] is a somewhat unnoticed, and perhaps quite salutary, development. There seems to be underway, in the inevitably untidy fashion of busy modern courts, a perceptible movement in favor of . . . structuralism. . . .”)


81. Judge Starr argues for the explicit articulation of the role of structure in statutory interpretation. Starr, supra note 11, at 703. Dean Guido Calabresi, in A Common Law for the Age of Statutes, devotes a chapter specifically to “structural responses.” GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 69-80 (1982). Professor Sunstein recognizes and discusses the valuable role of structural analysis in interpreting statutes. Sunstein, supra note 18, at 425-26. These acclamations, however, pale—at least in quantity—when compared to the vast amount of literature expressly devoted to textualism and to legislative history as modes of interpretation.
fers to the process of relying on the placement or juxtaposition of items of a statute one to another, or of a statute to other statutes. Such relationships may vary from the placement of words within a section, the placement of sections within a statute, or the placement of statutes within a code. Invocation of concepts of structural interpretivism may range from application of more or less established linguistic rules of punctuation, syntax, and grammar—in which case structure may be viewed as “textualism” by another name—to the incorporation of certain of the common-law canons. The structural relevance of other statutes to the interpretive process may be derived either from the similarity or dissimilarity of language—whether in terms of the words chosen or the internal organization of the provisions—or from a desire to create an intellectually coherent corpus in the sense of filling in most of the gaps while eliminating as many redundancies as possible. In the latter case, structure is hardly textualist, but is rather “purposive.”

To the extent that the structural methodology is essentially the linguistic enterprise of seeking to derive meaning from the order and placement of words, or by grammatical rules of punctuation or conjunctions, the approach quite easily fits the mold of the textualist and is characterized by the same strengths and weaknesses as discussed above. The more problematic issues with the use of structure as a means of ferreting out legislative intent arise with resort to certain of the canons and with the borrowing of legislative material from other statutes.

Although canons have been criticized from the earliest years of the republic as permitting too much latitude to judges, courts have em-


83. See infra note 91.

84. See infra notes 257-59, 398-407, and accompanying text.

85. For example, “and” gives provisions directly related significance, such that the statute requires that in order to satisfy its provisions, all of the elements listed must be met, while “or” gives the provisions independent significance, so that the requirements of the statutes are met by proving any of the listed elements. Compare Garcia v. United States, 469 U.S. 70, 73 (1983) (suggesting that words joined by “or” have separate meaning) with Schreiber v. Burlington N., 472 U.S. 1, 7-8 (1985) (suggesting that words in list might be given related meanings even if joined by “or”).

86. See, e.g., Pavelic & LeFlore, 493 U.S. at 125 (“Our task is to apply the text, not to improve upon it.”).

87. See, e.g., Justice Chase’s circuit court opinion in United States v. Priestman, as quoted in Priestman v. United States, 4 U.S. (4 Dall.) 28, 30 n.1 (1800) (comparing British practice of affording judges legislative power and American practice of conforming strictly to ascertainable legislative intent and endorsing latter).
ployed certain of them for the purpose of ascertaining legislative intent and as a check on a judge's imposition of her own policy preferences. Thus, the latinate canons such as noscitur a sociis, ejusdem generis, and expressio (or inclusio) unius est exclusio alterius are useful not because they compel a particular and determinate outcome—they do not—but because they provide selective means of rationalizing conclusions arrived at by reference to more substantive concerns such as one's "policy" preferences or understanding of practical realities—understandings that are then attributed unto the legislature.

The so-called "whole act rule" perhaps best illustrates the kinship between the traditional use of canons and the current structural approach to interpretation. The whole act rule posits that where the provisions of a bill receive passage as a single act, those provisions should be construed in tandem, with no one provision deemed to be superior or inferior to the others. No provision should be read, therefore, as superfluous or of lesser dignity than any other.

This rule is readily traceable to the canon exemplified in the so-called "mischief rule," requiring the judge to ascertain the purpose of legislation and to interpret the relevant contested provision so as to avoid the mischief that the legislation was enacted to address. Moreover, this latter rule may be seen as the progenitor of the rule of construction that demands not simply internal consistency in the

88. Noscitur a sociis, literally translated, states that meaning is derived by the company that a word keeps.

89. Ejusdem generis, a particularized form of noscitur a sociis, posits that a word of the same kind as others used in a list to which it belongs should be given a meaning similar to that given the companion words. Thus, where general wording follows specific terms in an enumeration of like terms, the general words should be construed to embrace only objects of the same nature or character as the specifically enumerated terms.

90. Expressio unius est exclusio alterius signifies a presumption that the inclusion of certain things, by negative implication, excludes other things. See, e.g., Herman & Maclean v. Huddleston, 459 U.S. 375, 387 n.23 (1983) ("Such canons long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose."). But see Ballay v. Legg Mason Wood Walker, Inc., 925 F.2d 682, 688 (3d Cir.) (relying on the canon), cert. denied, 112 S. Ct. 79 (1991).

91. See generally Norman J. Singer, 2A STATUTES AND STATUTORY CONSTRUCTION § 47.02 (5th ed. 1992) (discussing relevance of context in statutory construction). See also Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Kokoszka v. Belford, 417 U.S. 642, 650 (1974) ("When interpreting a statute, the court will not look merely to a particular clause . . . but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions . . . .") (quoting Brown v. Duchesne, 60 U.S. 183, 194 (1856)); Richards v. United States, 369 U.S. 1, 11 (1962).

92. See Heydon's Case, 76 Eng. Rep. 637 (Ex. Ch. 1584), reprinted in HART & SACKS, supra note 47, at 1144; cf. Aaron v. SEC, 446 U.S. 680, 705 (1980) (Blackmun, J., concurring in part and dissenting in part) ("The words of a statute, particularly one with a remedial object, have a meaning imparted to them by mischief to be remedied.").
construction of the particular statute, but overall consistency in the construction of statutes that deal with the same or similar subject matter.\textsuperscript{93} Here again, the judge is asked to ascertain the object of the range of statutes and to give the challenged statute or provision a reading that would be in harmony with the range of statutes in the field.\textsuperscript{94}

Assuming that the structural approach to interpretation is candidly employed to ascertain and give effect to legislative intent—and such may well not be the case\textsuperscript{95}—the use of structure is subject to at least three significant criticisms. First, as Judge Posner has pointed out, the approach makes sense only if one attributes to legislators omniscience both as to past acts and the future consequences of their enactments, an assumption that is indefensible against the backdrop of even a cursory examination of the legislative process at work.\textsuperscript{96}

Second, it assumes a legislative tendency towards comprehensiveness in the drafting and passage of legislation. There is good reason to believe, however, that the assumption is wrong. Legislatures often tackle problems incrementally, sometimes making inconsistent compromises in the process. Not infrequently, a legislature may decline to address a specific problem even when it recognizes its existence, leav-

\textsuperscript{93} See infra part III.

\textsuperscript{94} See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206-09 (1975). One can identify two forms of harmonization. The first is an essentially procedural approach in which the aim of structural analysis is to balance procedural obstacles with remedial benefits, with the goal being to avoid "statute shopping." (This appears to have been the driving impetus in Hochfelder and Ballay.) In the second, one can conceive of "substantive harmonization" of the coverage of statutes, with the object being to "fill-in" statutory gaps or to "eliminate" redundancies in the perceived overall scheme of the statute. The emphasis in this latter case is on the institutional fit of the interpretation achieved by the analysis without regard to the allocation of litigation burdens and benefits. See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2780-81 (1991) (creating "one- and three-year" statute of limitations for implied cause of action under § 10(b) of Securities Exchange Act of 1934 by relying on existence of such pattern in analogous express causes of action under 1933 and 1934 Acts); Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) (deciding whether plaintiff with expressed right of action under § 11 of 1933 Securities Act also possesses right to sue under judicially implied cause of action of § 10(b) of Securities Exchange Act). But see Lampf, 111 S. Ct. at 2789-90 (Kennedy, J., dissenting) (arguing that benefits and burdens ought to be taken into account). See also Morris v. McComb, 332 U.S. 422, 423-24 (1947) (deciding whether payment of overtime wages to employees of trucking firm was covered by provisions of Motor Carrier Act, administered by Interstate Commerce Commission, or Fair Labor Standards Act, with its much more expansive reach); infra part III.B.3.

\textsuperscript{95} See infra part III.B.3.

\textsuperscript{96} See Posner, supra note 43, at 280 ("Many canons of statutory construction are wrong because they impute omniscience to Congress. Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process."); Richard A. Posner, Statutory Interpretation — in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 806-07 (1983) (criticizing resort to canons for, among other things, implied presumption of legislative omniscience).
ing it to the judiciary to "fill in the gaps" in the context of actual disputes.

Third, reliance on structure assumes not only knowledge, but competence in draftsmanship by legislators. This assumption is faulty both because of a lack of precision in general rules of draftsmanship and because the drafters often work in very difficult environments characterized by shifting bargains, moving deadlines, and insufficiency of resources to devote to ensuring that the final product is perfect.

Thus, resort to structure, like resort to the plain text or to legislative history, may be an equally misleading guide as to legislative intent. While the invocation of all three may moderate the breadth of discretion exercised by the interpreter, their availability and selective weighing generate more discretion, itself subject to abuse. The argument can thus be made that if the goal of interpretation is to search out legislative intent uninfluenced by the exercise of the interpreter's preferences and predilections, that goal is unachievable. What this suggests is redefining the purpose of interpretation to take account of the participation of the interpreter in the process. This requires acknowledging that what is involved is not so much "interpretation" as "construction."

B. Interpretation as Construction: The Middle View

The challenge to intellectual honesty of asserting that the judge's role in construing a statute is that of giving effect to legislative intent has long been recognized. The difficulties flow from two sources.

98. See, e.g., Posner, supra note 43, at 281 ("[A] statute that is product of compromise may contain redundant language as a by-product of strains of negotiating process.").
99. See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Anna, 472 U.S. 237, 255 (1985) (Brennan, J., dissenting); Delaware Tribal Business Community v. Weeks, 430 U.S. 73, 97 (1977) (Stevens, J., dissenting) (asserting that discrimination was result of "legislative accident," caused by Congress being "too busy to do all of its work as carefully as it should").
100. But see United States v. Turkette, 452 U.S. 576, 581 (1981) (stating that these canons of statutory construction only posit presumptions to aid judge in deriving meaning; they are not iron-clad rules of interpretation, and, like all presumptions, their value may be overcome by evidence showing that statute evinces meaning contrary to presumption).
101. Cf. BankAmerica Corp. v. United States, 462 U.S. 122, 141, 145-48 (1983) (White, J., dissenting) (suggesting that after resort to plain language, legislative history, and structure, majority's conclusion is no more defensible than if it had relied solely on one of these tools).
102. See, e.g., Nicholas Z. Zeppos, Judicial Candor and Statutory Interpretation, 78 Geo. L.J. 353 (1989) (arguing that judicial candor in statutory interpretation is problematic due to legitimate concerns over courts' role in interpretation).
The first, explored in some depth above, is the lack of any assurance of correspondence between the capacities of human thought or intentions and the ability to convey such by language—that is, the problem of determinacy. The second is that law speaks synchronically not only to those situated contemporaneously with its making, but to those yet unborn. The difficulty of temporal translation thus created, like that of transindividual communication, raises the issue of legitimacy.

Many persons who are quite comfortable with the overall workings of the conventional legal system nonetheless recognize the need to address these difficulties. Their efforts within the familiar institutional setting have generated several answers, some quite structural in character. In general, these restatements tend to understate the need for concern with determinate answers, and instead focus on ensuring that institutional roles fit within accepted boundaries of legitimacy.

Three such approaches are particularly interesting because of their use of structural analysis. All three acknowledge the significance of legislative intent to the interpretive function of the judge. They also share the analytical conclusion that reliance on text and structure alone—even where sincerely followed—is not tantamount to establishing legislative intent. Moreover, they agree that given changed circumstances, reliance on the legislative history of an act may amount not to discerning legislative intent, but to an act of judicial creation, for there may well be no reason to believe that the legislature whose history is being relied on would have wished that its intent be applied to changed circumstances.

These approaches, however, vary in the extent to which they suggest that the independence of the judge is or should be cabinèd by legislative intent—even when ascertainable—or by societally shared institutional, practical, philosophical or even artistic norms. They also differ in the extent to which they are willing to accept or adumbrate as a normative matter the legitimacy of interpretation that is dependent on the integrity of the judge qua judge. The judge as an interpreter is not simply an agent with the task of discovering legislative intent, but an independent actor who construes and makes law on the basis of legislative prescriptions. In short, these “transcontextual” schools of interpretation attempt to bridge the gap between the “strict intentionals” and the “postmodernists” or “literary-based legal critics” discussed in subpart C by focusing primarily on the institutional or structural role of the judge as a mediator of text and legislative purpose.
1. The Legal Process School

Generally associated with the work of late professors Hart and Sacks,\textsuperscript{103} and traceable to the general critique of law by the "legal realists,"\textsuperscript{104} the "legal process" school provides the superstructure for much of the institutional analysis of statutory interpretation. The central contention of the school is that the function of the judge as an interpreter of legislation should be viewed as an extension of the judge as a common-law adjudicator.\textsuperscript{105} The judge's role is to ascertain the "true intent" or "true purpose" of legislation, not merely the "legislative intent." The basic tool that she brings to this task is essentially her capacity to act "reasonably." She is to give a reasonable interpretation of the law; that is, an interpretation that would further the societal good embodied in the legislation.\textsuperscript{106}

In doing so, the judge should examine, in addition to the text and structure of the legislation, prior common-law decisions relating to the subject matter of the legislation, reasoning where appropriate by analogy from those decisions. The function of providing a reasonable interpretation of the law obliges the judge to harmonize the various sources of law so as to deal effectively with the mischief, the avoidance of which is the object of the law.\textsuperscript{107}

Thus, in undertaking the interpretive task, the judge is constrained not solely by the language and structure of the statute, but by her membership in a learned profession and the institutional constraints symbolized by the robe.

2. Dynamic Conventionalism

Judge Richard Posner's views on statutory interpretation deserve special attention not only because he has been a prolific critic (albeit

\begin{itemize}
\item \textsuperscript{103} See, e.g., \textit{Hart \& Sacks, supra} note 47; \textit{see also Calabresi, supra} note 81, at 87-90 (explaining "so-called Harvard legal process school" of Hart and his successors and school's determination that proper interpretation of statutes "could not be a simple application of the will of past legislatures").
\item \textsuperscript{104} \textit{See generally Jerome Frank, Law and the Modern Mind} (1930). Frank's book, an early discourse on legal realism, attempts to expose the "judicial actualities" of law. \textit{Id.} at 59.
\item \textsuperscript{105} Although addressing a rather narrow subject—what to do with obsolete statutes—Dean Calabresi's \textit{A Common Law for the Age of Statutes} is a classic elaboration of the argument. \textit{See generally Calabresi, supra} note 81 (\textit{passim}). The book addresses a common-law approach and use of judicial policy over statutes.
\item \textsuperscript{106} As persuasively argued by "public choice" theorists, in a pluralist society, "legislative intent"—even if ascertainable—may not necessarily coincide with the "general" or "public" good.
\item \textsuperscript{107} \textit{See Eskridge \& Frickey, supra} note 45, at 575-77 (interpreting \textit{Hart \& Sacks, supra} note 47, at 1144-46).
\end{itemize}
a friendly one) of conventional intentionalist teaching, but also because he is a daily practitioner of the art.

Judge Posner maintains that he is a "legal intentionalist" who subscribes to the view that the task of an interpreter of legal text is to ascertain legislative intent. The methodology he recommends for doing so, however, differs significantly from the conventional ones discussed above.\textsuperscript{108} He attributes the underlying rationale for this difference to the "problematic character of legislative text" and the temporal remoteness of law-givers from those whose conduct the law regulates.\textsuperscript{109} The former problem creates the need for a judge to engage in "gap filling," which may or may not result in what an enacting legislator sitting as a judge would have done, while the latter problem speaks to potential disharmony between the world sought to be regulated by the law-giver and the actual world confronting the interpreting judge. Judge Posner provides a single resolution to both of these problems: the judge as an "imaginative reconstruct(or)" of legislative intent.\textsuperscript{110} In his view, such a modified "legal intentionalist"

holds that what you are trying to do in reading a statute . . . is to figure out from the words, the structure, the background, and any other available information how the legislators whose votes were necessary for enactment would probably have answered your question of statutory interpretation if it had occurred to them.\textsuperscript{111}

This process occurs in two stages. First, the judge tries to put herself in the shoes of the enacting legislature and tries to construct how that legislature would have wanted the statute applied to the case facing the judge. If the judge is unable to imaginatively reconstruct the statute—a strong possibility due either to lack of necessary information or because the legislature would have been severely divided on the point—then the interpreting judge should resolve the case by attributing to the statute the meaning that would yield the most reason-

\textsuperscript{108} Commentators have noted the varied approaches to interpretivism to which Judge Posner has subscribed over time. See, e.g., Aleinikoff, supra note 35, at 33. Rather than seeking to uncover the real Judge Posner, the position attributed to him here rests on my understanding of his current views as presented in his more recent writings.

\textsuperscript{109} Posner, supra note 31, at 210.

\textsuperscript{110} Posner, supra note 43, at 287. But see Eskridge, supra note 15, at 1483-84 (embracing interpretative methodology ("dynamic interpretation") grounded less in perspective of creators and more in evolving social, political, and economic environment in which judge is called upon to interpret statute).

\textsuperscript{111} Posner, supra note 31, at 218; see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring) (stating that in determining applicable statute of limitations for judicially implied cause of action, "most responsible approach . . . is to . . . 'imagine . . . how Congress would have balanced the policy considerations').
able result for the case at hand, "always bearing in mind that what seems reasonable to the judge may not have seemed reasonable to the legislators, and that it is their conception of reasonableness, to the extent known, rather than the judge's, that should guide decision."\textsuperscript{112}

Towards this end, Judge Posner asserts that the interpretive goal of this imaginative judge is not to update the statute so as to reflect the judge's contemporary values, but to replicate the values, attitudes, and outcome that the enacting legislature would have desired.\textsuperscript{113} In his view, only such close adherence to the refigured intent of the enacting legislators can ensure that a judge acts within the proper boundaries of her discretion.\textsuperscript{114}

The approach of the interpreter's recreation of the lawmakers' intent based on conventional instruments and "any other available information" has been criticized both by conventionalists and literary-based critics alike, even while they prescribe radically different solutions. The fundamental flaw, they argue, is that Judge Posner's modified intentionalism does not merely assume that corporate intent is ascertainable, it posits the portability of that intent to an environment that may be entirely alien to the lawmaker.\textsuperscript{115}

\textsuperscript{112} See also Posner, supra note 43, at 287.
\textsuperscript{113} Id.
\textsuperscript{114} Posner, supra note 31, at 226-29.
\textsuperscript{115} As Professor James Boyd White put it:

[\textit{The test, what a legislature would have wanted, is impossible to apply, since the shift in circumstance it presupposes would also produce a shift in the legislature's own perception and motives. If we have any distance at all from the legislators, the precise question we face could not have occurred to them, for it arises in a different context and has a necessarily different meaning . . . .}]

White, supra note 20, at 2034; see also Dworkin, supra note 41, at 314-15 (asserting that attribution of authorial intent to legislature raises issues such as which historical people count as legislators whose statements can be taken as representative, how their intentions are to be discovered, when individual intentions differ, and how composite institutional intention can be framed); cf. Frank H. Easterbrook, \textit{Statutes' Domain}, 50 U. Chi. L. Rev. 533, 537-39 (1983) (arguing that public choice theory makes it clear that it is impossible either to discern legislative body's intent or to reason from previous acts of legislature to dispose of present problem). \textit{But see} Posner, supra note 31, at 229 (contending that "sophisticated legal intentionalism" recognizes and builds into analytic framework possibility that framers of legislation might intend to regulate activities they may be incapable of foreseeing).

Despite their seemingly similar analytical conclusions, Professor White and Judge Easterbrook give diametrically opposed prescriptions as to what the interpreter should do. Professor White's suggestion is that the judge or lawyer as interpreter must immerse herself in the text not with a view to reproducing the original intent of the writer, but with an openness to being persuaded to a view other than that with which she initially approached the text. As such, she "necessarily remakes an original text, but always under the obligation to do it justice." White, supra note 20, at 2020-22; see also Dworkin, supra note 41, at 516 (stating that pronouncements of individual legislators are important not because they establish writer's intent as flowing from particular mental state to be deferred to by inter-
3. Interpretation as the Application of Background Norms

An updating of the legal process approach to interpretation is Professor Cass Sunstein's conception of interpretation as an appeal to background norms. While in most cases the norms operate at an unobtrusive level because they are noncontroversial, in hard cases they manifest their presence by their continuing contestability. Thus, like the legal process theorists, Professor Sunstein suggests that these shared social and institutional norms provide both the direction to and the constraint on the capricious exercise of subjective preferences by the judge acting as interpreter. By contending that it is possible to systematically and hierarchically prioritize these background norms—as opposed to their ad hoc invocation on the ground of reasonableness—Professor Sunstein suggests an approach that is distinctive. He would place constitutional norms over common-law ones, and institutional norms designed to improve the performance of governmental entities over private claims to vested property or contractual rights.

Confronted with the synchronic dilemma, he argues that these hierarchies are not immutable. As the product of background norms, they may vary from time to time and from age to age, depending on the functional needs of the society: the social, political, economic, or intellectual demands of the time. Legitimation lies in the proper ordering of the hierarchies, a task in which the judge is assisted by prevailing societal concerns.

The difficulty with Professor Sunstein's interpretive scheme—which may be generalized to all the institutional methodologies discussed here—is at least two-fold. Having accepted that interpretation is, at heart, a value-laden contest over the primacy to be given conflicting

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116. See Sunstein, supra note 18, at 405.
117. See id. at 463, 469-70. For example, in Professor Sunstein's hierarchy, constitutional considerations and related concepts of separation of powers between the federal and state governments, and between the political and judicial branches, should be more instrumental in shaping the interpretation of a statute than common-law norms of vested property or contractual rights. Moreover, when the conflict is between competing constitutional rights, Professor Sunstein suggests a hierarchy for determining which interest should be preferred over the other. See id. at 470-71.
118. See id. at 460-73.
119. See id. at 462.
objectives, he suggests a reconciliation that relies exclusively on assumed shared background norms. In the first place, the belief that such norms are sufficiently shared and sufficiently weighty that they can effectively act as coherent guideposts for the interpreter is surely debatable. That background interpretive norms may be both shared and subject to contestation at different periods of a civilization’s history would seem to make eminent sense, but the interesting aspect of the interpretive process lies in the method for fashioning acceptable rules for selecting from among the various sources that are in contest. Shared norms are useful only to the extent they assist in winnowing down the plausible forces in contest, and, even then, the interpreter is bound to ask and determine the origin of their “sharedness.” It is not enough to take their commonality on faith.120

Second, Professor Sunstein’s proposed solution to the interpretive difficulties inadequately deals with the conventionalists’ fear of indeterminacy of results and the lack of appropriate channelling of the judge’s discretion on the one hand, while also failing to satisfy proponents of literary criticism techniques of the responsiveness of his methodology to the role of law as a constitutive force in society. In the process of synthesizing shared norms, the judge as interpreter under Professor Sunstein’s scheme would appear to have a reasonably free hand. Yet, the process of synthesizing those norms binds the judge to a retrospective, or at least status quo, orientation in the discerning of relevant social conventions. The judge appears to have the flexibility of one unrestrained hand, with the other firmly tied behind her back.

C. Interpretation as Construction and Deconstruction

A well-established distinction in interpretive methodologies is that between a “writer-centered” and a “reader-centered” approach.121 Conventional analytical methodologies that focus on the search for the “writer’s intent” or that adhere to strict textualism (often in the belief that the text is the best exemplar of a writer’s intent) clearly fall into the former category. Contextual or institutionalist methodologies such as those implicated in the legal process or in Professor Sunstein’s approaches are somewhat more difficult to place in this classification. To the extent these approaches do not advocate that

120. Thus, for example, Professor Sunstein appears convinced that the primacy of public law over private ordering is a shared norm in today’s interpretive climate. See id. at 412. If that were so, neither Judge Easterbrook’s theory, discussed supra note 115, nor the Ballay decision, discussed infra part III, would have much of a following. I believe that both do.

the interpreter is bound to an exact reproduction of the writer's intent, the centrality of the writer's views is de-emphasized. In spite of the broader leeway thus given the interpreter, it would be, strictly speaking, inaccurate to categorize these approaches as "reader-centered." This is so because they legitimize the reader's interpretation only by reference to the social and structural conventions in which the writer operated. Thus, they may also be viewed as "writer-centered."

By contrast, literary-based interpretive approaches are truly "reader-centered." The validity of the interpretive process is ultimately a function not of what the writer may or may not have intended, but of the message received, embraced, and (in a manner of speaking) transmitted by the reader.

These methodologies, of which three are discussed below, share at least one attribute that distinguishes them from the conventional and institutionalist methodologies. They explicitly look beyond the legal system to derive the tools of interpretation. Law is viewed neither as self-sufficient nor as internally coherent. Law cannot be understood or validated by reference to legal doctrine, but must be judged against the background of societal conflict and humanistic interactions. Where the institutionalist might find meaning solely by reference to legal institutions and conventions, these reader-centered approaches argue for a much broader inquiry. Interpretation is impossible without the juxtaposition of legal conventions to philosophical, literary, or humanistic inquiries.

It is in the source(s) of that extra-legal engagement, and its implications for the interpretive process, that these more radical approaches to interpretation differ among themselves. Three approaches have received some adumbration and they are discussed below.

1. Interpretation as Honest, Practical Abstraction

Professor Ronald Dworkin's *Law's Empire* presents one of the more extended and sustained discussions of the justification for a particular interpretive methodology extant, that he calls "law as integrity."\(^{122}\) The interpretive process in law, he asserts, should be viewed both in methodology and in object as similar to, if not part of, the broader human enterprise of understanding and, by understanding, shaping the society we inhabit.\(^{123}\) To understand a practice, the interpreter attempts to give the best account of the practice that she can. That

\(^{122}\) *Dworkin, supra* note 41, chs. 3 & 6. He elucidates the application of this conception of interpretation in chapters 7-10.

\(^{123}\) *Id.* at 52-66 (discussing interpretive concepts that aid in ascertaining author's intention). According to Professor Dworkin, this is not to argue that legal interpretation does not differ in specifics from other forms of interpretation; rather, "interpretation takes
account is very much the product of philosophical reflection, practical realities, and social structures. This process of understanding may thus involve a recasting of the practice so that the practice can explain—and in so doing made to approximate—the interpreter’s view of what constitutes “the most value for the practice.” The process for obtaining such an account is highly structural in character. It begins with a description or identification of the phenomenon or practice to be interpreted in what Professor Dworkin terms the “preinterpretive” stage. Next, an interpretive community engages in or settles on justification(s) of the practice, or at least the essential elements of the practice. Finally, there is a “postinterpretive” stage at which the interpreter “adjusts his sense of what the practice ‘really’ requires so as better to serve the justification he accepts at the interpretive stage.”

In applying these concepts to legal and, more specifically, statutory interpretation, Professor Dworkin is quite sanguine of the possibility of identifying in law, as in social practice, “discrete ideas” around which agreement collects and that can be employed uncontroversially in all interpretation. These may be termed “paradigms.” He appears to find a set of such ideas—at least in the context of contemporary Anglo-American jurisprudence—in the statement that “[l]aw insists that force not be used or withheld . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.” Hence, in the interpretive and postinterpretive stages, an interpreter must seek to understand and justify the present use of coercion by refer-

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124. See id. at 53 (discussing concept of political and legislative integrity in developing concept of law).
125. Id. at 52-53. Indeed, Professor Dworkin readily analogizes his proposed approach to the reflective equilibrium methodology adumbrated by John Rawls in A Theory of Justice. See JOHN RAWLS, A THEORY OF JUSTICE (1971).
126. DWORKIN, supra note 41, at 65 (discussing various “stages of interpretation”).
127. Id.
128. Id. at 66.
129. Id. at 127.
130. Id. A paradigm is a “proposition [about law] that in practice cannot be challenged without suggesting either corruption or ignorance.” Id. at 88. Unfortunately, Professor Dworkin does not explicitly employ this terminology in his discussion of statutory interpretation; but as I contend below, the idea is very much integral to his explanation and justification of the function of the interpreter in construing statutes.
131. Id. at 93. Professor Dworkin appears to accept the possibility that this statement of a paradigm is time and culturally contingent. “Paradigms are broken, and new paradigms emerge,” he asserts. Id. at 90; see also id. at 102 (“Interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong.”).
ence to past political decisions,\textsuperscript{132} whether such action takes the form of legislative enactments or judicial decisions.\textsuperscript{133}

Professor Dworkin terms "law as integrity" the best methodology for engaging in the task.\textsuperscript{134} This approach imposes on the interpreter the duty to provide the required justification for the use of coercion in terms of "consistency in principle," rather than "consistency in policy."\textsuperscript{135} "Consistency in principle," when applied to legislative acts, "asks lawmakers to try to make the total set of laws morally coherent."\textsuperscript{136} In the case of judicial interpretation, it instructs judges "that the law be seen as coherent in that way, so far as possible."\textsuperscript{137} "The state lacks integrity because it must endorse principles to justify part of what it has done that it must reject to justify the rest. . . . [T]he inconsistency in principle among the acts of the state personified that integrity condemns."\textsuperscript{138}

In essence, then, the individual interpreter—like the state—is engaged in identifying rights and responsibilities that flow from past political decisions. The interpreter justifies the extension of those rights and responsibilities to the present by looking to a coherent and comprehensive set of relationships within society. Interpretation, Professor Dworkin contends, demands that specific interpretive tasks be seen and treated as part of a broader whole, not in isolation or as being self-contained.\textsuperscript{139}

\textsuperscript{132} Id. at 98 ("So the assumption that the most general point of law, if it has one at all, is to establish a justifying connection between past political decisions and present coercion shows the old debate about law and morals in a new light.").

\textsuperscript{133} Id. at 99 (stating that conceptual connection between law and coercion is based upon legislation and precedent).

\textsuperscript{134} Id. at 225. He considers and rejects two other possible methodologies that he calls "conventionalism" and "pragmatism." Id. at 94; see also id. chs. 4 & 5.

\textsuperscript{135} Id. at 134.

\textsuperscript{136} Id. at 176.

\textsuperscript{137} Id. More specifically, Professor Dworkin claims that law as integrity is an expression of "political integrity," embodying the virtue that "like cases be treated alike," and requiring "government to speak with one voice, to act in a principled and coherent manner towards all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some." Id. at 165.

\textsuperscript{138} Id. at 184.

\textsuperscript{139} Id. ("But we nevertheless accept integrity as a political ideal. It is part of our collective political morality that such compromises are wrong, that the community acts as a whole and not just individual officials one by one must act in a principled way."). Professor Dworkin further states:

"The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness . . . and procedural due process that provide the best constructive interpretation of the community's legal practice."

Id. at 225.
His response to the dual issues of legitimacy and determinacy is, as illustrated by his discussion of statutory interpretation, highly structural. 140 With the judge as the prototypical interpreter, 141 Professor Dworkin asks that the judge envision herself as a participant in an inventive genre of writing: the “chain novel”:

In this enterprise a group of novelists write a novel seriatim; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity. 142

This metaphor succinctly addresses both issues of legitimacy and determinacy. The judge is a creative craftsman—we might say a card-carrying member of a guild—who works within a genre. Her independence is thus constrained by the recognizability (and, therefore, acceptability) of the end product and by her expectation and anticipation of the contributions of others working within the genre. 143 The judge is part of the same community as the legislator, although he will treat the legislator as

an author earlier than himself in the chain of law, though an author with special powers and responsibilities different from his own, and he will see his own role as fundamentally the crea-

140. My interest here is in the structural focus of his arguments, not in the substantive grounding of his claims for “law as integrity.” Thus, I leave for another time and place my criticism of substantive claims such as his assertion that any good interpretation must seek to justify the use of state coercion in the context of past political decisions, or that such inquiry “does not aim to recapture . . . the ideals or practical purposes of the politicians who first created it . . . [but] rather to justify what they did . . . in an overall story worth telling now.” Id. at 227. For an example of criticisms aimed at his substantive ideas, see John Stick, Literary Imperialism: Assessing the Results of Dworkin’s Interpretive Turn in Law’s Empire, 34 UCLA L. REV. 371 (1986).

141. This position is perhaps unavoidable not solely because of practice (the explanation for the focus on the judge in conventional and institutional interpretive methodologies), but equally on philosophical grounds, given Professor Dworkin’s understanding of the purpose of interpretation as the justification of state coercion and his insistence that the interpreter is the “state personified.”

142. DWORKIN, supra note 41, at 229.

143. Id. In Professor Dworkin’s terms, the writer

must take up some view about the novel in progress, some working theory about its characters, plot, genre, theme, and point. . . . [Yet h]e cannot adopt any interpretation, however complex, if he believes that no single author who set out to write a novel with the various readings of character, plot, theme, and point that interpretation describes could have written substantially the text he has been given.

Id. at 230.
tive one of a partner continuing to develop, in what he believes
is the best way, the statutory scheme Congress began.\textsuperscript{144}

Membership in the community and the expectation that the others
subscribe to one’s ideas legitimize the product of the shared en-
deavor. Yet, an aspect of that membership is that the member is al-
lowed room for creativity; indeed, for re-envisioning the particular
task at hand, if warranted by the material with which one is
working.\textsuperscript{145}

Ultimately, then, the particular focus of interpretation is that of the
interpreter or reader, not that of the previous contributor or writer. It
is for the reader, before becoming writer, to ascribe meaning to pre-
ceding writings and to shape those writings by her contribution. As
Professor Dworkin states, the constraints and freedoms are, however,
matters of the judgment of the interpreter.\textsuperscript{146}

A judge interpreting a statute functions in the political domain.\textsuperscript{147}
The interpreter begins with the text to which she is directed by the
political branches and, relying on her conception of the system of
political morality, fairness, justice, and due process, expands outward
from the immediate case in a series of concentric circles. The seem-
ing freedom empowered by her selective recourse to these varied
sources of authority appears checked, however, by the insistence that
the expansion be consonant with more or less well-defined “depart-
ments of law” and the political history of the community;\textsuperscript{148}
although, on closer inspection, even this limitation appears to be less of a wall
than a yellow ribbon routing pedestrians at a construction site.\textsuperscript{149} The

\textsuperscript{144} Id. at 313.

\textsuperscript{145} See id. at 234 (stating that author is neither possessing of “total creative freedom”
 nor “mechanical textual constraint,” but each qualifies other).

\textsuperscript{146} Id. (“[T]he constraints that [the author] sense[s] as limits to [his] freedom . . . are as
much matters of judgment and conviction . . . as the convictions and attitudes [the author]
call[s] in . . . “); see also id. at 313 (“[N]o one can properly answer any question except by
relying at the deepest level on what he himself believes.”).

\textsuperscript{147} Cf. id. at 239 (“[T]he best story for [the interpreter] means best from the standpoint
of political morality, not aesthetics.”).

\textsuperscript{148} Id. at 255 (“Judges who accept the interpretive ideal of integrity decide hard cases
by trying to find, in some coherent set of principles about people’s rights and duties, the
best constructive interpretation of the political structure and legal doctrine of their
community.”).

\textsuperscript{149} See, e.g., id. at 330 (stating that interpreter who “suspects that some of her concrete
opinions are in conflict with, and are condemned by, her more general and fundamental
political convictions, . . . must ask which reading of statute would best serve all her
convictions taken together, as a structured system of ideas, made coherent so far as this is
possible”). Cf. id. at 250-51. This process, which Dworkin terms “local priority,” is
apparently available to the lay-person as interpreter as much as it is to the judge as
interpreter. Indeed, Professor Dworkin advances as a justification for it that it permits
legal interpretation to take place “within practical boundaries that seem natural and
intuitive.” Id. at 252.
interpreter is obliged to respect, but not necessarily to follow, conventional and institutional yardsticks such as the text and the legislative history; these are only raw material for the interpreter’s imaginative construction of ideas that fit well with her political convictions and the practices of the community personified.\footnote{150} Here, language is neither clear nor unclear; legislative intent is neither ascertainable nor unascertainable. The proof is in the best construction the interpreter can give the varied material available given her understanding of the principled political interests of the community.

Putting aside the correctness of the underlying substantive philosophical preferences that undergird Professor Dworkin’s work,\footnote{151} his approach might be criticized on the ground that despite the elaborateness of the theory, it remains essentially vague because it seeks to offer everything to everyone. The interpreter is both freely chained to the past and able to conform the future to the present by its anticipation in her current interpretation. How realistic or practical, one might ask, is the admonition that the interpreter give the practice the best it can bear? In short, does Professor Dworkin’s structural case have any operational value, or is it merely the statement of a normative desire without prescriptive possibility?\footnote{152}

Such criticisms may have force. I think, however, that a major contribution of Professor Dworkin’s structural approach is its emphasis on the role of the interpreter not simply as the object of transmitted instructions, but as the generator of communication subsequently to be decoded by others. In this view, interpretation is not a static process, but integrally linked to ongoing social practice and conduct.

2. Interpretation as Narrative

While Professor Dworkin relies on the artifact of a fictive structural device—the writing of a chain novel—to elucidate his vision of interpretation as a collective or associative (that is, communal) endeavor, many legal scholars who subscribe to the “law and literature movement”\footnote{153} argue that legal interpretation may be appropriately viewed

\footnote{150} Id. at 335-51.

\footnote{151} See generally id. See also MARMOR, supra note 26, at 48-60 (critiquing Professor Dworkin’s substantive treatment of conventional theories of law and legal interpretation).

\footnote{152} See POSNER, supra note 31, at 248.

\footnote{153} For example, Professor West has observed: “The Law as Literature movement is becoming increasingly difficult to define as it comes of age.” West, supra note 20, at 203 n.1. Professor West has identified three strands in the movement: (1) scholars who derive legal ideas from literary works; (2) scholars engaged in elucidating relationships between legal and literary criticism and between literary and legal theories as analytical or conceptual methodologies; and (3) legal scholars arguing that law and legal theory “can profitably be read as literature.” See id. Given the emphasis of this piece on structural analysis, my primary interest is in the latter two strands.
as a routine narrative. They contend that the practice of law, legal theory, and the function of interpreting both can usefully be understood as the reading and writing of literature.

An obvious starting point is that “law” (at least in the popularly understood sense of a set of rules that dictates particularized behavior), like literature, is created and dispersed as linguistic text authored at a particular time and setting, to be translated or interpreted by a recipient other than the author, usually at some other time and in a setting other than the author’s.\textsuperscript{154} Interpreting legal text, therefore, partakes of many of the same methodologies as the interpretation of literary text.\textsuperscript{155} Likewise, problems of interpreting literary text, such as the nature of the enterprise—whether the quest is for “authorial,” “reader,” or “neutral” intent—relevance of the texture and structure of language, the determinacy or ambiguity of the text, among others, attend legal interpretation. The conclusion would thus follow that interpreters of legal text may employ many of the same interpretive techniques and are subject to many of the same interpretive constraints as are literary critics.\textsuperscript{156}

Beyond technical similarities or dissimilarities, many legal scholars—in particular, those in the feminist critical\textsuperscript{157} and critical race\textsuperscript{158} theory movements—find in the techniques of story-telling powerful tools for understanding law. Of especial interest is law and the legal system’s propensity to artificially carve out as decisive spheres of privilege and subjugation. Central to the utility of story-telling is its capacity to lay bare in dramatic and readily comprehensible terms the structures of society and the role of the legal system in creating, nurturing, and perpetuating the dominant order.\textsuperscript{159} Law, rather than be-

\textsuperscript{154} See generally Sanford Levinson, \textit{Law as Literature}, 60 \textit{Tex. L. Rev.} 373 (1982).

\textsuperscript{155} See, e.g., Abraham, supra note 36 (\textit{passim}).


\textsuperscript{157} For a listing of some scholars whose writings fall into this class, see Tushnet, supra note 19, at 1517 n.10.

\textsuperscript{158} For a listing of some scholars whose writings fall into this category, see \textsc{Derrick Bell, Faces at the Bottom of the Well} 144 (1992); Richard Delgado & Jean Stefancic, \textit{Critical Race Theory: An Annotated Bibliography}, 79 \textit{Va. L. Rev.} 461 (1993); Tushnet, supra note 19, at 1517 n.11.

\textsuperscript{159} This central theme in the use of fictive devices (and particularly of story-telling) as tools of legal interpretation is now accepted in legal academia. For illustrative examples of the amalgamation of story-telling and standard legal scholarship to create “a new and improved” product, see Bell, supra note 158; \textsc{Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice} (1988); \textsc{Patricia Williams, The Alchemy of Race and Rights} (1991); Richard Delgado, \textit{Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law}, 45 \textit{Stan. L. Rev.} 1133 (1993) (illustrating problems with attempting
ing an epiphenomenon, is properly placed as an integral element of the multiple structures of relationships that dictate, mold, and foster socio-economic and political intercourse. Law is not power in the abstract, but a routine aspect of daily experience. Law does not simply shape, and is not merely shaped by the exceptional aspiration, but is omnipresent in the here and now of daily interactions. \(^{160}\) By recounting these stories, the structural significance of law to the established order is made both accessible and intelligible to the professional class of lawyers and judges and, most importantly, to the much broader audience of laypersons who consciously and unconsciously affect and are affected by law and legal institutions.

There is a related but somewhat different understanding of the relationship of law to literature. This understanding analogizes the practice of law to that of a reader conversing with literary text. The salient intercourse occurs between the lawyer as reader on the one hand and legal texts as emblematic of society on the other. \(^{161}\) In this argument, understanding structures and transcending them must be the central task of the lawyer as an interpreter. That task is best undertaken by bearing in mind that all text, whether expressive of a need or of a command, must be translated or interpreted in a structural setting of hierarchical relationships on the one hand and aspirations on the other. \(^{162}\) Thus, a lawyer, in interpreting text, such as a statute, approaches the task anew each time. On each occasion, she may deploy

\(^{160}\) For an adumbration of this point from the standpoint of law as story-telling, see Williams, supra note 20 (examining racism as crime by telling specific true stories), and from the standpoint of law as literary criticism, West, supra note 20. Intriguingly, student Notes dealing with the securities law issues addressed in this Article have employed the technique of beginning with an extended anecdote or story that is clearly intended to place the legal issue in the practical setting of mundane lawyering. See, e.g., Patrick Havel, Note, The Forgotten Warrior: Section 12(2) of the Securities Act of 1933 and the Battle Against Insider Trading, 90 Colum. L. Rev. 226, 226 (1990) (hypothesizing case of customer bringing § 12(2) action against stockbroker but trying to avoid in pari delicto defense to secure recovery); Adam Hirsch, Comment, Applying Section 12(2) of the 1933 Securities Act to the Aftermarket, 57 U. Chi. L. Rev. 955, 955-56 (1990) (asking readers to consider five-paragraph hypothetical demonstrating "the quandary in which investors who feel defrauded in the secondary market may find themselves").

\(^{161}\) The work of Professor James Boyd White is illustrative of this approach. See, e.g., James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism 3-21 (1990); see also White, supra note 20.

\(^{162}\) An underlying premise, as Professor White puts it, is that
different areas of knowledge in telling and retelling the story as she makes and remakes herself, her aspirations, her client, and that client's aspirations. Each time, she is mindful of the fact not only that the structural relationships that obtained when the text was created are different from those existing at the time of her interpretation, but also that the structure of the earlier interpretation is different from that which now obtains. Yet, this does not imply an open-ended license to the interpreter to make of texts and structures whatever she desires. This is the case because the lawyer is engaged simultaneously in the uniquely personal act of interpreting specific text and in the interactive social act of conversation with others, notably her client and the judge. These latter two actors, particularly the judge, are also engaged in a conversation whose methodology parallels that of the lawyer. All three are shaped by structures and in turn come to shape the structures with which they interact. As in literature then, the interpretation they reach is a composition reflecting their myriad relationships. While all three retain their individual capacities, their persons are products of the conversation.

Understanding and shaping structural relationships, then, is an integral component of the various strands of interpretive methodologies embodied in the law and literature movement. Indeed, it would not be stretching the positions of the proponents of the movement to assert that structure replaces text as the primary symbol of analysis. In a real sense, all text is structured because no text that purports to have meaning can exist outside the particularized structure of its interpretation.

As framed above, the basic criticism of the interpretive method of law and literature proponents is whether it can be meaningfully invoked in the routine and practical task of lawyering, such as the adjudication of investment disputes between a broker and her client.

whether we know it or not, our every utterance is a way of being and acting in the world. Our purposes, like our observations, have no prelinguistic reality, but are constituted in language . . . . Our words get much of their meaning from the gesture of which they are a part, which in turn gets its meaning largely from the context against which it is a performance.

White, supra note 161, at xi. It follows then, that a healthy response to the "frequently remarked" and surely regrettable contemporary practice of dividing up human experiences into "separate compartments or categories"—each with its own language and modes of validation—is to strive for "integration," that is, "a kind of composition and that in a literal and literary sense a putting together of two things to make out of them a third, a new whole with a meaning of its own." Id. at 4-5.

163. See, e.g., White, supra note 20, at 2021-22.
164. See White, supra note 161, at 101-02; White, supra note 20, at 2022.
165. Cf. West, supra note 20; Robin L. West, The Meaning of Equality and the Interpretive Turn, 66 Chi.-Kent L. Rev. 451, 454 (1990) (contending that judge's conception of document as "legal" rather than "political" shapes, at least in practical terms, any
Put another way, is the theory too exotic for the mundane task of adju-
dicating particularistic disputes grounded on assertedly statutorily cre-
ated claims? In terms of the terminology of this piece, the interpretive 
methodology of the law and literature movement squarely poses the 
issue of determinacy.

3. Interpretation as Deconstruction

Perhaps the phenomenal occurrence in legal scholarship during the 
decade of the 1980s was the attack to which its conventional prac-
titioners were subjected by the critical legal studies movement. At 
the core of the challenge is the argument that legal scholarship and 
the legal principles it purports to explain, criticize, or espouse is essen-
tially sterile because it is based on an inherently structural flaw: 
that of the so-called “paired opposites.” Conventional scholarship, 
critical legal studies proponents contend, seeks to build around law 
such edifices as neutrality, objectivity, determinacy, and principled-
ness by taking and presenting classifications as a given—that is, 
“privileging” the classifications—and critiquing propositions in terms 
of whether they fall within or without the classification. By focusing 
on the contestability of the secondary propositions, conventional 
thinkers insulate the classifications themselves from challenge. By 

disposition by judge to freewheeling creativity in interpretation of document). But see 
Cole, supra note 37, at 548 (suggesting routine conversations of laypersons are necessary to 
interpretive process—even of legal documents); see also infra part IV.B (suggesting how this 
might be done).

166. For an account of the “movement” written by an insider, see generally Tushnet, 
supra note 19. Professor Roberto Unger, one of the luminaries of the movement squarely 
places it on the left of the political spectrum. See Roberto Unger, The Critical Legal Studies 
Movement, 96 Harv. L. Rev. 561, 564-67 (1983). Thus, I use the phrase here in this more or 
less popularly accepted sense that it describes persons of “left leaning or ‘progressive’ 
politics” who believe themselves to be members of the movement. I do not distinguish 
between the various strands of the movement. See Tushnet, supra note 19, at 151 
(describing various groups that intersect with movement because they share “location” on 
political spectrum that channels their radical criticism of law as conventionally deployed); 
see also Heller, supra note 13, at 127, 128 n.4 (noting absence of any firm understanding 
about who is member). See generally Gary Minda, The Jurisprudential Movements of the 1980s, 
50 Ohio St. L.J. 599 (1989) (describing and discussing similarities and differences of 
critical legal studies and two other intellectual legal trends of the 1980s, namely, law and 
economics and feminist legal thought).

For a critique of the movement, see J. Paul Oetken, Form and Substance in Critical Legal 
Studies, 100 Yale L.J. 2209 (1991); cf. Stick, supra note 16 (criticizing method of 
argumentation employed by “nihilist” or “irrationalist” wing of movement).

167. Examples of such paired opposites, only one of which (usually that to the left of the 
slash) is privileged under conventional analysis, include the following: presence/absence, 
identity/difference, unity/diversity, self/other. See, e.g., J.M. Balkin, Deconstructive Practice 
and Legal Theory, 96 Yale L.J. 743, 746-53 (1987); Michel Rosenfeld, Deconstruction and Legal 
Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism, 11 
contrast, argue critical legal scholars, probing at the classifications reveals their essentially political and subjective character. The deconstructive exercise discloses the intellectual incoherence, masked ideological conflict, indeterminacy of rules and principles, and the privileging of subjectively determined hierarchies inherent in these classifications.

The relevance of interpretive theory to these systemic structural attacks was spelled out by Jack Balkin, a member of the movement, in a 1987 article. Drawing on the writings of a renowned French “structuralist-cum-post-structuralist,” Jacques Derrida, Professor Balkin argues that American lawyers, particularly those open to a fresh understanding of their practice, can learn a lot from the deconstructive practice associated with those continental European scholars exemplified by Mr. Derrida.

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The statement in the text is, of course, my interpretation—or, if you would rather, understanding—of the gospel according to the critical legal studies movement. As many have pointed out, there is no all-encompassing and verifiably accurate statement of the beliefs of those who even self-consciously associate themselves with the movement, let alone outsiders or fellow travellers. See, e.g., Tushnet, supra note 19, at 1515–16; cf. Rosenfeld, supra note 167, at 1212 (“Any attempt at defining deconstruction is hazardous at best as there is disagreement over whether deconstruction is a method, a technique, or a process based on a particular ontological and ethical vision.”).

169. See Oetken, supra note 166, at 2211 (enumerating elements of critical legal studies attacks on legal system).

170. See, e.g., Tushnet, supra note 19, at 1518 n.12 (citing Alan Hunt, The Big Fear: Law Confronts Postmodernism, 35 MCGILL L.J. 507, 512 n.7 (1990)).

171. Balkin, supra note 167, at 744.

172. For a study of the relationship between structuralist and post-structuralist critique of literary theory and their convergence in the American analytical mindset, see Art Berman, From the New Criticism to Deconstruction: The Reception of Structuralism and Post-Structuralism 114-43 (1988) (especially Chapter 5). Professor Heller examines links between the structuralism school of continental European literary and philosophical criticism to the thoughts of members of the critical legal studies movement. Heller, supra note 13, at 127.

173. Balkin, supra note 167, at 743-44; cf. Heller, supra note 13, at 128 n.5 (listing other continental European scholars whose mode of thinking Mr. Derrida may be viewed to exemplify).
Of particular interest are two structurally related concepts embedded in these critics’ deconstructive practice: “the inversion of hierarchies” and “the liberation of the text from the author.” Common to both is that the deconstructionist, like the conventionalist, purports to begin the process of interpretation by “interrogat[ing]” the “text.” Contrary to the usual formalism of conventionalists, however, a deconstructionist’s definition of “text” is not limited to writing on paper—for the limitation of “text” to writing is possible only by privileging the written form—but embraces other forms of communication, including the structure of society itself. This difference in the definition of what constitutes “text” is itself a product of the structural methodology of interpretive analysis employed by deconstructionists.

Application of the concept of “inversion of hierarchies” operates on the assumption that when any interpreter approaches any text, she does so with some privileged or preconceived (that is, foundational) ideas. Thus, the interpreter gives a preference to writing over speech by tending to credit it with more reliability, accuracy, or truthfulness. This automatic preference of one form over another is not just pervasive, but omnipresent. Moreover, the privileging is totemic in that it is so embedded in the culture that it takes on metaphysical qualities of truth, and to question the preferred form is virtually tantamount to being irrational. Yet, assert deconstructionists, it is not meaningfully possible to understand the privileged foundational idea without understanding the excluded other. Thus, one cannot understand a rule without understanding its exception, the normal without the abnormal, the perceived without the inferred, the central without the peripheral, the true without the false, the complex without the simple, the public without the private, and so on. To do so (and in the process of so doing), the interpreter must necessarily reverse (that is, invert) the accepted hierarchy. Interrogation of the text through such inversion and reinversion discloses, deconstructionists suggest, that no principle, rule, standard, or classification is a “self-contained, self-supporting ground” on which to base a theory or rule for social

175. Id. at n.9 (citing CHRISTOPHER NORRIS, DECONSTRUCTION: THEORY AND PRACTICE 31 (1984)); see also Fish, supra note 27, at 37-57. A frequently quoted refrain emphatic of the point is Jacques Derrida’s statement that “il n’y a d’hors ce texte,” variously translated as “there is nothing but the text” or “there is nothing outside of the text.” See, e.g., Schlag, supra note 22, at 1631 n.1.
176. See, e.g., West, supra note 20.
177. These illustrations are taken from Balkin, supra note 167, at 747. One can, of course, conceive of others such as construction and destruction or deconstruction, community and stranger.
governance.\textsuperscript{178} This is so because the privileged idea contains within it seeds of its opposite.\textsuperscript{179} That a particular idea rather than its opposite is made the rule and not the exception, therefore, is purely a social construct, the explanation of which is not found in the writing or text itself, but ultimately in the reader who privileges the rule rather than the exception.\textsuperscript{180}

It is here that the second but related conception of interpretation as the deconstructive practice of "liberating the text from the author" comes into play. If the practice of reversing hierarchies succeeds in exposing to debate the legitimating conceptions that undergird the established hierarchies, there remains the issue of how those conceptions achieved preeminence, and, therefore, how alternative ideas can be conceptualized. The answer suggested by Derrida is one of structural process: a process he terms "iterability."\textsuperscript{181} We start with a given: an idea can only be expressed or conveyed in the form of a "sign" or "symbol." "[A] sign can only signify to the extent that it can signify repeatedly, in a number of different contexts."\textsuperscript{182} This is so because, as Professor Balkin explains, "signs can only be used for communication if they are public. They must be capable of repetition and manipulation by any possible user."\textsuperscript{183}

The value of a sign therefore lies in its ability to signify something over and over again. This is the concept of iterability. Yet, if a sign has to be capable of signifying repeatedly in different contexts at different times to different persons, then "we can use signs if and only if they are separable from our intent . . . whether or not they mean what we intend."\textsuperscript{184} It follows then, according to deconstructionists, that "[l]anguage can signify only if it can escape the actual present meaning it had to the person who used it."\textsuperscript{185} Ascertaining the meaning of a sign is thus the function of the recipient's interaction with it. Specifically, it is that reader's interpretation, not the signifier's "intent," that is dispositive. Without this capacity of a "sign" to break free from the creator's "subjective" intent, iterability would be impossible. The resulting teaching of deconstruction is that the text is "liberat[ed] from

\begin{itemize}
\item \textsuperscript{178} Id. at 749.
\item \textsuperscript{179} The classic illustration is the privileging of "writing over speech." For a discussion of this example, see Balkin, supra note 167, at 757-58; see also Fish, supra note 27, at 37-67.
\item \textsuperscript{180} See Balkin, supra note 167, at 774-75 (explaining operation of this privileging phenomenon by referring to lawyers' interpretation of cases).
\item \textsuperscript{181} See generally Jacques Derrida, Speech and Phenomena, and Other Essays on Husserl's Theory of Signs 76-88 (David B. Allison trans., 1973)
\item \textsuperscript{182} Id. at 779.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id.; see also Fish, supra note 27, at 38-57.
\end{itemize}
its author at the moment of creation,” and this results “in the free play of the text.”

The consequence is that neither the determinacy of the text, nor its authoritiveness flows from the legitimacy of its creator—including the social and political institutions that put their imprimatur on the text. Rather, such determinacy or legitimacy, to the extent it exists, comes from the reader or interpreter. At this point, deconstructionist views diverge. Some suggest that a reader-centered inquiry is no more determinate for several of the same reasons that authorial intent cannot be determinate. A reader, for example, is no more likely to be free of the biasing effects of hierarchies and classifications than is an author. Other deconstructionists contend that determinacy will exist because readers, no less than authors, are members of an identifiable class whose approach to text conforms to some institutionalized ground rules from which they cannot break, even if they so desired. Beyond the question of determinacy, deconstructionists appear to be in sync on the issue of legitimation. Interrogation of the text, including the supporting structures and institutions, discloses it as representing a particularized vision of the world at a particular moment in time. Nothing in the text in and of itself explains why it should be authoritative. That explanation lies outside of the text, and examination of it would invariably reveal it as coming from power distributions.

Much of the criticism of the critical legal studies and deconstructionist movements center around the issue of their treatment of the question of determinacy and legitimacy. At the general level, the criticism is that because the movements’ focus is on revealing the irreparable conflictual and contradictory make-up of all aspects of society’s institutions, their teaching is nihilistic. In the absence of constructive alternative programs, argue critics, deconstructionist criticisms lack value, and the movements—or at least their proponents—ought not be taken seriously. The objection, in my view, misses the point. Deconstruction shares with the other reader-centered approaches to interpretation the appreciation of legal interpretation as intimately involving the entire superstructure of social, political, and economic relations. To believe that legal interpretation can occur independent of purportedly nonlegal forces or institutions within society is, deconstructionists correctly argue, erroneous. Deconstructive theory thus reinforces insights at the core of the law and literature movement, which are also present in Professor Dworkin’s work.

186. Balkin, supra note 167, at 780.
188. See, e.g., Posner, supra note 31, at 211-20; cf. Stick, supra note 16 (criticizing method of argumentation employed by nihilistic or irrationalist wing of movement).
D. Making Sense of Structure

Thus far, I have employed the words “structure,” “structural,” and “structuralism” on the assumption that they convey readily ascertainable information to the reader. That assumption may well be false. This subpart undertakes an explicit articulation of the ideas embedded in these terms.

I have proposed that the various approaches to interpretation find in “structure” a powerfully coherent and legitimate tool of legal analysis generally and statutory interpretation in particular. At a basic level, this is possible if we accept that meaning may be found in the placement of items in relationship to other items. Although that acceptance should not automatically be presumed, concession of the possibility raises no intellectually difficult problems. Can any more be said about structure? For one thing, identifying the items that may reliably be juxtaposed to each other is not a self-actualizing process. For another, determining the manner of the juxtaposition raises an infinite variety of issues that challenge the method and purpose of the interpretive process. Most crucially, to assert that “meaning” flows from “structure” begs the fundamental question of what is meant by “meaning.”

Conventional textualism, whether justified by the formalistic application of the “plain meaning” rule or the notion that the ascertainment of legislative intent can best or only be achieved by reference to the words employed in the legislation, acknowledges the relevance of structure to the interpretive process. While it seems straightforwardly clear that structure as envisioned by proponents of conventional textualism—theorists and practitioners alike—encompasses traditionally propagated grammatical rules of language, ideas about the role of structure in their interpretive scheme are so underdeveloped that it is difficult to assert with any certainty what else might be included. Thus, for example, Justice Scalia, on whose utterings I have relied to articulate much of the underlying theoretical understanding of the use of structure in conventional analysis, appears to suggest that structure may embrace more than the relationship of statutory text to include the interrelationship of past judicial decisions. The inter-

189. See supra note 38 and accompanying text.
190. See supra note 54 and accompanying text.
191. See supra notes 80-101 and accompanying text.
192. See, e.g., Scalia, supra note 53, at 589 (describing our precedent-based system as one in which “courts apply to each case a system of abstract and entirely fictional categories developed in earlier cases, which are designed, if logically applied, to produce ‘fair’ or textually faithful results”). For authority on the Supreme Court’s reliance on plain meaning, compare supra note 49 and accompanying text.
preter may derive meaning from the juxtaposition of words and sentences; but may the interpreter also derive meaning from the juxtaposition of sections within a statute, and of statutes within a code? If so, what rules shape these interrelationships?

A common assertion among practitioners of conventional textualism—for example, the United States Supreme Court—is that structural analysis is relevant only to the extent that it illuminates legislative intent. Within this framework, such practitioners have been willing to go as far as relying on the interrelationships of statutes to one another, but seemingly no further.\textsuperscript{193} The caprice of the demarcation is dealt with by pointing to the twin concerns of legitimacy and determinacy. Interpretation of legislation, if it is to be legitimate, must confine itself to ascertaining what the legislative act commands. Legislative acts can command only through statutes. Reference may not be made, therefore, to instruments other than statutes. Similarly, because "interpretation" is no more than the judicial function of ascertaining the meaning of legislative acts, the validity of the product of the function rests on determinate ascriptive results that respect the delineated spheres of the judicial and political branches of government. The end product of judicial interpretation of a statute must be a determinate command arrived at within the circumscribed role of the judge as merely an \textit{interpreter}, not a law-giver.

This bright-line dichotomy between an interpretive judicial role and a prescriptive legislative one is challenged by institutionalists, at least in their conception of the role of structure as a tool of interpretation. Even accepting that the function of interpretation is to ascertain statutory intent or legislative purpose, reliance on the juxtaposition of items to one another as a source of meaning cannot be confined to only those items that fall squarely within the written text: word, sentence, paragraph, section, title, act, or code. The political branches and the judiciary are not isolated entities enveloped in a lawmaking bubble. They derive their being and functions from the existence of other relationships that act on them, and on which they themselves act. Each time a court interprets a statute, it is necessarily making or giving law. This is especially the case where the court relies on more than the literal wording of a statute. A legislature rarely acts without regard to its supposition of what meaning a court would give to its actions, particularly in view of the court's power either to declare the legislative enactment unconstitutional or to interpret it in such a way as to "avoid a constitutional problem."\textsuperscript{194}

\textsuperscript{193} See, e.g., \textit{supra} notes 82-94 and accompanying text.

\textsuperscript{194} The Supreme Court's recent decision in \textit{Zobrest v. Catalina Foothills School District} indicates that even this hitherto accepted rule of constitutional law is up for grabs. 113 S.
Because the relationship between the political branches on the one hand and the judiciary on the other in the making of statutory law is interactive, structural analysis imposes on the interpreter a complex set of rules. Essentially, those rules ask the judge in each case to reconstruct the politico-legal structure and to respond in a fashion that accords with the political and legal traditions of the community. Those traditions are best exemplified by institutional practices and mores. The issue of legitimacy is thus resolved by confining the interpretive process within those established institutional practices/mores. Schooled properly, a judge is unlikely to usurp the legislative or executive function because part of her training as a judge is to respect the constitutional checks inherent in her appointment as a judge and not her election as a legislator. In those rare cases (or on those rare occasions) where indoctrination fails, the specific act of the specific judge can usually be corrected by the hierarchic structure of the judicial system.

Providing determinate interpretive responses, on the other hand, poses somewhat more difficult issues. Institutional training and membership in an “interpretive community” may furnish some commonality of approach, thereby checking the level of indeterminacy. The subscription to precedents and reasoning by analogy characteristic of common-law adjudication may function in this manner.195

Resort to creative argumentation encouraged by the adversarial system, and the use of law as a tool for social reform, however, would appear to undercut any such systemic warranty of determinacy. Necessarily, then, institutionalists look outside of institutional structures for generative rules that promote determinacy. The sources of such rules have varied over time. They share, however, a set of structural characteristics. Initially, the use of judicial canons of interpretation provided an avenue for the resolution of the determinacy issue. It appeared a particularly promising avenue because the formal structures embedded in the canons made them acceptable instruments both for institutionalists and conventional textualists. Formalists and early realists alike, however, effectively demonstrated their aridity,

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195. See, e.g., Calabresi, supra note 81, at 163-66 (discussing feasibility of common-law function of courts in “this age of statutes”).
forcing contemporary institutionalists to articulate other structures consonant with the determinacy requirement. While those structures have yet to be fully worked out, they evidence a willingness to concede determinacy of outcome in the particular case in exchange for overall systemic coherence. That coherence is based on a view of the participating interpreter not simply as a cog, but a complete embodiment of the system in whom all of its history, rules, customs, practices, and values are subsumed. The consequence is that the validity of any particular interpretation is to be judged not with regard to the application of determinate rules, but the systemic legitimacy of the rendered interpretation; that is, the extent to which the interpretation is coherent with other rules, customs, practices, principles, and values associated with the system.

It is this focus of institutionalists on systemic legitimacy that provides the bridge to the critiques mounted by the various members of the critical legal studies movement. The essential character of the challenge is to demonstrate that the claimed legitimation of “liberal legal practice and institutions,” based as it is on the conception of “objective neutrality,” is a fake because legal practice and institutions are contingent products of subjective political decisions. Demonstrating the validity of the criticism via the deconstructive process has been a good deal easier than putting forward a programmatic vision of an acceptable substitute. The difficulty hampering success in the latter project is the same that has bedeviled conventional textualists and institutionalists alike: finding an interpretive framework that takes account of the subjective character of communication while at the same time positing outcomes that are reasonably determinate.

Interpretation is a highly subjective cognitive process whose social value rests in the intersubjective communicability of both the process and its results. Classic liberal practices and institutions (including law) mediated the dilemma by positing a “rational self” that was both subjectively conscious of its interest and objectively cognizant that the achievement of that interest was interdependent on the realization of a shared community of interests. The particularization of this rational self has varied from field to field over time. It has ranged from the mysticism of Adam Smith’s “invisible hand” to current unadulteratedly self-centered political economic theories of collective choice. It has embraced the legal individualism of the nineteenth century, under which social institutions were thought to exist to serve and promote self-actualization, just as readily as it has embraced the current

196. See supra notes 40-46 and accompanying text (discussing Judge Posner and Professor Sunstein’s structural devices).
class-based regulatory regime (characterized by the "rights revolution"), in which the self, while still the dominant concern of the legal system, may be subordinated to some collective social or communitarian interest.\textsuperscript{197} The shift, in each case, was underpinned and manifested through pervasive institutional structures such as markets, court systems, and statutory schemes. The institutions can be deconstructed and, in so doing, a claim can be made that what has occurred is the unveiling of the fallacy of the ideas they embody.

Poststructuralism—at least in the incarnation of a radical nonempirical critique of liberal ideology—grounding its critique of the orthodox on the contingent character of the choice to privilege one particular act rather than another, appears to advocate as a programmatic response no more than the consideration of alternatives. It does not spell out those alternatives. And in any event, such resituated alternatives would appear to be equally amenable to the deconstructive critique asserted against contemporary liberalism.

The law and literature movement exemplifies a quite different programmatic response to the product of the deconstructive process. Rather than rejecting the "self," law as narrative embraces it fully and situates its legal account entirely within that framework. The experiences of the self, not the contradictory abstractions of a hypothetical other, are put forward as the legitimate criteria for intersubjective communication. Such experiences, when publicly recounted and analyzed, empower not only the story-teller, but the many others like herself whom traditional institutions and practices have, in the name of objectivity, effectively disempowered and rendered voiceless. For such persons, reliance on the "self" is a necessary step to participation in the community of others. Personal experiences are thus individualistically and collectively preceptorial.

Rather than resting on empathy alone as the currency of exchange, practitioners of the art of law as literature are quite willing to exploit the systemic contradictions and hypocrisies of contemporary liberalism. Whatever the shortcomings of the "rights revolution," its grounding in the purported collective objectivism of personhood represents a distinct advance over the subjective individualism of the late eighteenth century. It should not be dismissed, therefore, on the ground that it incorporates philosophical or ideological inconsistencies. The rules surrounding the generation and exercise of rights may

\textsuperscript{197} Much of the literature on "civic republicanism" is a working out of the transfiguration of the concrete reality of the individual-centered liberalism of the late eighteenth and early nineteenth centuries to the current humanistic liberalism of reformist academics. See, e.g., Symposium, The Republican Civic Tradition, 97 YALE L.J. 1493 (1988).
be indeterminate, but that does not without more render reliance on those rights illegitimate. That the rules are contingent is precisely a good reason for their exploitation when the circumstances favor doing so, and for rejecting them when the wind changes direction.

Yet, poststructuralists cannot view the embrace of subjectivism even as reformulated by proponents of law as narrative with any degree of equanimity. Contingent exploitation of rights grounded on empathy when effectively communicated may indeed be a very powerful analytical tool, and it may well be that the community, over extended periods of time, will be fairer to its members and less contradictory in its practices. These are, however, highly contingent circumstances, subject to effective deconstruction. Moreover, the willingness to accept (that is, buy into) contemporary legal liberalism’s rights compromise between its contending impulses towards individual subjectivism and collective objectivism is but a prelude to the sort of co-existence with the status quo that would flourish, denuding the movement of any radical transformative vitality. Acceptance of the “self” as the organizing core of social practice is thus ultimately conservative, and regardless of the initial progressive aspirations of those critics who have brought the use of narrative into legal analysis, or who expect to exploit the contradictions of the liberal order by manipulation of the language of rights, the result will be a devolution back to stasis.

Structuralism, another product of primarily continental European intellectual thought, has received little attention from legal theorists in this country. The essence of structuralism is that concrete propositions or rules regarding a collective or specific institutions within the collective (for example, language or law) can appropriately

198. There is, for example, no principled reason why the narrative of the disempowered is more likely to shape the construction of a future order than that of the already privileged. Indeed, the reverse may well be the case. To the extent that stories by and of the disempowered awaken them from their slumber, the resulting sense of awareness may amount to no more than temporary elation symptomatic of false consciousness of the power of the self.

199. See, e.g., Berman, supra note 172, at 114-43.

200. See Heller, supra note 13, at 127; cf. Berman, supra note 172 (noting similar relative lack of attention among American literary critics). Some scholars of the poststructuralist school have tended to draw inspiration from the works of European literary critics. See, e.g., Balkin, supra note 167, at 744 (noting that work of French philosopher-deconstructionist, Jacques Derrida, has been applied mainly to literary criticism). Other proponents of structuralism are more likely to look to the work of anthropologists such as Claude Levi-Strauss and psychologists such as Piaget to illuminate the method. See generally Hermann, supra note 13.

201. Like proponents of the other schools of thought discussed in this Article, proponents of structuralism are unified more in their iconoclasm than in their reconstitutive proposals. It is, however, in their contributions to the latter that this Article mainly is interested.
be based or drawn from the formally unarticulated or consciously unrecognized but deeply embedded network of relations among and between institutions and experiences. Structuralist discourse proceeds in two stages. The first is the deconstruction of the formal rules or practices by examination of the hidden subconscious assumptions and values embedded in the institutions and interrelationships that are responsible for the actual functioning of the group or its subparts, as distinct from the mythologized explanations enshrined in the formal rules. Rather than being linguistically based, structural deconstruction is grounded on analyzing the belief systems embodied in the functions of the institutions of the society and their interrelationships. Formal texts and rules are relevant only to the extent that they enlighten the deconstructive process by suggesting one source of influence on institutional practices.

At the second stage, structuralism builds on the result of the deconstructive practice by exploiting both the conscious and subconscious forces at work in shaping institutional relationships. By examining the network of institutional relationships at varying levels of interaction, structuralist interpretation offers a possibility of constructively applying deconstructive practice to elements within a system. It recognizes the normative force of explanations, while accepting the limited capacity of the interpretive method to reshape—at least within a lifespan—the core assumptions and institutions of a society.

In addition, structuralism, by presenting deconstruction and reinterpretation as tiered processes, avoids the poststructuralist ontological dilemma of positing a universalist critical methodology grounded on the existence of an unprivileged "other" when the critics themselves are necessarily members of the privileged self, with no better claim to knowing the possibility of the "other."

Structuralism thus arguably provides radical critics of the law and literature movement an interpretive road out of the box into which poststructural analysis would seem to paint them. It makes it possible to argue coherently for transformation of the status quo while taking cognizance of the strength, vitality, and even legitimacy of socially embedded practices. It offers critical illumination into the quest for meaning as both the search for a workable and determinate end prod-

202. See, e.g., Hermann, supra note 13, at 1141-43 ("Structuralist theory contemplates a pre-eminent role for the unconscious in the formation of social and cultural patterns."); see also Heller, supra note 13, at 140; Hermann, supra note 13, at 1179 ("A structural analysis of legal doctrine aimed at disclosing the origins of legal reasoning must begin with the assumption that the significance of each opinion lies not in the surface formulations but in the unconscious deep structures guiding the decision."). Marxist deconstruction of capital formation and Freudian analysis of contents of the "self" in liberal society are classic illustrations of structuralism at work.
uct and the enunciation of a normative or prescriptive statement of that end product.

The remainder of this Article examines the particulars of structure and structuralism as tools of legal interpretivism and advocates an agenda of interpretivism that exploits the increasingly opportunistic use of structure by conventional textualists and institutionalists. It suggests that such a goal might be achieved by bringing to bear on conventional structural analysis the transformative values of structuralism: that is, a deconstruction of institutional practice(s) and a recreation of the practice on the basis of the actual experiences of the regulated.

The next part explores in some detail conventionalist approaches to structure as an interpretive tool through an analysis of the recent United States Court of Appeals for the Third Circuit decision in \textit{Ballay v. Legg Mason Wood Walker, Inc.} and other related cases under the federal securities laws. Part IV discusses how the specificities of structuralism can be deployed through the broadening of conventional structural analysis to generate transformative results. The justification of the claim that the search for meaning must serve both to create understanding or awareness of practice and to prescribe a normative direction for conduct on the basis of such practice is also taken up in part IV.

III. \textbf{Structure in the Interpretation of the Federal Securities Laws}

This part explores conventional understanding and explanation of the role of structure in statutory interpretation. It does so by examining judicial interpretation of federal statutory provisions relating to civil claims of violations of the federal securities laws. It starts by delineating the approach to structure undertaken by the Third Circuit in \textit{Ballay v. Legg Mason Wood Walker, Inc.}

I defend the Third Circuit's structural methodology by exploring the shortcomings of the competing conventional methodologies of "plain text" and "legislative history." My contention is that serious engagement with the interpretive process inevitably forces the judicial interpreter to adopt "structure" as the more effective means of making practicable the objective of the legislature and the conduct of the regulated. Finally, I review other securities laws cases that have explicitly resorted to structure as an interpretive tool. The purpose here is two-fold. First, the review allows the articulation with some specificity of the elements of conventional structural analysis. Second, the analysis discloses shortcomings of conventional structural analysis; shortcomings that I contend can best be dealt with through a structuralist
methodology that explicitly incorporates the teachings of the deconstruction of institutional practice into our theories of interpretation.

A. Structure and the Construction of Section 12(2) — The Ballay Decision

Section 12(2) of the Securities Act of 1933,203 which gives the purchaser of a security the right to rescind a transaction or to recover money damages if the seller used material misrepresentations in making the sale, has not been a particularly stinging arrow in the quiver of securities laws plaintiffs.204 This is so despite the absence of many of the traditional encumbrances to the viability of a plaintiff’s claim under traditional common-law tort actions.205 Frequently, plaintiffs seemed to insert it as a scavenger or an afterthought to make sure that all the bases were covered. Not surprisingly, then, judicial exposition of the meaning and reach of the section tended to be quite cursory.206 Moreover, despite the recent spurt of activity in scholarship and judicial decisions on the section,207 it is highly unlikely that the section will tax significant judicial resources.208

Thus, I present and discuss the Ballay decision and its interpretation of section 12(2) as a model not so much of what the law is or should be, but as an elaboration of the developing structural methodology for statutory interpretation and the potentials and pitfalls that the approach holds out for the interpretive enterprise.

203. See infra note 217 for the text of the statute.
204. E.g., Havel, supra note 160, at 227-28 (observing that “unlike section 10(b), section 12(2) has not been an engine for wide-ranging regulation of the securities markets,” and referring to § 12(2) as “relative[ly] obscur[e]”).
205. See infra note 279.
206. See Weiss, supra note 6, at 27-34.
207. See infra note 266.
208. This is likely to be the case for two reasons. First, claims under § 12(2) can almost always be brought under another section of the securities laws. See infra notes 234-38 and accompanying text. Second, and much more importantly, to the extent § 12(2) provides advantages for plaintiffs over other sections, it is because the claim would be against a broker (or similarly situated functional intermediary) rather than, for example, an issuer, underwriter, or a direct “beneficiary seller.” However, the Supreme Court’s recent decision making it clear that arbitration agreements involving § 12(2) are to be enforced, and the brokerage industry’s uniform use of arbitration agreements, means that § 12(2) law is likely to be developed in the arbitration forum rather than in the courts. See Rodríguez De Quijas v. Shearson/American Express, 490 U.S. 477 (1990).

One possible exception to this consideration would arise if persons engaged in “private placements” (that is, direct transactions between buyers and sellers not involving public offerings and, therefore, not entailing brokerage agreements) were to resort constantly to the courts to retrieve losses arguably based on the negligence of the seller. See, e.g., Pacific Dunlop Holdings v. Allen & Co., 993 F.2d 578 (7th Cir. 1993). The conventions of business realities and ethics of the private placement marketplace make this quite unlikely, and the Pacific Dunlop Holdings-type case should be the exception rather than the rule.
The decision in *Ballay v. Legg Mason Wood Walker, Inc.*209 disposed of claims brought by purchasers of the shares of a restructured company against a brokerage firm that had recommended the securities.210 The Third Circuit, reversing a jury finding for the plaintiffs, held that the plaintiffs were not entitled to relief because they had made their purchases in the “secondary” market. The Third Circuit thus became the first appellate court to so hold. The decision nonetheless raised the profile of a fray (engendered only in the last decade) among federal district courts as to whether section 12(2) applies only to transactions involving initial distributions. Appellate and district court decisions in the prior four decades shared the consensus—albeit unexamined211—that section 12(2) applied to all purchases of securities, regardless of the stage of distribution.

According to trial testimony, between June 1986 and August 1987, Legg Mason, a “full service brokerage firm,”212 recommended the stock of the Wickes Company to its clients on the basis of a “philosophy of value investing.” Under this philosophy, “Legg Mason promote[d] investment in the undervalued stock of companies that show[ed] potential for future growth.”213 This means that the firm searched out and recommended stock that exhibited “characteristics in one form or another that [gave] one the basis for believing that there [was] limited risk involved with investing in those stocks.”214

The recommendations put out by an analyst in Legg Mason’s head office were made both orally through an interoffice “squawk box,” which was connected to branch offices, and through various written communications circulated to Legg Mason’s brokers and clients. It appears that in communicating the Wickes recommendations, Legg Mason erroneously included goodwill in its statement of the book value of Wickes, while inaccurately representing that this reported

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210. Id. at 685.
212. A “full service brokerage firm” provides clients with investment counselling services, in contrast to discount firms, which simply execute a client’s instruction to buy or sell securities. *Ballay*, 925 F.2d at 685 & n.2. In exchange, full service brokerage firms typically charge significantly more than do discount firms.
213. Id. at 685.
214. Id. These so-called “out of favor situations” typically involved purchasing stock or debt in companies that had emerged recently from bankruptcy or reorganization, as had Wickes.
value excluded goodwill.\footnote{215} This resulted in a misrepresentation to investors of the constructed book value of Wickes.\footnote{216}

The investors, having lost more than they believed themselves exposed to on the downside, sued Legg Mason alleging, \textit{inter alia}, a violation of section 12(2) of the Securities Act of 1933.\footnote{217} The Third Circuit held that the plaintiffs had no claim against Legg Mason, because claims for violation of section 12(2) may be brought only for misrepresentations made in connection with the sales of securities in initial distributions, not with sales in the secondary or aftermarket.\footnote{218}

\begin{footnotesize}
\footnote{215} It is not clear whether the misrepresentation was due to typographical errors, as claimed by Legg Mason, or to some other cause.
\footnote{216} \textit{See id.} at 685-86 \& n.4. Legg Mason represented on more than one occasion that its valuation of Wickes' book value excluded "goodwill." In reality, the book value claimed for Wickes did include Legg Mason's valuation of "goodwill."
\footnote{217} Securities Act of 1933, \textsection 12(2), 15 U.S.C. \textsection 77l(2) (1988) reads:
\begin{quote}
Any person who --- . . . (2) offers or sells a security (whether or not exempted by the provisions of section 3 [15 U.S.C. \textsection 77(c)], other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.
\end{quote}
\footnote{218} \textit{Id.}

While it is generally acknowledged that this language is not a model of clarity, the essential elements of a cause of action under the statute are fairly well spelled out. The purchaser of a security (other than government securities) may institute private civil action against the seller to rescind the purchase or otherwise obtain monetary damages under the following conditions: (1) the offer or sale was by a prospectus or oral communication (2) disseminated through interstate transportation, the mails, or other means of communication, (3) that included material misrepresentations or omissions (4) of which the plaintiff did not know, and (5) which the defendant cannot show it did not know, and in the exercise of reasonable care could not have known. \textit{See, e.g.}, \textit{Ballay}, 925 F.2d at 687-88. Each of these conditions raises interpretive problems that are at first blush even more difficult than what the \textit{Ballay} court purported to find in the term "oral communication." \textit{Cf., e.g.}, Pinter v. Dahl, 486 U.S. 622 (1988). In \textit{Pinter}, the Court addressed the issue of who was a seller within the meaning of \textsection 12(1) of the Act. \textit{Id.} at 653-54. The Court left unresolved, however, the definition of "seller" under \textsection 12(2). \textit{Id.} at 650 n.4.

\textit{Ballay}, 925 F.2d at 685. For a discussion of what constitutes "initial distributions" and "aftermarket," \textit{see infra} note 227. As the Third Circuit noted, its decision was the first by a court of appeals to hold squarely that the application of \textsection 12(2) can be delineated along the initial distribution/secondary market dichotomy. \textit{Ballay}, 925 F.2d at 684. The Seventh Circuit has declined to follow the distinction. \textit{See Pacific Dunlop Holdings v. Allen & Co.}, 993 F.2d 578 (7th Cir. 1993).
\end{footnotesize}
The court's conclusion was grounded on a structural analysis of section 12(2).

The court's structural approach may be configured into three strata: an intrasectional analysis of section 12(2), an intersectional analysis of the Securities Act of 1933, and an interstatutory juxtaposition of the Securities Act of 1933 and the Securities Exchange Act of 1934. Language and legislative history, for what they are worth, appear relevant only at the first level of the analysis. Explicit references to "policy" concerns predominate in the last tier, and the bulk of the structural analysis is brought to bear at the intermediate (that is, intersectional) stratum.\textsuperscript{219}

Invoking the maxim that "the starting point in every case involving statutory construction is the statutory language,"\textsuperscript{220} the court apparently found the meaning of the phrase "prospectus or oral communication" sufficiently elusive to compel resort to the contextual tool of structural analysis.\textsuperscript{221} The court found the appropriate structural context in the judicial canon \textit{noscitur a sociis}, "which instructs that a provision should not be viewed 'in isolation but in light of the words that accompany it and give [it] meaning.' "\textsuperscript{222} According to the court, the phrase "prospectus or oral communication" should be viewed as a listing of related terms, and the statutorily undefined term "oral communication" must thus draw its meaning from the statutorily defined term "prospectus."\textsuperscript{223}

The conclusion that both terms must be viewed as interconnected, with their meanings bound up to the more restrictive of the two terms, follows from the court's inability "[to] deduce [any] evidence that Congress intended an expansive meaning of oral communication

\textsuperscript{219} District court opinions that have either embraced or rejected the distinction have addressed it in very cursory fashion. See supra note 12; infra note 469.

\textsuperscript{220} Ballay, 925 F.2d at 687 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976)).

\textsuperscript{221} Id. at 688 ("Because the 1933 Act does not define ‘oral communication,’ we must interpret the plain meaning of these words in light of their context in the statute and in keeping with the intent of Congress in passing the 1933 Act.") (citing Kmart Corp v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").)

\textsuperscript{222} Id. (quoting Massachusetts v. Morash, 490 U.S. 107, 115 (1989)).

\textsuperscript{223} Id. (acknowledging that Supreme Court has noted that application of the maxim "\textit{noscitur a sociis}" is not "'an inescapable rule,'" but nonetheless arguing that it is "'often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.' " (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).
unconnected to the term 'prospectus.'"224 This launched the court into the second and more definitive tier of its structural analysis.

The hurdle confronting the justification of the court's restrictive definition of "oral communication" (even when read as modified by "prospectus") appears at first blush very daunting. The definition of the term "prospectus" is broad indeed. Section 2(10) defines the term as any "prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security . . . ."225

The Third Circuit nonetheless began its assault with a seemingly counterintuitive assumption: that the definition implicates a particularized type of document restricted in its usage to the sale of securities in an initial distribution.226 The defense of the assumption, however, is quite straightforward. It is relational in character.

The definition in section 2(10) is not semantic, but must be understood in the context of the practical usages of the term "prospectus" in the Securities Act. The utility of the word "prospectus" in the Act is to describe an instrument without which a "security" cannot be registered (and, therefore, ordinarily cannot be sold).227 The court thus pointed to the mandated usage of a prospectus that contains specifically required information in connection with the registration of a security as a prerequisite for its lawful sale within the coverage of the 1933 Act.228 Moreover, on the basis of the specificity of the require-

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224. Id.
226. Ballay, 925 F.2d at 688.
228. Section 10 of the 1933 Act must be read in pari materia with § 5 of the Act. Section 5 prohibits the sale or offer for sale of any securities (except those exempted under §§ 3 and 4 of the Act), unless such sale or offer for sale was made contemporaneously with or preceded by the delivery of a prospectus meeting the terms spelled out in § 10. See Securities Act of 1933, § 5, 15 U.S.C. § 77e (1988). Section 10 provides for two types of prospectuses: the "plenary" and the "summary" prospectus. See id. § 10, 15 U.S.C. § 77j. While the Third Circuit is correct that this structure "clearly ties a prospectus with registration statements" filed with the SEC, Ballay, 925 F.2d at 688, its further conclusion that these prospectuses are required solely in connection with "initial distributions," however, begs fundamental questions such as what constitutes a "prospectus" meeting the requirements of § 10, and what is an "initial distribution." The court appears to assume that there are settled answers to these questions, an assumption that is far from self-evident. Compare, e.g., SEC v. Manor Nursing Ctrs., 458 F.2d 1082, 1098 (2d Cir. 1972) (finding that selling document containing errors does not satisfy § 10 definition of "prospectus") with SEC v. Southwest Coal & Energy Co., 624 F.2d 1312, 1318, 1319 (5th Cir. 1980) (finding that it does).

Similarly, § 10 appears to permit the use without modification of a prospectus for up to nine months after an offering has been bona fide made to the public. See Securities Act of 1933, § 10, 15 U.S.C. § 77j (1988). Does this imply that an initial distribution involves all transactions in the security during the nine-month period, or merely that transaction
ments of section 10, which exhaustively prescribes the form the mandatorily required registration prospectus must take, and the limited exemptions from the otherwise broad definition of prospectus in section 2(10) to exclude post-registration communication with an investor if a prior written prospectus had been furnished to that investor,\(^{229}\) or a simple communication which refers to a section 10 prospectus and does no more than identify the security, its price, and by whom orders will be executed,\(^{230}\) the court concluded that, notwithstanding the broadly inclusive definitional language in section 2(10), the term “prospectus” is not to be given an expansive reach.

In short, the court’s reasoning appears to be that whatever may be our initial linguistically based understanding of the term “prospectus” in section 2(10), the provision is qualified in its entirety by the uses to which the term is put within the statute itself. The demonstrated uses, the court contended, are narrow. It necessarily follows then that the associated term “oral communication” should also be narrowly interpreted.\(^{231}\)

The court also found the placement of section 12(2) within the overall structure of the 1933 Act to be of interpretive significance. Pointing out that section 12(2) is immediately preceded by sections 11\(^{232}\) and 12(1)\(^{233}\), both of which provide civil causes of action for involving the issuer or the underwriter? The confusion is illustrated in Pacific Dunlop Holdings v. Allen & Co., 993 F.2d 578, 580 n.5 (7th Cir. 1993). The court in Pacific Dunlop Holdings defined a “primary offering” as “a public offering made on behalf of the issuer.” Id. (“The proceeds realized from the offering will be available to the issuer to be used for corporate purposes.”). The court then defined “secondary trading” as “made on behalf of some person or persons other than the issuer.” Id. (quoting 3A HAROLD S. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 6.03 (1988)). Read literally, purchases made under a “best efforts” underwriting would qualify as an “initial distribution,” while those under a “firm commitment” underwriting would not. Cf. Weiss, supra note 6, at 38-40 (arguing that certain types of “private placements” qualify as “initial distributions,” while others do not); Daniel J. Winnike & Christopher E. Nordquist, Federal Securities Law Issues for the Sticky Offering, 48 BUS. LAW. 869 (1993) (discussing classification problem in context of resale by underwriter of involuntarily acquired securities owing to lack of demand at time of original offer to public).


\(^{230}\) See id. § 2(10)(b), 15 U.S.C. § 77b(10)(b). Such a communication might easily be the tombstone advertisement in a newspaper, or a simple brokerage confirmation slip.

\(^{231}\) In an unconvincing implication of an affirmative proposition from a negative, the court argued that if Congress “had intended an expansive meaning for the term ‘prospectus,’ Congress more simply could have drafted Section 12(2) to describe all ‘written or oral communications.’ ” Ballay, 925 F.2d at 689 (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.29 (4th ed. 1984)).

\(^{232}\) Securities Act of 1933, § 11, 15 U.S.C. § 77k (1988). Section 11 imposes “express” or “strict” liability on specifically identified persons for material misrepresentations in a registration statement, subject only to specifically enumerated defenses and caps on recoverable monetary damages. See generally Herman & MacLean v. Huddleston, 459 U.S.
conduct associated with initial distributions\textsuperscript{234} (and, according to the court, deal \textit{solely} with initial distributions), the court argued that the section must be similarly limited to sales or offers to sell made in the “initial distribution.”\textsuperscript{235}

The third stage of the court’s structural analysis commences with the observation that were it to give an expansive reading to the term “oral communication” as used in section 12(2), the result would be an anomalous (and, for the court, illogical) conclusion where a buyer of securities could recover for oral misrepresentations, but be unable to recover for the same misrepresentations made in a written communication that is not a prospectus. The indicated anomaly flows from the assumption that, in most cases, a plaintiff who cannot invoke section 12(2) to cover a misrepresentation in a written document that is not a prospectus would be able to recover if at all only under section 10(b) of the Securities Exchange Act of 1934.\textsuperscript{236} A section 10(b) plaintiff faces, however, significant hurdles that do not exist under section 12(2). There are, for example, the imposition on the plaintiff of the burdens of pleading and proving the scienter, reliance, and causation.


\textsuperscript{234} Because the court nowhere defines the meaning of “initial distributions,” the accuracy of this claim cannot be meaningfully evaluated. See supra note 6. It should be noted, however, that § 11 has been applied to trades on the secondary market, provided that the particular security can be traced back to the offering with which the offending registration statement (including prospectus) was employed. See Barnes v. Ososky, 373 F.2d 269, 271 (2d Cir. 1967); see also In re AES Corp. Sec. Litig., 825 F. Supp. 578, 593 (S.D.N.Y. 1993) (declining to dismiss § 12(2) claim, on ground that plaintiffs who made their purchases in “secondary market” may be able to recover their losses if they can trace their purchases to misrepresentations in offering document). Moreover, the shifting in § 11(a) of the burden of showing reliance on an offending registration statement to the plaintiff who sues more than a year after the registration of the securities if the issuer publishes an annual report covering the post-registration period would appear to undercut the Ballay court’s claim.

\textsuperscript{235} Ballay, 925 F.2d at 691-92.

\textsuperscript{236} As a practical matter, the assumption may well be correct. However, it ignores the legal possibility that state laws—for example, blue sky and negligent misrepresentation claims—are not preempted by the securities laws and may afford relief with regard to misstatements in a written document not deemed to be a prospectus on conditions no more stringent than those under § 12(2).
elements of a section 10(b) claim, burdens which are absent in a section 12(2) action.

Although not explicitly stated by the court, this is a concern that is significant only in the context of conduct by brokers. Section 12(2) covers only sellers of securities, thereby exempting such other participants in the sale of a security such as accountants and lawyers. Other potential "sellers" such as issuers and underwriters, because of their exposure under sections 11 and 12(1), would be no more liable under a broad interpretation of section 12(2) than under a narrow one. The concern, then, over the exposure of brokers under a broad interpretation of section 12(2) is a statement about how brokers ought to be treated in relation to other market participants within the securities industry. Are brokers "mere agents" whose conduct should be regulated under the arms-length rule of section 10(b), or are they fiduciaries who should be subjected to the "mere negligence" standard of section 12(2)? The Third Circuit's answer was that they are the former.

237. Although § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988), does not expressly authorize private civil actions for its violation, it is by now all but settled that such a private right of action does exist under the section and SEC Rule 10b-5, 17 C.F.R. 240.10b-5 (1991), promulgated under the section. See Basic, Inc. v. Levinson, 485 U.S. 224, 230-31 (1988); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976); cf. Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2087-92 (1993) (holding that defendant may seek contribution from joint tortfeasor under § 10(b) and Rule 10b-5); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991) (adopting statute of limitations period for § 10(b) claims). As a judicially implied cause of action, the elements of the claim have been fashioned by the courts through a series of case-by-case adjudications, the results of many of which have never been squarely addressed by the Supreme Court. For a basic statement of the elements, see Wilson v. Comtech Telecommunications Corp., 648 F.2d 88, 92 (2d Cir. 1981).

238. See supra notes 203-07 and accompanying text. In a § 12(2) action, lack of knowledge on the part of the defendant is an affirmative defense (that is, there is a presumption of knowledge by the defendant), which can only be satisfied both by a showing of the absence of such knowledge and proof by the defendant that she could not, in the exercise of reasonable care, have known of the untruth. The requirement of "scienter," by contrast, imposes on the plaintiff the burden of pleading and proving knowledge by the defendant that, as the Supreme Court has put it, embraces a state of mind involving the "intent to deceive, manipulate, or defraud," or at least recklessness. Ernst & Ernst, 425 U.S. at 193 n.12. Neither affirmative reliance by the plaintiff nor a causal link between the misrepresentation and the injury sustained by the plaintiff are explicitly required under § 12(2), although both may play some role in a court's determination as to whether the misrepresentation or omission is "material," which is an element of a § 12(2) claim.


Next, explicitly relying on the "object and structure" of the securities laws to support its narrow construction of section 12(2),242 the court invoked the frequently asserted proposition that the 1933 and 1934 acts collectively had the object of stabilizing and reducing fraud in a post-great crash securities market.243 From this proposition, the court drew another: that the Securities Act on the one hand, and the Securities Exchange Act, on the other, cover distinct and severable spheres of the marketing of securities. According to the court, Congress, in the 1933 Act, "sought to establish safeguards for investors in batch offerings of securities by establishing registration and disclosure requirements designed in part to protect investors from fraud and to promote ethical standards of honesty and fair dealing."244 The Exchange Act, stated the court, "on the other hand was enacted 'to provide for the regulation of securities exchanges[.] . . . to prevent inequitable and unfair practices on such exchanges[.] . . . and for other purposes.' "245 This distribution of functions among the statutes, the court asserted, reinforces its structural analysis of the language of section 12(2),246 so that claims of violation of the 1933 Act can only be made for transactions in the initial issues market,247 while claims arising from trading in the "secondary" or "aftermarket" must be prosecuted, if at all, under the 1934 Act.248

242. Ball v. Legg Mason Wood Walker, Inc., 925 F.2d 682, 689 (3d Cir.), cert. denied, 112 S. Ct. 79 (1991) (citing Dole v. United Steelworkers, 494 U.S. 26, 35-36 (1990)). As the court's invocation of the maxim noscitur a sociis proves, however, the structural framework here is analogous to that employed in construing the "language" of § 12(2). The difference, as suggested below, lies not in the semantics of "language," "object," or "structure," but in the more emphatic reliance on policy objectives to shape the structural analysis.

243. Id.

244. Id. at 690 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976)).

245. Id. at 689 (quoting In re Data Access Sys. Sec. Litig., 843 F.2d 1537, 1548 (3d Cir.), cert. denied, 488 U.S. 849 (1988)).

246. The court downplayed the cursory reference to the statement in the legislative history of the 1933 Act to the effect that "[t]he bill affects only new offerings of securities . . . . It does not affect the ordinary redistribution of securities unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering." Id. at 690 (quoting H.R. 85, 73d Cong., 1st Sess. 7 (1933)). This, in my view, is quite appropriate. Neither "new offering" nor "redistribution" is explained. Although the Third Circuit appears to assume they refer to the process of issuing and distributing securities, an equally plausible meaning is that they qualify the legislative process, so that the dichotomy they exemplify is that between the issuance or distribution of securities before or after the Act has come into force.

247. Id.

248. But see id. at 690 n.10 (citing In re Data Access, 843 F.2d at 1548). The court attempted to avoid the logic of its structural argument by clothing the 1934 Act in two garbs: as embodying amendments to the 1933 Act and as containing new substantive provisions. Id.
This reasoning, however, put the Third Circuit in seeming conflict with the holding of the United States Supreme Court in United States v. Naftalin. Construing the reach of section 17(a) of the 1933 Act, which authorizes criminal and civil injunctive prosecution of much of the same conduct for which a seller may be liable under section 12(2), the Naftalin Court explicitly rejected the claim that prosecutions under section 17(a) could not be brought for conduct engaged in the secondary market.

The Third Circuit distinguished away Naftalin on two grounds. First, the somewhat different phrasing in the two statutes of the manner in which prohibited conduct may be perpetrated signified a congressional intent to distinguish between the beneficiaries of the statutes; and second, this interpretation was borne out by the admittedly scanty legislative history of the two sections.

On the first point, the court found a significant distinction between Congress' use of the phrase "prospectus or oral communication" in section 12(2) and the use of "directly or indirectly" in section 17(a). In the court's view, if Congress had intended to give section 12(2) the broad scope of section 17(a) (that is, as applying to trading of all securities whether in the initial or aftermarket), then it would have used "prospectus or any oral communication."

With regard to the legislative history, the Third Circuit turned its prior argument on its head. In ruling that section 17(a) applied equally to initial and secondary markets, the Supreme Court had pointed to the statement in the Senate Report that "[t]he Act subjects the sale of old or outstanding securities to the same criminal penalties

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249. 441 U.S. 768 (1979).

250. Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (1988), provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Id.

251. Naftalin, 441 U.S. at 778.

252. Bailay, 925 F.2d at 692. Surely, this argument proves too much. It is not evident why the adjective "any" would be required to modify "oral communication." Is it not just as persuasive to argue that had Congress intended to limit the clearly broad term "oral communication" to those associated with a prospectus, it would have inserted "related" before the phrase "oral communication"?
and injunctive authority for fraud, deception, or misrepresentation as in the case of new issues put out after the approval of the act. 253

The Third Circuit, disregarding the similarity of this language to that in the House Report on section 12(2),254 found that the Senate Report had thus made explicit Congress’ intent to subject secondary trading to section 17(a) prohibitions, in contrast to its alleged silence in section 12(2).255 Naftalin, the Third Circuit thus held, provides no precedent for applying section 12(2) beyond the initial market for securities.

The Ballay decision is not reticent about the policy underpinnings of its structural approach to the interpretation of section 12(2).256 It readily explains its adoption of a methodology different than that employed by the Supreme Court in Herman & MacLean v. Huddleston257 by pointing to the substantive societal interests implicated in the judicial rulings. In Herman & MacLean, the Supreme Court, while recognizing that the 1933 and 1934 Acts should be read in pari materia— that is, as related statutes—nonetheless held that such a structural approach did not dictate the avoidance of redundancies or overlap in the construction of their provisions.258 Thus, the Court found that actions prohibited under section 10(b) of the 1934 Act could be prosecuted under section 11 of the 1933 Act, despite the more relaxed burden of proof placed on the plaintiff under the latter provision.259 By contrast, the Third Circuit, in restrictively construing the reach of section 12(2), took the position that “one provision should be narrowly interpreted, when consistent with legislative intent, so as not to eviscerate requirements for recovery under another complementary provision.”260 Narrow construction of section 12(2) was necessary to


254. See id. The Third Circuit’s construction of the word “new” as meaning “initial” rather than “post-enactment” issue of securities is neither self-evident nor firmly supported by legislative history or other extrinsic evidence. See supra note 246. It is just as natural (and indeed more probable) to construe the word “new” to apply to post-enactment issues of securities whether traded in the initial market or aftermarket.

255. See Ballay, 925 F.2d at 691-92.


258. See id. at 380-87.

259. Id.; see also infra note 405 and accompanying text (discussing reasoning of Herman & MacLean Court). A plaintiff’s burden of proof under § 11 of the 1933 Act is, if anything, less stringent than that under § 12(2). For example, given the wording of the two sections, a plaintiff may well be required to plead (if not prove) as a jurisdictional matter under § 12(2) that she did not know of the misstatement, while such an allegation clearly is not required under § 11.

260. Ballay v. Legg Mason Wood Walker, Inc., 925 F.2d 682, 692 (3d Cir.), cert. denied, 112 S. Ct. 79 (1991). This assumes clarity as to what is unquestionably a contestable proposition: what constitutes “legislative intent” under § 12(2)—or indeed under the
avoid making section 12(2) a preferred method by plaintiff purchasers for litigating alleged wrongdoing in the secondary market—to the detriment of section 10(b) of the 1934 Act.

The court pointed out that purchasers unable to recover under section 10(b) might nonetheless succeed under the less stringent requirements of section 12(2). While this might be an acceptable outcome with regard to transactions in the initial market that functions to raise capital for sellers, the court contended that it would be inequitable as applied to sellers in the secondary market who possess a different reason for entering the market place. That is, sellers in the secondary market are there to speculate and therefore entertain a different risk/reward profile from initial sellers. This difference in the structure or character of the relationships justifies both the differences in the distribution of burdens of proof and availability of remedies under sections 12(2) and 10(b).

What the court failed explicitly to acknowledge is that this reading of section 12(2) favors one, and only one, particular group of actors in the securities marketplace: brokers. As I shall argue below, this is a very significant flaw in the Third Circuit’s structural methodology. If it had approached the problem from a slightly different perspective, one that explicitly focused on the forces that shape interpretations of the securities laws by the persons whose conduct they regulate, the court would have been compelled to advance a different set of internally more coherent and logically defensible reasons for its conclusion.

B. Structure and the Securities Laws: Conventional Methodology in Perspective

The Ballay court’s holding has been followed (with scant analysis) by one court of appeals and rejected by another. Furthermore,

judicially created private right of action under § 10(b) and its administrative offspring, Rule 10b-5.

261. See id. at 692-93 & n.13. This appears to me the only plausible explanation of the court’s attempt to distinguish the decision in Herman & MacLean.

262. Id. As the Third Circuit framed the latter issue:
There is good reason why sellers in initial distributions should be liable for rescissionary damages. These sellers receive the full purchase price from the investors and are the investors’ sole source of information concerning the value of the security. The same is not true of sellers in the aftermarket, such as Legg Mason, who receive only a commission and who are not the investors’ sole source of information concerning the value of the stock.

Id. at 693. This argument is explored further infra part IV.

263. See infra part IV.B.

264. See First Union Discount Brokerage Servs. v. Milos, 997 F.2d 835, 843-44 (11th Cir. 1993) (“Although the writings of some courts and commentators counsel otherwise, we are
the decision generally has been disapproved by commentators. Critics have contended either that the court misinterpreted legislative intent (derived from the legislative history of the Act and prior judicial opinions) or that the specifics of the court's structural analysis are flawed. Both sources of criticism ultimately boil down to the claim that the court's analysis prefers the wrong "policy" outcome. Neither set of criticisms, however, confronts the interpretive method-

persuaded by the Third Circuit's reasoning and hold that section 12(2) of the 1933 Act does not apply to aftermarket transactions.

265. See Pacific Dunlop Holdings v. Allen & Co., 993 F.2d 578 (7th Cir. 1993). District courts have either followed the Ballay decision or have attempted to distinguish it away. See supra note 12.

266. See e.g., 17A J. WILLIAM HICKS, CIVIL LIABILITIES: ENFORCEMENT AND LITIGATION UNDER THE 1933 ACT § 6.01, at 19-21 (1993); 9 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 4218 (3d ed. 1992); LOSS, supra note 256; Therese H. Maynard, Liability Under Section 12(2) of the Securities Act of 1933 for Fraudulent Trading in Postdistribution Markets, 52 WM. & MARY L. REV. 847 (1991); Robert N. Rapp, The Proper Role of Securities Act Section 12(2) as an Aftermarket Remedy for Disclosure Violations, 47 BUS. LAW. 711 (1992); see also Hirsch, supra note 160, at 975-76 (criticizing pre-Ballay district court decisions that excluded the application of § 12(2) to secondary markets and encouraging its extension to aftermarket transactions). But see Robert A. Prentice, Section 12(2): A Remedy for Wrongs in the Secondary Market, 55 ALB. L. REV. 97, 140 (1991) ("I cast my lot with the Third Circuit . . . ."); Weiss, supra note 6, at 2-3 (arguing that Ballay was correctly decided).

267. See, e.g., Pacific Dunlop Holdings, 993 F.2d at 589; 17A Hicks, supra note 266, § 6.01; Maynard, supra note 266, at 870-73; Rapp, supra note 266.

268. See, e.g., Pacific Dunlop Holdings, 993 F.2d at 588; 9 LOSS & SELIGMAN, supra note 266, at 4218; Loss, supra note 256, at 914-17; cf. 9 LOSS & SELIGMAN, supra note 266, at 4220-21 [T]he extraordinarily able lawyers who drafted the 1933 Act chose a tight drafting style and created a statute that is an intricate work of art in the eyes of the expert, but to others resembles a devilishly devised game of chess whose mastery requires a considerable apprenticeship. . . . Congress relied on this intricate drafting style to express its intention largely through reference to defined terms.

Id.

While Professor Weiss agrees with the outcome in Ballay and defends that outcome by contending that the structure of the securities laws manifests congressional intent consonant with the Ballay decision, he expressly avoids joining a core reasoning of the Ballay court: that the in pari materia rationale compels a narrow construction of § 12(2) so as not to eviscerate the utility of § 10(b). See generally Weiss, supra note 6.

269. Professor Louis Loss plaintively stated:

[O]ne searches the four corners of the Ballay opinion and the Weiss endorsement without finding the slightest reference to the policy implications of granting or denying access to § 12(2). When the statute at issue is ambiguous—and at the very least the § 12(2) plaintiff can mount a respectable argument—why do court and commentator go to such efforts to give the defendant the benefit of the doubt in resolving what arguendo is statutory ambiguity? If any one is to be given a leg up, why not the investor for whom Congress was particularly concerned?

Loss, supra note 3, at 58.

While I for one cannot help but empathize with Professor Loss' substantive concerns, it is by no means clear that if the appropriate policy is to be determined by reference to the baseline of "legislative intent" in 1933, Professor Loss' analysis is any more persuasive than Professor Weiss or the Ballay court. The argument over the proper scope of that intent—
logy employed by the court. Rather, these critics treat structural analysis as if it were equally fungible with textualism or with legislative history.

It is certainly the case that judicial decisions in recent years predominantly have favored restricting the reach of the securities laws, just as the decisions of the 1940s through the early 1970s invariably read the statutes quite expansively. In both sets of opinions, based on the reading of the relationship of §§ 2(10), 5, 10, and 12—can never be dispositive. See supra note 6 and accompanying text.

Moreover, the invocation of "policy" is not a trump-card available only to "investors" or "plaintiffs." Thus, the decision in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (restricting availability of private right of action under § 10(b) of the 1934 Act), can scarcely be distinguished from that of J.I. Case Co. v. Borak, 377 U.S. 430 (1964) (extending implied private right of action under § 14(a) of the 1934 Act), on the ground that the former was based on policy grounds, see Blue Chip Stamps, 421 U.S. at 737, but not the latter. As Justice Kennedy argued in Virginia Bankshares v. Sandberg, the question is not so much whether the Court is applying some "policy," (it is, always), but which policy. 111 S. Ct. 2749, 2773 (1991) (Kennedy, J., concurring in part and dissenting in part). In this light, the Third Circuit's policy of denying relief to plaintiffs is actually more in keeping with the policy preferences established by the trend of recent Supreme Court opinions than Professor Loss' favoring a construction that extends remedial relief. Cf. id. at 2770 (Kennedy, J., concurring in part and dissenting in part) ("If the analysis adopted by the Court today is any guide, Congress and those charged with enforcement of the securities laws stand forewarned that unresolved questions concerning the scope of those causes of action are likely to be answered by the Court in favor of defendants.").

270. The trend may be traced to Blue Chip Stamps, 421 U.S. at 755 (disallowing claims by plaintiff class with contractual right to purchase on ground that they had not actually purchased or sold securities), and United Housing Found. v. Forman, 421 U.S. 837, 858 (1975) (declining to permit purchasers of "stock" in housing co-op to sue under federal securities laws for alleged misrepresentations in offer and sale of shares of co-op). See also Pinter v. Dahl, 486 U.S. 692 (1988) (concluding that facilitation of sales transaction is not alone sufficient to create seller liability under § 12(1) of the Securities Act); Schreiber v. Burlington N., Inc., 472 U.S. 1 (1985) (limiting plaintiff's right to sue under § 14(e) of Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) (1988), only to situations involving misrepresentations, not to acts or conduct—even where such are claimed to have been manipulative); Marine Bank v. Weaver, 455 U.S. 551 (1982); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (declining to infer private right of action under § 17 of the Securities Exchange Act of 1934, 15 U.S.C. § 78q (1988)); International Blvd. of Teamsters v. Daniel, 439 U.S. 551, 570 (1979) (finding interests in retirement plan not "security").

271. See, e.g., Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (creating presumption of reliance under § 10(b) in face-to-face transactions, at least where duty to
the Supreme Court purports to be engaged in no more than the function of a surrogate: defining legislative intent or statutory purpose. In both instances, the Court was simply stating its own view of what Congress rationally should have been doing; that ultimately is what is meant by policy.272

This section explores the extent to which the traditional tools of interpretation—notably, textualism, legislative history, and structure—provide meaningful justification for the Court's manipulation of policy. Framed another way, if the frequently articulated preference of conventional interpretive analysis for textualism is cogent, it would seem that the interpretation of section 12(2) could be effectively accomplished within the "plain language" of the statute.273 It is hardly absurd to read section 12(2) as providing that:

any person who . . . offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of . . . oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the

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272. But see Blue Chip Stamps, 421 U.S. at 762 (Blackmun, J., dissenting) (seemingly drawing distinction between ascertaining "statutory purpose," in which courts may legitimately engage, and "resort to utter pragmatism and a conjectural assertion of 'policy considerations,' " which courts should disfavor).

273. Cf., e.g., Pinter, 486 U.S. at 642-43 (ascertainment of plain meaning of "seller" in "ordinary parlance" is insufficient to determine its meaning under § 12(1) of the 1933 Act); Shearson/American Express v. McMahon, 482 U.S. 220, 227-28 (1987) (concluding that predispute agreement to submit controversies to arbitration is not substantive provision waiver of which is prohibited under the Securities Exchange Act of 1934) (emphasis added); Wilko v. Swan, 346 U.S. 427, 438 (1953), overruled by Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (concluding that agreement to submit predispute controversies to arbitration is stipulation, entry into which is void under Securities Act of 1933) (emphasis added); see also Weiss, supra note 6, at 1-4 (distinguishing between "literal" approach, which is straightforwardly syllogistic in character, and "functional approach" that looks not so much to structure of statutes, but to structure of regulated markets).
statements, in the light of the circumstances under which they were made, not misleading. In short, a strict textualist could plausibly argue that the term “oral communication” could be given a meaning without reference to the phrase “prospectus.” After all, and adhering to regular parlance, the phrase “oral communication” could readily be construed as communication that is verbally made—that is, not written.

This “ordinary plain meaning” approach, it can be argued, is enhanced by the juxtaposition of the undefined phrase “oral communication” to the word “prospectus,” which is defined. Thus, it would seem reasonable to assume that because the word “prospectus” is defined, the drafters were conscious of the distinction between technical and normal usage. The failure to define “oral communication” is an invitation to assume that the phrase has its ordinary and routine meaning.

That the Third Circuit ignored such a straightforwardly plausible reading of section 12(2) and instead plunged into an analytical process that assumes that “oral communication” must have a special meaning that relates it back to “prospectus,” and that it does so despite the presence of the disjunction “or,” demonstrates the weak utility of textualism in conventional interpretive theory. That weakness is confirmed by the seeming unquestioned acceptance by the litigants and court alike that plain unvarnished textualism is unsatisfactory for the task at hand. Nor has this acceptance been rigorously challenged by commentators, even when they disagree with the conclusion of the Third Circuit.

What made structure an attractive alternative to textualism? The explanation is that the court viewed structural analysis as preferable to textualism because it represents a more efficacious interpretive methodology in the late twentieth century. It represents some advance (albeit an incomplete one) over traditional mechanisms in wrestling with

275. Cf. United States v. Naftalin, 441 U.S. 768, 774 (1979) (finding that use of “or” suggests not identity of purpose, but different coverages: “Each succeeding prohibition is meant to cover additional kinds of illegalities, not to narrow the reach of the prior sections.”); see also Aaron v. SEC, 446 U.S. 680, 697 (1980). But see Schreiber, 472 U.S. at 7-8 (in construing reach of “deceptive or manipulative,” “it is a familiar principle of statutory construction that words grouped in a list should be given related meaning”); Hochfelder, 425 U.S. at 197-201 (concluding that prohibitions against “manipulative,” “deceptive,” or “artifice” are directed at same conduct—knowing misrepresentation with intent to defraud).
277. See supra note 266.
the social issues that statutory interpretation must address in the postmodern age. Structural analysis is the method by which traditional power-brokers give effect to the continuing need to bridge increasingly glaring fissures within conventional interpretive approaches. In particular, structure seemingly permits the interpretive process simultaneously to ascertain and effectuate "legislative intent," while placing the statute as an independent object dissociated from the will of the makers and open to whatever content the interpreter chooses to pour into the vessel.278

To appreciate the necessity for resort to structure, it is helpful to underscore the shortcomings of "text" and "legislative history" by examining their application to concrete issues presented under the securities laws.

1. Plain Language and Structural Analysis: 
   The Meaning of "Security"

Because several of the conducts regulated under the securities laws—particularly those provisions that authorize civil actions—have common-law analogues,279 defining what is covered by the securities laws serves the threshold jurisdictional function of guarding the gate to the federal courts.280 Defining what constitutes a "security" (or a transaction in a security) is thus of elemental significance. Despite, or perhaps because of, this fact, as the Supreme Court with classic understatement has pointed out, "[i]t is fair to say that our cases have not been entirely clear on the proper method of analysis for determining when an instrument is a 'security.'" 281 This failure does not flow from

278. This is, of course, reminiscent of the approach of the literary new critics, and despite Judge Posner's efforts to draw a recognizable distinction between "modified intentionalists" and "new critics," see Posner, supra note 31, at 220-27, conservative judges who rely on "text" and "structure" to the exclusion of legislative history subconsciously or otherwise engage essentially in this process of seeing the statute as an independent object of interpretation removed from the intentions of the writer.

279. Thus, typically, actions brought under the federal securities laws contain pendent state law claims. Facts giving rise to allegations of violations of § 12(2) will generally suffice for claims of common-law negligent misrepresentation, while claims of violation of § 10(b) and Rule 10b-5 would readily embrace common-law claims of fraud, or breach of fiduciary duty.


281. Landreth Timber Co. v. Landreth, 471 U.S. 681, 688 (1985). It is telling that of the approximately 12 decisions during the last 50 years in which the Court has been called on directly to determine whether particular instruments or transactions fall within the definition of a "security," it has in all but one instance disagreed with the decision of the lower court. See Reeves v. Ernst & Young, 494 U.S. 56 (1990); Landreth Timber, 471 U.S. at 681; Marine Bank v. Weaver, 455 U.S. 551, 556-60 (1982); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 557 (1979); United Housing Found. v. Forman, 421 U.S. 837, 851-58 (1975); Tcherepin, 389 U.S. at 332; SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959); SEC v. W.J. Howey Co.,
the absence of expressed legislative instructions, but rather from conflicting tendencies on the Court between the formalistic application of the "plain meaning" rule and a structural orientation that the Court has termed the "economic reality" of challenged transactions.

In sections 2(1) of the Securities Act of 1933 and 3(a)(10) of the Securities Exchange Act of 1934, the term "security" is exhaustively and expansively defined to include such seemingly standardized financial instruments as any stock, bond, or note, and less regularized

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When used in this title [Securities Act of 1933], unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Id.

283. Codified at 15 U.S.C. § 78c(a)(10) (1988), as amended, the section currently reads (again with the proviso that "unless the context otherwise requires"): (10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance, which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Id.
transactions as investment contracts, and participation in oil and gas operations. In interpreting these provisions, the Court initially paid virtually no heed to the specific intent of Congress as manifested either by "plain textualism" or "legislative history"; it subsequently gravitated towards textual formalism, and, in the more recent decisions, it appears to be explicitly embracing structural analysis. Read together, the three stages support the structural argument presented in Ballay.

Thus, despite the refrain of recent Supreme Court decisions that "it is axiomatic that the starting point in every case involving the construction of a statute is the language itself," the actual texts of sections 2(1) and 3(a)(10) have played at most a secondary role in determining whether a particular instrument, transaction, or relationship falls within the range of matters attempted to be regulated by Congress under the federal securities laws. The dominant factor has been the Court’s perception of appropriate institutional relationships or structures. Such perceptions were grounded on the Court’s understanding of the graces and evils of specific practices to the orderly working of the system for capital accumulation, the interaction of participants within the capitalist system, and the efficacy for the system of the imposition of particular modes of regulation under the guise (or, more accurately, disguise) of congressional intent.

In SEC v. C.M. Joiner Leasing Corp., the Supreme Court determined that the offer for sale of potentially oil-bearing parcels of land, together with the contract to drill on the land, fell within the definition of "security" under section 2(1) of the Securities Act. Far from relying on the "plain meaning" of section 2(1), the Court expressly

284. To compound the scope of the term, these definitions are conditioned on the limiting phrase "unless the context otherwise requires," and the broadening phrase "or any instrument commonly known as a security."

The Supreme Court has repeatedly stated that, at least for the purposes of determining federal question jurisdiction, the definitions in § 2(1) of the 1933 Act and § 3(a)(10) of the 1934 Act may be treated as being coextensive. See, e.g., Reves, 494 U.S. at 61 n.1 (citing United States Housing Found., 421 U.S. at 847 n.12).

285. See, e.g., Landreth Timber, 471 U.S. at 685. This assertion, which has become the hallmark of the "plain meaning rule" with regard to the securities laws, may be traced to Justice Powell’s concurring opinion in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). It is thus of quite recent vintage. The statement on its face tells very little. Its import, however, has become unmistakable. It is that where a persuasive argument exists against the interpretation rendered by the Court, the Court can avoid responsibility for its choice by shrugging it off to the legislative branch. See, e.g., Reves, 494 U.S. at 63 n.2 ("If Congress erred, however, it is for that body, and not this Court, to correct its mistake.").

286. This is what the Court succinctly terms "economic realities." See, e.g., United Housing Found., 421 U.S. at 848 (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)). 287. 320 U.S. 344 (1943).
declined to state precisely the definitional elements of the section directly implicated in the offending transactions. What the Court could state with assurance was that "[t]he trading in these [offer/sale] documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end."

How did the Court establish the "aim of the Securities Act"? It was not by pointing to "plain language," nor to "legislative history." These talismans are barely invoked. The Court simply states the aim and in no way intimates any incapacity on its part to assert it independent of any specific congressional statement. The Court evaluated the transactions at stake and independently determined their impact on and function as means of raising capital. Having decided that the transactions had a direct bearing on the capital raising function, the Court declared them to be covered by the Securities Act.

Moreover, the Court did so notwithstanding the argument that application of two traditional canons of interpretation—the "ejusdem generis" rule and the "ancient maxim "expressio unius est exclusio alterius""—compelled a contrary result. The Court's rejection of the relevance of these canons to its interpretive role was not based on the supremacy of congressional intent, but on the characteristic of the interpretive process as a seamlessly integrated effort to realize the statutory purpose. That effort, the C.M. J ones opinion suggested, implicates the legislature, the courts, and market participants all as contributors to the interpretive process.

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288. Id. at 348-49 (suggesting that "instrument" might be "investment contract," but not explicitly so holding).
289. Id. at 349.
290. Cf. id. at 350-51 & n.7 (discussed infra note 291); id. at 355 (limiting reference to text to conclusory assertion that "[i]n the present case, we do nothing to the words of the Act; we merely accept them").
291. It is worth emphasizing that the primary mechanism on which the court relied was the interpretation that would be given the offering/selling material by its recipients. See id. at 348.
292. Id. at 350.
293. Cf. id. at 350 n.7. While the Court criticized the ejusdem generis rule as a relic of a period when courts were hostile to the supplanting of the common law by legislative acts, Justice Jackson did not appear to subscribe to the view that the statutory purpose is tantamount to "legislative intent." Indeed, the language of the opinion suggests otherwise. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of words fairly permits so as to carry out in particular cases the generally expressed legislative policy.
294. Thus, the Court asserted that
SEC v. W.J. Howey Co.,\textsuperscript{295} the Court's seminal opinion on the definition of what constitutes a "security,"\textsuperscript{296} is perfectly consonant with the above. There, in explaining why transactions involving the offer for sale of orange groves—when coupled with an optional contract for the management and sale of the produce of the groves—constitute an "investment contract," the Court relied extensively on state court decisions that found similarly termed transactions fraudulent.\textsuperscript{297} The Court then stated its conclusion that by using a term whose meaning had been developed by state common-law judges, it is "reasonable" to attach that meaning to the term as used by Congress.\textsuperscript{298} The Court defended this conclusion not on the basis of any supportive legislative history, but on the ground that this interpretation is consistent with the overall aims of the Securities Act.\textsuperscript{299}

Here again, these aims were not defined in terms of any specific intent attributable to Congress, but rather the Court's own sense of the objective of the legislation: to promote full and fair disclosure.\textsuperscript{300} Finally, the Court invoked the practice and expectations of those being regulated as justification for its holding.\textsuperscript{301}

\textsuperscript{[i]}n applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering. The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.

\textit{Id.} at 352-53.

\textsuperscript{295} 328 U.S. 293 (1946).

\textsuperscript{296} The \textit{Howey} Court's definition of an "investment contract" as a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the \textit{shares} in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed by the enterprise.

\textsuperscript{297} 328 U.S. at 298-99 (emphasis added), was—until the Court's decision in Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985)—the uniform judicial definition of a security. \textit{See}, \textit{e.g.}, International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979); United Housing Found. v. Forman, 421 U.S. 837 (1975); Tcherepnin v. Knight, 389 U.S. 332 (1967) (suggesting that "form" should be disregarded for substance when searching for meaning of "security").

\textsuperscript{298} \textit{Id.}

\textsuperscript{299} \textit{Id.}

\textsuperscript{300} \textit{Id.} at 299.

\textsuperscript{301} \textit{Id.} The court explained:

[The holding] permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to issuance of the many types of instruments that in our commercial world fall within the ordinary concept of a security. It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

\textit{Id.} (citation omitted).
Reliance on congressional intent began to creep into the Court’s decisions by the late 1960s. In *Cherepnin v. Knight*, the Court relied primarily on the *Joiner* and *Houvey* precedents to hold that “withdrawable capital” in a state chartered savings and loan association constituted a “security.” It nonetheless buttressed its position by references to legislative history, specifically industry representations to congressional committees.

In *United Housing Foundation v. Forman*, the Court faced the issue of whether, notwithstanding the literal wording of section 2(1), an instrument expressly denominated as a “stock” should nonetheless be viewed as anything but a “security.” In declining to apply literal textualism to resolve the question, the Court relied on the “intent of Congress,” which it said was to regulate publicly traded securities. That intent mandated that a court, in each case, look to the “economic realities” of the transaction, not the “name appended thereto.” Although the mechanics of determining the “economic realities” of the transaction looked much like the application of prece-

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The Court’s decision in SEC v. United Benefit Life Ins. Co., 387 U.S. 202, 211-12 (1967), similarly relies heavily on the practical consequences in the market place of its decision, not on what Congress purportedly intended. *Cf.* SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 71 (1959) (holding that “variable annuity life insurance policies” were “securities,” rather than exempted “insurance policies,” because risk of loss in value of policy was borne not by insurer as issuer, but by policy holder). While Justice Brennan’s concurring opinion in *Variable Annuity* explains this conclusion in part by reference to legislative intent, the Court’s opinion does not. *See id.* at 75-76.


303. *Id.* at 338. At issue was the definition of “security” under § 3(a)(10) of the Securities Exchange Act of 1934. *Id.* The Court took the position that its decisions under the 1933 Act provided good authority, *id.* at 336, a position to which the Court continues to adhere. *See Reves v. Ernst & Young*, 494 U.S. 56, 61 n.1 (1990) (“We have consistently held that ‘the definition of a security in § 3(a)(10) of the 1934 Act . . . is virtually identical [to the definition in the Securities Act of 1933] and, for present purposes, the coverage of the two acts may be considered the same.’ ”) (quoting United Housing Found. v. Forman, 421 U.S. 837, 847 n.12 (1975)).

304. *See Cherepnin*, 389 U.S. at 340-42. The Court found in the plea by the “Building and Loan League” for the exemption from registration under the 1933 Act of the shares of savings and loan associations an implied recognition by the industry that such shares were “securities.” *Id.* at 340-41.


306. *Forman* involved an attempt by representatives of beneficiaries of publicly assisted low-income housing programs to employ the federal securities laws to challenge post-intake increases in rental payments. *Id.* at 842-45. The structuring of the housing programs as “co-ops” with “shares” issued to beneficiaries made the jurisdictional argument at least colorable. *Id.* at 840-43. For a description of the program, see *id.* at 841-47.

307. *Id.* at 849.

308. *Id.*
dents, the rationale had changed significantly. "Congress' intent," not "statutory purpose," had become the legitimating principle. In practice, however, congressional intent was no more readily susceptible of determinate grounding than statutory purpose. Indeed, the Court found itself invoking the ultimate canon of indeterminate judicial self-justification: "A thing may be within the letter of the statute and yet not within the statute. . . ." Similarly, despite the reference to congressional intent, the Court acknowledged that the expectations of the parties is a relevant factor in determining when a transaction falls within the statutory scheme.

Following *Forman*, the move from statutory purpose to legislative intent collapsed into the rhetoric of textual formalism. Although peremptorily invoked in *International Brotherhood of Teamsters v. Daniel*, the Court first seriously attempted to take on analytically the claim that the plain language of the statute provides independent grounding for determining what constitutes a "security" in *Landreth Timber Co. v. Landreth*. Faced with whether the sale of one-hundred percent of

309. "Economic realities" appeared to be another term for *Howe*y's definition of "investment contract." As such, it emphasized generalized institutional understanding and practice. *See id.* at 851-52 (applying "economic realities" test).

310. *Id.* at 849 (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1891)). The Court appeared to equate as coterminous the search for "statutory purpose" with that for "legislative intent."

311. *Id.* at 851. Ultimately, it is difficult not to find dispositive the Court's assertion that [c]ommon sense suggests that people who intend to acquire only a residential apartment in a state-subsidized cooperative, for their personal use, are not likely to believe that in reality they are purchasing investment securities simply because the transaction is evidenced by something called a share of stock.

312. 439 U.S. 551, 558 (1979) ("The starting point in every case involving construction of a statute is the language itself.") (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)). This assertion proved to be virtually a *non sequitur* in the *Daniel* case. The issue in question was whether interest in a noncontributory defined benefits pension plan constituted a "security." The reference to the "language" served merely to prove the negative: that there was no reference to pension plans in the definition of the term "security." The Court then employed a combination of procedural bars and the *Howey* test's definition of "investment contract" to hold that the interest at issue was not a "security." *Id.* at 558-62. As in *Forman*, the dispositive consideration again appeared to be the "common sense" expectations attributable to the parties. *Id.* That expectation is analytically buttressed not by textualism, but by a structural analysis of "congressional intent" based on the Court's understanding of the interplay of the regulatory regimes of the securities laws and the Employee Retirement Income Security Act. *See id.* at 569-70.


The Court had invoked textualism as a dispositive tool somewhat earlier to restrict the implied cause of action under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988), and the SEC's Rule 10b-5, 17 C.F.R. § 240.10-b5 (1991), promulgated thereunder. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-201 (1976). Reliance on plain meaning, however, was tentative. *Cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975). At least initially, it may have been no more than a contingent
the interests in an operating business in a single transaction to a single buyer fell within the securities laws because the transfer of the interests at issue was through the “sale of stock” (rather than the sale of assets), the Court in *Landreth Timber* insisted that the plain language of the statute compelled an affirmative answer. The interests represented by the word “stock” as used in the *Landreth Timber* transaction, the Court stated, fell squarely within the ordinary concept of a “security” and within the category of instruments that Congress’ remedial purpose, in requiring full disclosure, was intended to cover. But the latter point, the Court appeared to suggest, was superfluous. In the absence of specific reasons to doubt the propriety on its face of calling the interests at issue “shares of stock,” the inquiry as to whether they are covered by the securities laws should terminate.

But, candidly acknowledging that prior decisions did not readily fit into the new mold, the Court, while declining to rely on legislative history, exploited structural analysis to refute specific arguments anchored in those precedents. It thus rejected the contention that its prior decisions could be read as establishing the proposition that the securities acts were inapplicable to transactions where control passed to the purchaser. It grounded that rejection on the intersectional ob-

weapon to restrain the further growth of a disfavored “oak.” *See, e.g., id. at 792; id. at 756-60, (Powell, J., concurring); cf. Steve Thel, The Original Conception of Section 10(b) of the Securities Exchange Act, 42 Stan. L. Rev. 985, 986 (1990) (suggesting that initial linguistic construction by Court may have been impelled by no more than conservative urge to narrow reach of statute). But see Aaron v. SEC, 446 U.S. 680 (1980) (extending Hochfelder beyond implied private cause of action).

Whatever the motivation, it is abundantly clear that the Court’s linguistic analysis was crabbed and sustained subsequently only by the cloak of precedent. *See Thel, supra, at 994-95, 399 (discussing various meanings of “manipulation”); see also Aaron, 446 U.S. at 689 (“[W]e do not write on a clean slate.”); id. at 713 (Blackmun, J., concurring in part and dissenting in part) (concluding that whether construction given language of § 10(b) in Hochfelder was right or wrong, it has no application to SEC enforcement actions).

314. *Landreth*, 471 U.S. at 687. Specifically, the Court rejected the “sale of business doctrine,” under which lower courts, applying the Court’s precedents, had held that where the transaction was essentially in the nature of a transfer of ownership and control of a business to the buyer, the transaction would not satisfy the Howey test and would be outside of the statutory purpose of protecting persons who make investments with the expectation of profiting from the effort of others. *See id. at 684; see also Gould v. Ruefenacht, 471 U.S. 701 (1985) (making it clear that its new textualism applied regardless of percentage of ownership at stake in stock transaction).

315. *Landreth*, 471 U.S. at 687-88. The Court distinguished those instances where the “form” of the instrument should control under the “plain language” rule from its prior decisions that looked to the “economic substance” of the underlying transaction, rather than its facial characterization. The Court asserted that the “economic realities” test had been designed for and applied to instruments not readily classifiable as “stock” or similarly standardized investment instruments. *See id. at 688-90.

316. *See id. at 694 n.7.*
ervation that while section 4(2) of the Securities Act\textsuperscript{317} exempts private transactions from registration, such transactions, if they involve the sale of securities, fall within the antifraud provisions of the Act.\textsuperscript{318}

The Supreme Court's reliance on "plain language" in this area, however, was short-lived. Five years after \textit{Landreth}, in \textit{Reves v. Ernst \& Young},\textsuperscript{319} the Court minimized the relevance of the "plain language" rule.\textsuperscript{320} In holding that a "demand note" issued by an agricultural cooperative and paying variable interest rates was a "security," the Court stated that the appropriate rule in situations involving debt instruments was that of the "family resemblance" test, not "plain language." Under the family resemblance test, the starting presumption is that an instrument denominated as a note would qualify as a security. That presumption, however, may be rebutted by a showing that the note resembles other instruments that have been judicially declared not to be securities, or by a showing that the instrument should not be declared to be a security. Success in making the showing depended on four considerations: (1) the traditional expectations of the buyers or sellers of the instrument as to whether it is ordinarily sold or purchased for investment purposes—that is, with a speculative expectation of appreciation over time—or as a means of financing some underlying commercial transaction; (2) the method for the distribution of the instrument; (3) the "reasonable" expectation or treatment of the instrument by the investing public; and (4) whether any other factor, such as the existence of another regulatory scheme, militates for or against finding that the transaction in question should be protected under the securities laws.\textsuperscript{321}

In short, the Court held that each case is \textit{sui generis}, to be resolved not by reference to linguistic text or legislative history, but by the collective application of the structural considerations that the Court had employed since the \textit{Joiner} decision, as well as the beliefs and practices of the regulated. The standard thus advanced in \textit{Reves} reflects judicial

\textsuperscript{318} See \textit{Landreth}, 471 U.S. at 692.
\textsuperscript{319} 494 U.S. 56 (1990).
\textsuperscript{320} Id. at 61 ("In discharging our duty [to decide] which of the myriad financial transactions in our society come within the coverage of these [securities] statutes, we are not bound by legal formalisms, but instead take account of the economics of the transaction under investigation.") (citing \textit{Tcherepnin v. Knight}, 389 U.S. 332, 336 (1967)); \textit{cf.} id. at 76 (Stevens, J., concurring) (noting that Court may ignore literal wording of statute where lower courts and SEC have uniformly and consistently given particular gloss to word "note"). \textit{But see id. at 77} (Rehnquist, C.J., concurring in part and dissenting in part) (stating that word "note" should be given meaning ascertainable from dictionary and legal usage extant at time of enactment of securities laws).
\textsuperscript{321} Id. at 67-69 (concluding that rather than merely examining statute, standards articulated in "family resemblance" test should be used to clarify ambiguities).
subscription to the importance of the interpretation given a statute by those whose conduct the statute regulates, along with, of course, authoritative judicial and legislative assertions as to what the statute stands for. But Reves is simply the culminating decision in an extended line of cases demonstrating that even where one might expect textual analysis to be dominant, courts in practice have relied on extrinsic evidence—especially on the interplay of practice and participant expectations—to generate the law. Practice, not words, circumscribed the scope of the rules. Determinacy flowed from judicial understanding of practice. Similarly, legitimacy grew out of judicial construction of “statutory purpose,” not any explicit corporate legislative intent.

The judicial determination of appropriate “statutory purpose” varied over time and from case to case. In defining that purpose, the Court often looked to the existence of other statutes simultaneously to assert a broad scope for the securities statutes and to narrow their scope. Interestingly, in no case did the Court provide any proof that the legislative body had actually considered the relevance of those other laws to its crafting of the securities statutes.

2. The Relevance of Legislative History

The Ballay court’s reliance on legislative history is perfunctory and hardly persuasive. That history consists of a single sentence in a legislative report providing that section 12(2) applies to “new securities.” According to the Ballay court, “new securities” implies the sale of newly offered securities, thereby exempting trading in already issued securities. While this is not an untenable position, it is by no means the only reading possible, nor can it be said to be the more obviously correct one.

The Ballay court’s de-emphasis of legislative history may be attributed to paucity of the record, but that would be an incomplete explanation, for more has been made of even less legislative record. A

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324. See supra note 246 and accompanying text.
325. See, e.g., Weiss, supra note 6, at 45; cf. Thel, supra note 313, at 416 n.139 (citing letter from Benjamin Cohen to Felix Frankfurter).
326. See, e.g., Rapp, supra note 266, at 729 (contemporaneous statement of the FTC); see also United States v. Nafalin, 441 U.S. 768, 778 (1979) (“The act subjects the sale of old or outstanding securities to the same criminal penalties and injunctive authority for fraud, deception, or misrepresentation as in the case of new issues put out after the approval of the act.”) (emphasis added) (citations omitted).
327. The Supreme Court has noted that the legislative history of § 12(2) is “sparse.” See Randall v. Loftsgaarden, 478 U.S. 647, 657 (1985).
more useful appreciation of the Ballay court's approach is best seen by examining the quite inconsequential role that legislative history has played in the interpretation of the securities laws, despite its seeming prominence in the interpretive scheme.

As elaborated previously, the conventional use of legislative history in the interpretive process may be explained on two broad grounds. First, given the inherent ambiguity of language, resort to legislative history satisfies the need for determinacy by anchoring the legislative text in the concrete factual setting described in and evidenced by the statements and concerns of legislators. Second, given that the aim of statutory interpretation is to ascertain legislative intent, the surrounding history of the enactment may, in some cases, be a better guide than the plain words in defining that intent. The Supreme Court has employed both of these justifications instrumentally in its interpretation of the federal securities laws. But the unavoidable need to select from among the various material that, with plausibility, can be claimed to constitute the relevant legislative history challenges the validity of the conventional claim of a limited institutional role for the courts that pervade the legitimation of a status quo orientation in statutory interpretation. Rather, this selective resort to legislative history demonstrates the broad interpretive role of a court within the conventional framework.

The discussion of the plain meaning rule in the prior subsection disclosed the rather late arrival on the scene of the Supreme Court's explicit resort to legislative history in construing the meaning of the term "security." Actually, in at least two early cases, the Court, while citing to congressional reports, ignored their import and relied instead on its own assertion of the "statutory purpose" to dispose of the interpretive problem presented by the cases. In SEG v. Ralston Purina, the Court faced the issue of defining the scope of the "private offering exemption" from registration under the Securities Act. The Court expressly asserted that the legislative history was not "of much help in staking out [the] boundaries [of the exemption]." It took this position despite quite substantial statements on the record indicative of at least what some members of the Congress

328. See supra part II.A.2.
330. See supra note 303 and accompanying text.
332. Id. The provision is currently found in § 4(2) of the Securities Act of 1933, 15 U.S.C. § 77d(2) (1988). At the time of enactment in 1933, the provision was designated as § 4(1) of the Act, and it exempted offerings by issuers not involving a "public offering."
333. Ralston Purina, 346 U.S. at 122.
saw as the reach of the exemption. Thus, the Court quoted but ignored wording in the first draft of the bill that would seem highly probative of "congressional intent." Rather, it rested its conclusion as to the reach of the exemption by declaring that "[t]he natural way to interpret the private offering exemption is in light of the statutory purpose." The Court determined that "statutory purpose" not on the basis of the language or legislative history of the act, but on its own independent understanding of the appropriate goal of the legislation.

A similar nod to but complete disregard of legislative history appears in the Court's treatment of the waivability of the judicial forum in favor of arbitration in respect of claims alleging violation of section 12(2) of the Securities Act. In Wilko v. Swan, the Court held that despite the Federal Arbitration Act, a purchaser of securities who has agreed to submit any future disputes between her and her broker to arbitration cannot be held to her agreement, because such would

334. The legislative record revealed by the Ralston Purina Court's discussion was certainly more extensive and more directly on point than much of the record subsequent courts were to invoke as mandating their holdings. See infra note 440.

335. Ralston Purina, 346 U.S. at 122. As the Court pointed out, the original draft of the House bill, H.R. 5480, 73d Cong., 1st Sess. (1933), treated the exemption as covering "transactions by an issuer not with or through an underwriter." Id. (emphasis added). Because the terms "issuer" and "underwriter" are expressly defined in the statute, see Securities Act of 1933, § 2(4), 15 U.S.C. § 77b(4) (1988) (defining "issuer"); Securities Act of 1933, § 2(11), 15 U.S.C. § 77b(11) (1988) (defining "underwriter"), and because this phrasing was deleted subsequently solely on the ground that it was "superfluous" to "not involving a public offering," Ralston Purina, 346 U.S. at 125 (citing H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934)), one might understandably expect the Court to rely on the deleted phrase as explaining at least in a significant sense the reach of the provision being litigated. Yet, the Court paid scant attention to the deleted words. To the contrary, the Court seemed to find in material that it termed "oblique"—or on its face unclear—sufficient basis for ignoring legislative history. See Ralston Purina, 346 U.S. at 122 nn.5-6.

336. Id. at 124-25. But see J.I. Case Co. v. Borak, 377 U.S. 430, 432 (1964) ("While [§14(a) of the 1934 Act] makes no specific reference to a private right of action, among its chief purposes is 'the protection of private investors,' which certainly implies the availability of judicial relief where necessary to achieve that result.") (emphasis added):

337. See Ralston Purina, 346 U.S. at 124-25. The Court noted:
Since exempt transactions are those as to which there is no practical need for [the bill's] application, the applicability of § 4(1) should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction not involving any public offering.

Id.; see also id. at 126 (declining to rely on failure of Congress to adopt an amendment as justification for Court's holding "although . . . the rejection . . . supports this conclusion"). This approach should be contrasted with that in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 732 (1975), and Aaron v. SEC, 446 U.S. 680, 699 (1980), where the Court derived significant support for its narrow reading of the antifraud provisions of the securities laws from Congress' failure to adopt proposals advanced by the SEC.


be in violation of section 14 of the Securities Act, which voids "[a]ny condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of [the Securities Act]."\(^\text{340}\) Again, the Court relied on its own preference of competing policy choices,\(^\text{341}\) and not on any historically ascertainable subjective legislative intent.\(^\text{342}\) To the extent the Court's own independent judgment was measurably influenced by any of the traditional interpretive tools, it was the "language" and "structure" of the legislative provisions, not "legislative history."\(^\text{343}\)

Despite this early disregard, by the late 1960s the rhetoric of reliance on legislative history had become a pronounced feature of the interpretation of the securities laws.\(^\text{344}\) The significance of the rhetoric can and has been overstated.\(^\text{345}\) The effectual role of the rhetoric

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\(^{340}\) Wilko, 346 U.S. at 430 n.6 (quoting Securities Act of 1933, § 14, 15 U.S.C. § 77n (1988)).

\(^{341}\) See id. Specifically, the Court noted:

Two policies not easily reconcilable are involved in this case. . . . Recognizing the advantages that prior agreements for arbitration may provide for the resolution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

Id. at 438.

\(^{342}\) But see Rodriguez De Quijas, 490 U.S. at 479. The Rodriguez De Quijas Court stated that "[t]he Court considered the language, purposes and legislative history of the Securities Act," to reach its decision in Wilko. Id.

\(^{343}\) See Wilko, 346 U.S. at 434-36. Central to the Court’s holding was its own understanding of functional relationships within the securities markets. As it observed:

While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers.

It is therefore reasonable for Congress to put buyers of securities covered by [the] Act on a different basis from other purchasers.

Id. at 435.

\(^{344}\) See supra notes 301-03 and accompanying text.

\(^{345}\) Justice Stevens' dissent in Landreth Timber Co. v. Landreth, 471 U.S. 681, 697-700 (1985) (Stevens, J., dissenting), in my view, candidly states the distinction between the Court's purported reliance on legislative history in this second phase and the Court's mere awareness of and citation to it in the earlier phase. As Justice Stevens observed:

I agree that policy considerations are relevant in construing the Securities Acts, I would prefer to rely principally in the policies of Congress as reflected in the legislative history. If extrinsic considerations are to be given effect, I would place a far different evaluation on the weight of the conflicting policies. . . .

Id. at 700 n.2 (Stevens, J., dissenting). The argument that I advance here is that while the earlier Supreme Court did not hesitate to state that its conclusion was based on its own independent weighing of the "policy considerations," the current Supreme Court differs not so much in the fact that it engages in such weighing, but in the forcefulness with which it contends that the weighing is directly prescribed by such indicators as legislative history.
was often undercut by the ad hoc or random frequency with which the resort to legislative history was made, the absence of any standardized rules for its invocation, and the seemingly result-oriented manner of its deployment.

In Blue Chip Stamps v. Manor Drug Stores,\(^{346}\) for example, the Court equivocated on the relevance of a history of legislative inaction on proposals by the Securities and Exchange Commission (SEC) to overturn an earlier decision that had limited the reach of section 10(b) of the Securities Exchange Act of 1934 to “actual purchasers or sellers” of securities.\(^{347}\) The Court found “policy considerations” more appropriate to the task of statutory interpretation.\(^{348}\) By contrast, in Aaron v. SEC,\(^{349}\) the Court found in congressional inaction on SEC proposals an unambiguous endorsement of the Court’s construction of sections 10(b) of the 1934 Act and 17(a) of the 1933 Act.\(^{350}\) Similarly, the Court found legislative history (at least in the form of legislative inaction) very much pertinent to its determination of whether interest in a pension plan constitutes a security,\(^{351}\) but entirely irrelevant to the question of whether sale of a controlling interest in a business enterprise is also a security.\(^{352}\)

Moreover, the Court has failed to articulate any rules, principles, standards, or guidelines to distinguish those instances in which it is appropriate to rely on legislative history from those in which it would be improper to do so. In some instances where the Court has found the “plain meaning” of the language seemingly sufficiently clear, it nonetheless has found resort to legislative history appropriate.\(^{353}\) In other instances, the Court has taken the position that the statute’s “plain meaning” precludes consideration of legislative history.\(^{354}\)

\(^{346}\) 421 U.S. 723 (1975).

\(^{347}\) See id. at 732-33 (discussing SEC efforts to reverse, by legislation, the holding in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952)).

\(^{348}\) Blue Chip Stamps, 421 U.S. at 737-49.

\(^{349}\) 446 U.S. 680 (1980).

\(^{350}\) Id. at 699.


\(^{352}\) See Landreth Timber Co. v. Landreth, 471 U.S. 681, 694 n.7 (1985). Noteworthy is Justice Powell’s assertion that “[t]he history is simply silent—as it is with respect to other transactions to which these [1933 and 1934] Acts have been applied by the Securities and Exchange Commission and judicial interpretation over the last half-century since this legislation was adopted.” Id.

This is a remarkable statement in view of his authorship of the Court’s opinion in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), where, as discussed below, the Court had no misgivings about the paucity of legislative history to support its reading of § 10(b) of the 1934 Act. See id. at 201-06.

\(^{353}\) See, e.g., Daniel, 449 U.S. at 558.

The uncertainty thus created is magnified by inconsistencies as to the weight to be given various elements of "legislative history." In some cases, the Court has relied on affirmative legislative pronouncements, while discounting legislative inaction. In other instances, it has given effect to legislative inaction by reading it as endorsement of the status quo, the sole distinguishing feature being whether the Court is inclined to a liberal expansive view of the statute or a narrow conservative reading. The testimonies of administering officials and lobbyists have been deemed relevant in some cases, but breezily distinguished away in others. While the floor statements of congresspersons and committee reports have generally provided sustenance for majority and dissenting opinions alike, the Court has given no definite guidelines as to the weight to be accorded these varied sources.

It is difficult to avoid reading these inconsistencies as exemplifying the use of legislative history for post hoc rationalization of a conclusion reached on other grounds, rather than as a deductive tool of stat-

355. See supra note 78; cf. Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2095 (1993) (Thomas, J., dissenting) (contending that Congress' failure to provide explicitly for right to contribution under § 10(b), even as it amended the statute, militates against implying such a right). Specifically, Justice Thomas noted: "Had Congress intended 10b-5 defendants to sue joint tortfeasors, a single enactment could have given effect to this policy." Id. (Thomas, J., dissenting).

356. See, e.g., Aaron v. SEC, 446 U.S. 680, 699 (1980) (relying on Congress' failure to pass amendments recommended by SEC); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 732 (1975) (same); cf. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2778 (1991) ("[W]e may assume that, in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.' ") (quoting Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 147 (1987)); Edgar v. Mite Corp., 457 U.S. 624, 635-36 & n.11 (1981) (plurality opinion of White, J.) (noting significance of Congress' repeated refusal to impose precommencement disclosure requirement). But see Musick, Peeler & Garrett, 113 S. Ct. at 2089 (stating that Congress' passage of laws relating to insider trading (generally brought under § 10b-5 without defining term and modifying prior Supreme Court decision on statute of limitations period under Rule 10b-5 actions) amount to recognition of "the power of federal courts to shape within limit the contours of private claims under Section 10(b)," and, therefore, power of Supreme Court to determine whether defendants in 10b-5 actions may seek contribution from joint tortfeasors).


360. The Court has suggested that the statements of "floor managers" or "drafters of the bill" ought to be given special attention. But the Court has not always adhered to this position, even in the same opinion. Compare SEC v. Ralston Purina Co., 346 U.S. 119, 122 n.6 (1953) (ignoring House managers' reports) with id. at 126 n.13 (stating that views of House managers, commenting on conference report, is entitled to more weight than those of single conferees in Senate debate). In some instances, the Court has rejected the implication of conference reports that would appear to be on point, dismissing such statements as inconclusive or unclear. See Shearson/American Express v. McMahon, 482 U.S. 220, 256-38 (1987).
utory interpretation. This position is strongly supported by the most pervasive context in which legislative history is adduced. More often than not, the Court has used legislative history as support for some generalized "statutory purpose," rather than to support a precisely framed point in dispute.\(^{361}\)

One illustration of this post hoc approach is the Court’s use of legislative history in *Ernst & Ernst v. Hochfelder*.\(^{362}\) There, the Court found the legislative history of the Securities Exchange Act of 1934\(^{363}\) supportive of the conclusion that section 10(b) of the Act’s prohibition of manipulative acts and contrivances incorporated a scienter requirement. Having asserted that “manipulation” is the essence of a section 10(b) violation, and that the term as used in the securities laws “is and was virtually a term of art,” the Court then relied on *Webster’s International Dictionary* for the term’s definition.\(^{364}\) The Court confined its reading of legislative history to such material that it deemed supportive of the definition. Thus, while finding that “the extensive legislative history of the 1934 Act is bereft of any explicit explanation of Congress’ intent,”\(^{365}\) the Court nonetheless argued through a *seriatim* recitation of the various draft incarnations of section 10(b) that there is “no indication” the section “was intended to proscribe conduct not involving scienter.”\(^{366}\) In particular, the Court dismissed the legislative statements of a drafter of the bill as unhelpful, even though they suggested a much broader scope than the Court’s selective linguistic interpretation allowed,\(^{367}\) and it found the testimonies of representatives of the securities industry “entitled to little weight.”\(^{368}\) Although

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361. See, e.g., J.I. Case Co. v. Borak, 377 U.S. 430, 432-33 (1964). In addition to the cases discussed in the text, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 78-87 (1987), and Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-59 (1975), very much exemplify this approach. Cj. Edgar v. Mite Corp., 457 U.S. 624 (1982) (plurality opinion of White, J.) (indicating that, according to legislative history, purpose of Williams Act was to promote investor autonomy). In these cases, the secondary significance of legislative history to a judiciously determined policy objective of the statute is self-evident.


364. *Hochfelder*, 425 U.S. at 199 & n.21 (citing *WEBSTER'S INT'L DICTIONARY* (2d ed. 1934)).

365. Id. at 201.

366. Id. at 202. For an exhaustive refutation of this assertion, see Thel, *supra* note 313, at 424-64.


committee reports received somewhat more scrutiny, the Court found them equally unhelpful.369

In short, in no instance under the securities laws has analysis of the legislative history of a statute played a dispositive role in giving that statute a meaning sanctioned by the Supreme Court.370 As was the case with regard to plain meaning, the legitimizing role of resort to legislative history comes at the expense of a consistent and coherent (that is, determinate) set of applicable rules, standards, or principles. To the extent plain meaning and legislative history are made to function in tandem, they do so not on account of any well-established principles.

3. Structure and the Interpretation of the Securities Laws

Whatever the defects of "plain meaning" and "legislative history" as tools of interpretation, there is no denying their use in conventional analysis. The use of structure as an interpretive tool has yet to receive the same explicit acknowledgement. While the Supreme Court frequently asserts that the meaning of a statute depends on more than "language" and "history," the terminology for identifying these other factors varies. At times, the Court has simply referred generically to "context",371 at other times, it has spoken of "policy,"372 and frequently it has spoken of "congressional purpose."373 These terms are not unrelated to structural analysis, yet it would be misleading to view them simply as synonyms for structure.374 They differ from structure

369. See Hochfelder, 425 U.S. at 204-06.
370. Cases involving the implication of a "private right of action" under The Williams Act, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 78m(d)-(f), 78n(d)-(e) (1988)), are particularly instructive because they interpret legislation enacted against a backdrop of explicit judicial invocation of legislative history. Yet, in Piper v. Chris-Craft Indus., 430 U.S. 1, 26-32 (1977), the Court rejected evidence on the record that contradicted its predisposition to find no implied cause of action by tortuously arguing lack of certainty as to whether Congress actually understood the significance of the evidence.
371. For example, "context" may refer to surrounding linguistic text, or it may refer to surrounding social institutions and practices, or to both. See, e.g., Smith v. United States, 113 S. Ct. 2050, 2054 (1993) (suggesting Court is using context in the first sense); id. at 2062 (Scalia, J., dissenting) (indicating Court is using term in second sense).
372. See, e.g., Virginia Bankshares v. Sandberg, 111 S. Ct. 2749, 2764 (1991); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975). This is a particularly amorphous term. See supra note 269. With the exception of "context," it is perhaps the term that is least anchored to any set of definable guidelines. Interestingly, however, it has been invoked primarily by "conservative" judges to deny plaintiffs access to the courts on the entirely speculative ground of the future consequences of such access.
374. Compare Aaron v. SEC, 446 U.S. 680, 692 & n.9 (1980), with id. at 695 (seemingly equating "structure" with "policy") and id. at 713 (Blackmun, J., dissenting) (stating that Court's "most serious error may be a failure to appreciate the structural interrelationship
in that they essentially embody conclusions, while "structure"—like "text" or "history"—is, at least in conventional analysis, a method for ascertaining such conclusions that are then attributed to the "intent" of the legislature.375

As discussed previously,376 structural analysis takes two quite distinct forms. At one level, it encapsulates textual analysis by applying common-law generated syntactical rules. Thus, it is assumed that items listed in a group share common features, or that words susceptible of broad and general application are nonetheless limited or qualified by the more specific and narrower terms with which they are grouped.377 Despite the Ballay court’s invocation of one such canon—that of noscitur a sociis378—this structural approach to textual analysis has fared very poorly in judicial construction of securities laws.379

A second methodology, also resorted to by the Ballay court, derives meaning not from linguistic relationships, but from the juxtaposition of ideas and the framework of their application.380 By positing any text as a subpart of a larger whole, structural approach to interpretation proceeds in a tiered analysis, unveiling an item at a time in the belief that, ultimately, the meaning of the specific text will be brought out when a sufficient number of the layers of the legislative act have been examined. This approach, which can proceed from either of two directions,381 has fared a good deal better in the interpretation of the securities laws.

among equitable remedies in the 1933 and 1934 Acts"). See also id. at 717 (Blackmun, J., dissenting) (observing analytical categories as including "statutory language," "statutory history," "statutory structure," and "legislative purpose and policy").

375. For one illuminating illustration of these distinctions, see Aaron, 446 U.S. at 680. A standard statement of "context" or "statutory purpose" or "policy" with regard to the securities laws is that they are intended to mandate "full disclosure." As demonstrated below, such a statement in and of itself conveys little about structural analysis.

376. See supra part II.A.3.

377. See supra part II.A.3.


379. See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 387 n.23 (1983) (rejecting application of maxim expressio unius est exclusio alterius on ground that "[s]uch canons long have been subordinated to the doctrine that Courts will construe the details of an act in conformity with its dominating general purpose"); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943). But see Schreiber v. Burlington N., Inc., 472 U.S. 1, 6-8 (1985) (concluding that words listed in group must be construed to address same type of misconduct: improper failure to disclose rather than improper acts that do not involve duty to disclose).

380. See supra part III.A.

381. The process may flow, of course, in both directions. That is, the meaning of text may begin with examining the relationship of words within the section, the section within the title, the title within the act, and so on. Alternatively, ascertaining the meaning of the text could begin with statement of the purpose of the act, the relationship of the title to
A frequently repeated assertion is that "[the] 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme." Implicit in this statement is the claim that the interpretation of any of the provisions of the two Acts must be undertaken with the perspective of weaving together a consistent and coherent body of law. To do so, attention must be given to the interpretation of other sections, with the end-result being a harmonious structure that further the purpose(s) of the securities laws.

As a practical matter, applying these concepts to the interpretation of the securities laws has proved no more determinate than resort to language or legislative history. There is no unwavering statutory purpose to which the entire body of the securities laws can be said to serve, and even if there were, there are bound to be differences as to whether that purpose is served by one or another structural approach. Nonetheless, one can readily articulate concepts that further the act, of the section to the title, and of the words to the section. Where one commences depends, I argue below, with which understanding has become the more internalized to the interpreter. See infra part IV.


383. See, e.g., Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 485 (1990). The Rodriguez De Quijas Court justified overruling Wilko v. Swan, 346 U.S. 427 (1953), on the ground that it "would be undesirable" for Wilko to "exist side by side" with Shearson/American Express v. McMahon, 482 U.S. 220 (1987), because such an existence would constitute an inconsistency at odds with the principle that the 1933 and 1934 Acts should be construed harmoniously because they "constitute interrelated components of the federal regulatory scheme governing transactions in securities[,]" and in order to "discourage litigants from manipulating their allegations so as to cast their claims under one of the securities laws rather than another." Id. (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206 (1976)).

384. The claim that the "purpose" of the securities laws is to encourage "full disclosure," or that they are "remedial statutes" to be interpreted "not technically but flexibly" to achieve this goal is a familiar one. Nonetheless, as court opinions amply demonstrate (and with justification), such talismanic all-encompassing claims are simply too broad to be meaningful as guides to specific application either of substantive policy or of interpretive methodology. Among other equally broad purposes that have been advanced are "protection of the public," "protection of investors," "protection of shareholders," "protection of the integrity of the market," and a host of others. Yet, the outcome of a particular case may well depend on which one of these goals the Court states as being the purpose of the statute in question.

385. This comment is, of course, not unique to structural analysis. As has been demonstrated thus far, it is equally applicable to textual and to legislative history analysis, and the Supreme Court has occasionally vented openly about resulting indeterminacy. See, e.g., Virginia Bankshares v. Sandberg, 111 S. Ct. 2749, 2763 (1991) (criticizing use of legislative history in J.I. Case Co. v. Borak, 377 U.S. 426, 427 (1964), and observing that
nish strong rhetorical grounds for contending that structural analysis operates within a sufficiently circumscribed interpretive regime so that its results are not entirely capricious. Straightforwardly stated, conventional structural analysis asserts that it is possible to find a readily defensible interpretive meaning for a contested provision of a statute in the juxtaposition of sections of a statute, the comparison of the uncontested provisions of those sections, and the procedural hurdles embedded in the enforcement of the agreed-upon rights conferred by such provisions. Review of four Supreme Court opinions concertizes the point.

In *Ernst & Ernst v. Hochfelder*, the Court applied a structural analysis to support its reading of private actions under section 10(b) of the 1934 Act, and Rule 10b-5 thereunder, by emphasizing the need for procedural harmony. As did the Third Circuit in *Ballay*, the Supreme Court in *Hochfelder* reasoned that unless it placed procedural obstacles to the invocation of section 10(b) (that is, the requirement of pleading and proving scirent), it would be upsetting a carefully balanced relationship among the various provisions of the securities laws. The Court contended that because statutorily created negligence-based causes of action under the 1933 Act contained procedural limitations, to allow a negligence-based implied claim under section 10(b) would be inconsistent with the statutory structure. Potential claimants under the express statutory provisions would seek to circumvent the procedural limitations of those provisions by bringing suit under section 10(b). Requiring scirent under section 10(b) was thus necessary to avoid such circumvention.

“Borah’s probe of the congressional mind, however, never focused squarely on private rights of action, as distinct from the substantive objects of the legislation”); *Shearson/ American Express*, 482 U.S. at 520 (stating that statutory language of Wilko v. Swan, 346 U.S. 427 (1953), overruled by Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989), was “not obviously correct”).

386. 425 U.S. at 201.


389. *Id.* For example, the Court observed that § 11(e) of the 1933 Act provides for the shifting of attorney’s fees to a losing plaintiff and authorizes a court to require plaintiffs to post bond as condition to prosecution of the suit. *Id.* at 208-10. A § 10(b) claim, as an implied cause of action, the Court assumed, could not place similar obstacles in the path of a potential plaintiff. *See id.*

390. *Id.* at 210; *cf.* *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733-56 (1975), where the Court justified its restriction of the right to sue under § 10(b) of the 1934 Act and SEC Rule 10b-5 thereunder by pointing to semantic differences in the wording of § 10(b) and that of § 17(a) of the 1933 Act, the limited scope of express liability provisions (§§ 11 and 12) of the 1933 Act, procedural hurdles in the invocation by a plaintiff of express liability provisions (§§ 9 and 18) of the 1934 Act, and by contending as potentially dissonant with the provisions of §§ 28 and 29 of the 1934 Act a broad interpretation of
While the Hochfelder Court employed structural analysis in a defensive mode—that is, to justify and reinforce a position already adopted on other grounds—such structural considerations formed the affirmative basis for the Court's adoption of a one-year/three-year limitations period for actions under section 10(b) and Rule 10b-5 in Lampf, Plewa, Lipkind, Prutis & Petigrow v. Gilbertson. First, structural analysis formed the backbone of the Court's departure from the seemingly well-settled precedent that in the absence of an explicit federal statute of limitations governing a federal claim, an analogous state statute of limitations furnished an appropriate limitations period. The Court rejected the application of this doctrine to the section 10(b) claim by pointing to a "hierarchical" inquiry focusing on the breadth of the potential claims that may be brought under section 10(b), the interstate character of the conduct underlying those claims, and the ready availability of analogous federal claims with express federal statutes of limitations. While the first two considerations simply argue for the adoption of a "uniform" limitations period—which could be state or federal—the presence of the third strongly tips the balance in favor of borrowing the applicable limitations period from a federal, rather than a state, source.

Second, the Court employed a strictly structural approach to select the appropriate limitations period from the numerous available federal candidates. The Court found particularly persuasive the multiplicity of provisions under both the 1933 and 1934 Acts that embraced a one-year discovery rule and a three-year repose period. As the

§ 10(b). In Touche Ross & Co. v. Redington, 442 U.S. 560, 572-74 (1979), the Court justified its refusal to imply a private right of action under § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a) (1988), in part by pointing to the fact that the section whose language, on its face, provided no such right, was hemmed in by two sections that expressly did so, and by the fact that one of those, § 18(a), applied to a much narrower class of persons whose private right would otherwise be made redundant were it to imply such a right. But see Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) (discussed infra note 405 and accompanying text).


392. See id. at 2778 ("This practice, derived from the Rules of Decision Act, 28 U.S.C. § 1652, has enjoyed sufficient longevity that we may assume that in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.' ") (quoting Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 147 (1987)). This practice had been uniformly applied to § 10(b) claims by lower courts until the significant departure of the Third Circuit in In re Data Access Sec. Litig., 843 F.2d 1537 (3d Cir. 1988), cert. denied, 488 U.S. 849 (1988), where the court instead borrowed from the analogous limitations period for express causes of action under the Securities Exchange Act of 1934.

393. Lampf, 111 S. Ct. at 2778-79.

394. See id. at 2779. The need to discourage the bogeyman of "forum [or statute] shopping" was advanced as a reason for adopting a "uniform" limitations period. Id.

395. See id. at 2780 (discussing §§ 9(e) and 18(c) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(c) (1988)), and § 13 of the Securities Act of 1933, 15 U.S.C. § 77m
Court put it, "We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." But the choice available to the Court under this structural analysis was not quite as straightforward as suggested by the statement. The 1934 Act—as amended—contained two other provisions with differing statutes of limitations periods, one of which was enacted contemporaneously with section 10(b), while the other arguably reflects a much more current statement by Congress of the appropriate policy statement about claims under section 10(b). Yet, the Court's approach quite convincingly demon-

(1988)). Moreover, the Court found in the contemporaneous adoption of these provisions with § 10(b) an eloquent statement of plausible congressional intent. Id. at 2780-81.

396. Id. at 2780. The Court followed this approach in Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085 (1993). In holding that defendants in a Rule 10b-5 action can seek contribution from joint tortfeasors, the Court relied on the fact that §§ 9 and 18 of the 1934 Act—contemporaneously enacted with § 10(b)—explicitly provide for such a right. "[C]onsistency," stated the Court, "requires us to adopt a like contribution rule for the right of action existing under Rule 10b-5." Id. at 2091.


399. See Securities Exchange Act of 1934, § 20A(b)(4), 15 U.S.C. § 78t-1 (1988) (enacted by § 5 of the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 5, 102 Stat. 4677, 4681). The SEC and the Solicitor General had argued in favor of the five-year limitations period embodied in this legislation. Lamont, 111 S. Ct. at 2777-78. There was substantial support in Congress for this position. However (and indicative of the compromises inherent in the legislative process), the most that proponents of the broader limitations period could legislatively achieve was the prescription that the Lamont decision be applied only prospectively. See Securities Exchange Act of 1934, § 27A, 15 U.S.C. § 78aa-1 (Supp. IV 1992), as amended by Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2286, 2387. Congress' constitutional power to invalidate any retroactive application of the Lamont decision and to require the rehearing and restoration of any lower court decisions already dismissed on the basis of the retroactive application of the Lamont decision has generated substantial litigation. Although most courts have held that it does have such power, at least two opinions have held to the contrary. For cases finding § 27A unconstitutional, see, e.g., Axel Johnson, Inc. v. Arthur Andersen & Co., 6 F.3d 78, 81-85 (2d Cir. 1993); Cooke v. Manufactured Homes, Inc., 998 F.2d 1256, 1264-65 (4th Cir. 1993); Pacific Mut. Life Ins. Co. v. First RepublicBank Corp., 997 F.2d 39, 43-55 (5th Cir. 1993); Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269, 273 (1st Cir. 1993); Berning v. A.G. Edwards & Sons, 990 F.2d 272, 277-79 (7th Cir. 1992); Gray v. First Winthrop Corp., 989 F.2d 1564, 1568-74 (9th Cir. 1993); Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1543-47 (10th Cir. 1992); Henderson v. Scientiﬁc-Atlanta, Inc., 971 F.2d 1567, 1571-74 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993). But see Johnston v. Cigna Corp., 14 F.3d 486, 489-97 (10th Cir. 1993) (holding § 27A unconstitutional and distinguishing Anixter case on basis of difference between decisions that were nonappealable at time of passage of Act from those that were still appealable); Plaut v.
strates the effective and affirmative derivation of meaning from structural analysis based on the consanguinity of sections within an act, related characteristics within these sections, and the judicial tendency to find kinship and balance between and among the harshness of procedural bars and the quantum of relief available.\footnote{400}

The desire to discourage crass manipulation of the securities laws by private litigants was a central feature of the Court’s argument in the cases above in which it invoked structural analysis to restrict the availability of contested rights. That position led the Court to insist that there must be corollary procedural limitations to requests for broad relief,\footnote{401} or that narrow relief must follow where the procedural limitations were few.\footnote{402} In both \textit{Herman \& MacLean v. Huddleston}\footnote{403} and \textit{United States v. Naftalin},\footnote{404} the Court applied structural analysis to give quite broad scope to the reach of the securities laws. In \textit{Herman \& MacLean}, a unanimous Court held that the interrelated character of the federal securities laws permitted a plaintiff to bring claims for relief under either or both section 11 of the 1933 Act or section 10(b) of the 1934 Act. In doing so, the Court rejected the attempt of the defendants to preclude a plaintiff’s resort to the broad scope of relief available under section 10(b)’s implied right of action due to the availability of the expressed but relatively more limited relief under section 11.\footnote{405} In particular, after canvassing the various provisions for relief under both the 1933 and 1934 Acts, the Court found in their varied procedural structures a good reason for letting the litigant decide whether to invoke one or several sections in support of a claim for relief.\footnote{406} Rather than providing the basis for discriminating among sources of relief, the very tailoring of procedural mechanisms

\begin{footnotesize}
\footnote{Spending Farm, Inc., 1 F.3d 1487, 1493-97 (6th Cir. 1993) (holding § 27A unconstitutional).}
\footnote{400. Thus, the Court dismissed the two-year period under § 16 as being too narrow because the underlying cause of action under that section did not involve intentional wrongdoing, and it discounted the five-year term under § 20A because the underlying claim there—while involving intentional wrongdoing—was directed at a narrow and specific conduct, while § 10(b) involved a broad array of intentionally wrongful conduct. See \textit{Lampl v. 111 S. Ct. at 2780 n.5, 2781; cf. supra note 387 discussing analogous reasoning in \textit{Ernst \& Ernst v. Hochfelder}, 425 U.S. 185 (1976)).}
\footnote{402. See, e.g., \textit{Toche Ross} \& \textit{Co. v. Redington}, 442 U.S. 560, 577-78 (1979).}
\footnote{403. 459 U.S. 375 (1983).}
\footnote{404. 441 U.S. 768 (1979).}
\footnote{406. \textit{Herman \& MacLean}, 459 U.S. at 384.}
\end{footnotesize}
evident in specific sections form an affirmative basis for letting individual litigants invoke whatever sections they deem appropriate.\textsuperscript{407} Such an interpretation, the Court asserted, is necessary if persons explicitly protected by congressional action under section 11 are to receive protection no less favorable than that available under the section 10(b) judicially implied cause of action.\textsuperscript{408} As explained by the Court, this “cumulative construction of the securities laws also furthers their broad remedial purpose.”\textsuperscript{409}

In \textit{Herman \& MacLean}, then, the Court viewed the various sections as reflecting or evidencing some overall scheme, with the role of structural analysis being to harmonize an interpretation that gives the broadest scope to the realization of the scheme. But what is the scheme, and how readily identifiable is it? In \textit{United States v. Naftalin},\textsuperscript{410} the court of appeals identified that scheme as being to protect “investors” (and therefore purchasers), not “brokers.”\textsuperscript{411} It reversed, therefore, the conviction of a short-seller of stocks convicted of fraud for failure to disclose to his brokers that he did not intend to cover his positions if the shorting did not work out favorably.\textsuperscript{412} In rejecting the court of appeals’s conception of the scheme, the Supreme Court was compelled to address three structural arguments. The first was the Court’s frequent generalized references to “protection of investors” as the statutory purpose of the securities laws.\textsuperscript{413} The Court contended that such references did not imply the exclusion of other purposes. Rather, the securities laws had at least one other important function: “to achieve a high standard of business ethics . . . in every facet of the securities industry.”\textsuperscript{414}

\textsuperscript{407} Although the Court does not explicitly address the tension between its approach here and that in \textit{Ernst \& Ernst v. Hochfelder}, one potential basis of reconciliation—that Hochfelder dealt with procedural refinements to a judicially created right, while \textit{Herman \& MacLean} concerned the basic issue of the right to invoke a claim whose existence was “beyond peradventure,” 450 U.S. at 380—is unpersuasive. As indicated earlier, the Court employed structural analysis to defeat the claim for a similar entry level right. See Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

\textsuperscript{408} \textit{Herman \& MacLean}, 459 U.S. at 382-83.

\textsuperscript{409} \textit{Id.} at 386. In this context, the Court rejected application of the canon \textit{expressio unius est exclusio alterius}, asserting that it is inapplicable “where the remedial purposes of the Act would be undermined by a presumption of exclusivity.” \textit{Id.} at 387 n.23.

\textsuperscript{410} 441 U.S. 768 (1979).

\textsuperscript{411} \textit{Id.} at 772.

\textsuperscript{412} \textit{Id.} at 771.

\textsuperscript{413} \textit{Id.} at 774-75.

\textsuperscript{414} \textit{Id.} at 775 (citing SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186-87 (1963)) (emphasis added). The Court framed the “primary contemplation of Congress” with regard to the securities laws in terms of “setting the economy on the road to recovery,” to which investor protection and a high standard of business ethics merely constituted means of realization. See \textit{id.} (citing 77 CONG. REC. 2925 (1933) (statements of
Second, the defendant argued that the open-ended text of subsection 17(a)(1) of the 1933 Act under which he was prosecuted should be read in light of the more circumscribed language of the related subsection 17(a)(3) that appears to prohibit only conduct that injures purchasers.415 The Court responded that the analysis was misplaced for two reasons. In the first place, the subsections were linked by the disjunction "or," suggesting independent viability for each subsection.416 More tellingly, the Court stated that "while matters like 'punctuation [are] not decisive . . . ,' where they reaffirm conclusions drawn from the words themselves they provide useful confirmation."417 Because the Court had already concluded that the open-ended text of subsection 17(a)(1), when applied to the facts of the case, did not reach a result incompatible with its view of the purpose of the securities laws, giving effect to the use of the disjunction confirmed the Court's interpretation of subsection 17(a)(1).

Third, the defendant, invoking the often-stressed interrelated scheme of the federal securities laws, contended his prosecution—if one there was to be—should have been under section 10(b) of the 1934 Act, rather than section 17(a) of the 1933 Act. His argument was that the 1933 Act applied to "initial distributions," while the 1934 Act dealt with secondary trades.418 The Court did not reject the general thrust of this argument, but parried it by relying on statements in the legislative history drawing distinctions between "old," "new," and "outstanding" securities and carving out a special exemption for the prohibitions of section 17(a) from the reach of these distinctions.419

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415. Id. at 773. For the text of § 17(a), see supra note 250.
416. Naftalin, 441 U.S. at 774.
417. Id. at 774 n.5.
418. Id. at 777.
419. See id. at 778. As I have explained elsewhere, to draw any interpretive significance from the oratorical use of the terms "initial offerings" and "secondary trading" on Congressional debating floors and committee reports is problematic. See supra notes 246, 322-26, and accompanying text. I think the Third Circuit is correct when it asserts that the Supreme Court's rejection of the relevance of the distinction between "initial" and "secondary" offerings in the context of the interpretation of § 17 does not dispose of the § 12(2) issue. See Ballay v. Legg Mason Wood Walker, Inc., 925 F.2d 682, 691-92 (3d Cir.), cert. denied, 112 S. Ct. 79 (1991) (concluding that neither specific language nor history of §§ 17 and 12 compel that their scope be seen as coextensive). Indeed, there is language in the Supreme Court's opinion that can be read to suggest otherwise: "In other words, fraud or deception in the sale of securities may be prosecuted [under § 17] regardless of whether the security is old or new, or whether or not it is of the class of securities exempted under sections 11 or 12." Naftalin, 441 U.S. at 778 (citing S. Rep. No. 47, 73d Cong., 1st Sess. 4 (1933)); accord H.R. Rep. No. 85, 73d Cong., 1st Sess. 6 (1933). But see 9 Loss & Seligman, supra note 266, at 4218-19 (contending that decision in Naftalin is dispositive of interpretation of § 12(2)).
Strikingly absent in both the *MacLean* and the *Naftalin* decisions were references to the desire to avoid redundancies in an integrated system or to avoid undercutting the utility of one section by insisting on procedural equivalence based on tradeoffs between the difficulties of prosecution and the rewards of success at prosecution on which the *Hochfelder* Court had relied. What explains these disparities, and can they be readily reconciled to generate an intelligible explanation of structural analysis under the securities laws? The answer, I think, lies in the willingness of the courts to take yet another step on the road that structural analysis unavoidably launches them. The venture requires focusing on whether structural analysis is merely another judicial rhetoric confined to discerning appropriate places within given, unquestioned, and unquestionable hierarchy, or whether it is a tool for probing and questioning relationships and interrelationships among parties and within legal issues submitted for judicial resolution.

Thus, although both the *Hochfelder* and *Herman & MacLean* Courts applied structural analysis to resolve the interpretive problems they faced, the former seemed to find in structure the sort of direct prescriptive statement commonly attributed to “text” or “plain meaning,” while the latter viewed “structure” as evidencing “statutory purpose” that may be grasped through a variety of mechanisms. In this sense, the *Herman & MacLean* Court treated structure in much the same way that the *C.M. Joiner* or *Houey* Courts had treated textual interpretation under section 2(1) of the 1933 Act.420

In summary, while the Court has on occasion declined to rely on structural analysis,421 it has, on a significant number of occasions, forthrightly embraced a hierarchy of relationships among the elements of a statute in order to give meaning to a contested provision. This analytical method contends that by evaluating the placement of sections, the distribution of procedural burdens within related statutes, and some generalized understanding of the statutory scheme, an interpreter can legitimately assign proper and adequate meaning to a contested provision of law. Like “language,” and “legislative history,” structure is invoked and justified on the ground that the end-product of the analysis is “legislative intent,” not judicial fiat. As in resort to “language” and “legislative history” (but not policy or purpose), structure permits a circumscribed search for determinate meaning. Compared to language or legislative history, however, structural analysis is

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420. See supra notes 282-301 and accompanying text.
more transparently the product of the interpreter’s extrapolation of meaning than it is of the foisted-on intent of the writer.

C. Reconstructing Conventional Structural Analysis

The above evaluation demonstrates the dual difficulties in conventional interpretive methodologies of establishing a determinate meaning within a framework that is accepted as legitimate. "Plain meaning" failed to function within its own terms to establish a determinate account of the meaning of the term "security." "Legislative history" as a methodology offered disparate approaches whose legitimacy were subject to multiple challenges. Given this context, the seeming lack of precision or determinacy of structural analysis dissipates. Nor can structural analysis be dismissed on the ground that it lacks a legitimizing conception of the role of the judiciary. Ultimately, textualism and legislative history functioned to impart meaning not because of any slavish adherence to a prescribed script by the Supreme Court, but because of the exercise of independent choice by the Court. What structure has, and both plain meaning and legislative history lack, is the view of the interpretive process as precisely that: a process unified and integrated with others. Structure works because it functions in tandem with text and with legislative history; it does not pretend to eliminate completely these other methodologies, but rather views itself as the culmination of the practices those methodologies embody. It offers a true-to-life articulation of the forces at work that otherwise are obfuscated by the claim of subservience to "text" or to "legislative history" and that are ignored or unexplained by the simple reference to "statutory purpose" or "policy." In short, structural analysis goes some way towards providing an intelligible synthesis of the theory and practice of conventional interpretive practices.

Nonetheless, the conventional use of structure as an interpretive tool, in one significant sense, has failed to deal adequately with the contradictory pull and tug of determinacy and legitimation. Judicial opinions, as illustrated above, evince two quite distinct models of structural analysis. Although modern approaches to the use of structure may reject the invocation of talismanic formulae, judicial opinions still advance structural arguments in a highly mechanistic manner, as if the end-product inexorably flows from the internal relationships among the parts of the statute in question. The structure of the securities laws (for example, the relationship of one section to another) is presented as directing a specific outcome independent of the preferences of the interpreter.\footnote{422. See, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).} Represented as a directive from
Congress, this mode of structural analysis purports to disavow what is otherwise plain: that meaning, in large measure, is the creation of the judge as interpreter relying on a multiplicity of aids, not an irrevocable and crystal-clear command of the writer/legislature.

Happily, however, there is another strand of structural analysis. This latter approach reasons from the general to the specific and accurately conveys the end product of structural analysis not as compelled by specific instructions from Congress, but as a reasonable fulfillment of promises only intimated in legislative action. The conclusion reached by a court under this methodology does not so much flow from the intersecting relationships, because the relationships are manifestations of the conclusion. Structural analysis is relevant not because it generates the end product, but because it explains why that end product is (or should be) acceptable.

It is the assimilation of both models of reasoning from structure in Ballay that makes the Third Circuit's opinion both interesting and incomplete. By invoking intersectional analysis, the Ballay court seemed to be suggesting that its conclusion followed from some well-thought out legislative command. As demonstrated above, however, that sort of coherence is simply absent from any examination of the material relied on by the court. Ultimately, the Ballay court reached a conclusion that does not depend so much on intersectional structural analysis as it does on the court's perception of the appropriate relationship in contemporary society between a broker and her customer. In holding that the availability of relief under section 10(b) precludes the use of section 12(2), the court was stating in unmistakable terms that the appropriate relationship between a broker and a customer is embedded in the provisions of section 10(b), while section 12(2) reflects only the relationship of a particular type of seller to a particular buyer—that is, participants in an initial distribution. These sections did not themselves create the relationships, but merely reflected their existence. Intersectional analysis works not because it succeeds in elucidating the affirmative command of the legislation, but because it underscores the inherent interrelationship of legal provisions. Whether Congress intended it or not, it is unavoidable that for law to make any sense—that for the prescription to be communicated effectively to others—any part of it must be seen to be readily integrable


424. Cf. Loss, supra note 3, at 58 (stating that Ballay court was not only insensitive to congressional policy of promoting interest of investors, but was also blind to statutory scheme that evidences nation's decision of early 1930s to "sweep 'Wall Street's' Augean stables with a federal broom, and then to have federal personnel (judicial as well as administrative) keep the premises reasonably clean").
with other provisions. This need to integrate is not bottomed on demonstration of prescience by Congress, but on the reality that the interpretive process goes on among lay and professional persons alike and that such interpretation—whatever the source—shapes and, in turn, is shaped by practice. It is precisely because interpretation reflects, rather than creates, the practice that a purely deductive use of intersectional structural analysis fails.

Thus, in Ballay, intersectional analysis usefully demonstrated the limited viability of any interpretation cabined to the text or history of section 12(2). The determination that section 12(2) ought to be limited in order to avoid making section 10(b) redundant simply cannot be supported by deductive reasoning—even one that is structural in character. Rather, that next step can be made intelligible only by reference to some superstructure so integrated into the court’s world view that the court feels comfortable resorting to it without articulating its precise character or contours. Whether a court terms it “context,” “statutory purpose,” or “policy,” conventional analysis—even conventional structural analysis—takes that superstructure as a given and very rarely expatiates on its source. To attempt to give it a rational scope invites unflattering inquiry into both the source of legitimacy of the superstructure and its boundaries. Yet, to leave it unexplored renders structural analysis only a partial advance over the obscurantism of “text” and “legislative history.”

Once one concedes that courts do not mechanistically “find” the law, but rather are active participants in its creation, investigating that superstructure becomes imperative. A methodology for exploring that superstructure is structuralism. In the next section, I fashion and develop the implications of applying structuralism in the daily practice of interpreting statutes.

IV. STRUCTURALISM AND THE INTERPRETATION OF STATUTES

A. From Structure to Structuralism

If the strength of structure as an analytical tool lies in its receptiveness to a broader set of influences—at least when compared to textualism or legislative history—its major shortcoming flows from the judicial impulse to artificially contain the sources of such influences to those traditionally viewed as within judicial competence. For example, even as the courts abandoned the canons of interpretation in preference for evaluation of the practical consequences of their decisions on market actors, the ensuing resort to structural analysis continued to emphasize the relevance of procedural concerns, such as the need for a balanced trade-off between the burdens required to estab-
lish liability and to successfully discharge that burden. While the need for such a balance is better understood as predictions of the behavioral response of the regulated market participants, the courts continued to invoke legislative intent as the explanation for their decisions.

The impulse to rely on purported legislative intent is understandable. It is consistent with a hierarchical view of the role of law in regulating conduct. Under this view (presented here only in a somewhat mildly caricatured form), oracular pronouncements issue from the political branches, are interpreted by the priesthood of the judiciary, and are unquestioningly adhered to by the plain folks. The approach is indefensible both as a statement of what actually does transpire, and because it stifles practical inquiry into alternative conceptions of the relationships among the political branches, the judicial system, lawyers, their clients, and other participants who shape and whose conduct is shaped by statutes.

Consider, for example, the issue the Ballay court faced: whether a broker that mistakenly provides incorrect information to a customer can be sued under the negligence standard of section 12(2), or must be sued, if at all, under the fraud standard of section 10(b). The court purports to resolve this question by ascertaining "congressional intent" when Congress enacted section 12(2). Despite the obvious futility of the endeavor under textual and historical analysis, the Ballay court sought to constrain the more promising use of structural analysis to the same quest for legislative intent. The result was the court's anomalous conclusion that Congress in 1933 could not have intended that a negligence standard apply to broker-customer relationships in secondary markets because a contrary intent could not be reconciled with the legislative enactment of section 10(b) in 1934, the administrative promulgation of a rule to enforce the section in 1942, and the judicial implication of a private right of action under the section and the implementing regulation in 1946. This justification rings hollow.

425. See supra notes 383-90 and accompanying text.
426. Cf. supra note 270 and accompanying text (discussing effect of such considerations on Supreme Court definition of term "security").
427. See, e.g., supra notes 362-63 and accompanying text (discussing Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)).
429. Compare Weiss, supra note 6 (declining to rely on subsequent enactment of § 10(b) and implication of private right of action under that section as justification for limitation of § 12(2) to transactions involving initial public offerings).
By contrast, a candid acknowledgement that the search was for a
coherent regulatory scheme in 1991 governing the liability of a broker
to her customer for inadvertent errors would not only permit the
same sort of structural inquiry engaged in by the court, but would do
so in a context that actually replicates interactions among various
participants and that sanctions and legitimizes the necessary dynamism
in the development of the law. Such an alternative vision would forth-
rightly accept that the issue is not congressional intent in 1933, nor
judicial intent in 1991, but societal choice in the 1990s. It would rec-
ognize and integrate the historical forces at work in 1933, judicial de-
cisions construing legislation resulting from that setting and, in
particular, the current practices and aspirations of the regulated.

Legislation—at least that which regulates actions in the modern
state—is invariably a response to a perceived defect in communal in-
teraction. Against a backdrop of judicial review and pluralist beliefs,
legislation does not so much command as it invites engagement. Stat-
utory enactments may well provide the means by which to commence
the analysis of a problem, but in a real sense they are neither the start-
ing point nor the end product. They are preceded by the social inter-
actions they seek to regulate, and they are in turn interpreted both by
the judiciary and the particular persons they regulate. Such interpre-
tations may give rise to additional legislation.

Conventional structural analysis, as we have seen, explicitly takes ac-
count of the ongoing interaction between legislative acts and judicial
interpretations.\textsuperscript{430} Whether the interaction is presented as a directive

\textsuperscript{430} See supra note 101 and accompanying text. The disagreements among the
members of the judiciary relate principally to the degree of explicitness of the
acknowledgement in the opinion of the coequal character of the interplay, rather than in
the denial of its existence. See, e.g., \textit{Blue Chip Stamps}, 421 U.S. at 737. The Court noted:

We would by no means be understood as suggesting that we are able to
divine from the language of § 10 (b) the express intent of Congress as to
the contours of a private cause of action under Rule 10b-5. When we deal
with private actions under Rule 10b-5, we deal with a judicial oak which has
grown from little more than a legislative acorn.

\textit{Id.; see also Shearson/American Express v. McMahon}, 482 U.S. 220, 227 (1987) (asserting
that it is merely giving effect to legislative intent). \textit{But see id. at} 268 (Stevens, J., concurring
in part and dissenting in part) ("After a statute has been construed, either by this Court or
a consistent course of decision by other federal judges and agencies, it acquires a meaning
that should be as clear as if the judicial gloss had been drafted by the Congress itself."). \textit{Cf.
(Scalia, J., concurring) (reluctantly accepting that prior judicial interpretation, although
unwarranted by statute, compelled Court's decision). As Justice Stevens has pointedly
observed:

In the final analysis, a Justice's vote in a case like this depends more on his
or her views about the respective lawmaking responsibilities of Congress
and this Court than on conflicting policy interests. Judges who have confi-
dence in their own ability to fashion public policy are less hesitant to
from the legislature to the courts, or as a good faith exercise of discretion by the courts to give effect to ambiguous legislation, conventional structural analysis exposes to review, discussion, and analysis the pull-and-tug of the interaction. The regulated, however, are left out of this colloquy.431 Yet, the relevance of the role of those who are regulated and the importance of their interpretation of legislative acts and judicial pronouncements are rarely explicitly acknowledged in judicial interpretation. It is not that courts are unaware of these factors.432 Rather, the failure to explicitly recognize and integrate these considerations into judicial analysis accounts for much of the incoherence of contemporary statutory interpretation and adds to the gap between academic theorizing and legal practice.

Structuralism is the method for the incorporation of practice into legal analysis.433 I shall first expand on the concept and then defend it against the dual criticisms of "indeterminacy" and "illegitimacy."

B. Applied Structuralism

Structuralism as an interpretive method is at its core a sociological practice. Meaning flows predominantly from interactions within and among institutions. Yet, that meaning must be subjectively acquired, communicated, and evaluated by those to whom it matters. An interpreter is obligated, therefore, to seek out and understand the relevant institutions, the impact of the institutions on the views of those they directly affect, and the way such persons are likely to integrate her interpretation into the workings of those institutions. Linguistic text is relevant to a structuralist to the degree it can be identified with particular institutional behaviors and practices.

For a structuralist, a statute is not a fixed dictate from a superior organ of government that mandates unquestioned obedience.434 A statute, rather, is an interactive engagement among legislators, administrators, the judiciary, and the regulated. A court, in interpreting a statute, makes its own contribution to this process, not because it is an

change the law than those of us who are inclined to give wide latitude to the views of the voters’ representatives on nonconstitutional matters. Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 487 (1990) (Stevens, J., dissenting).

431. The occasional reference in legislative history to the statements of lobbyists, see supra note 74, only heightens this exclusion.

432. See, e.g., supra note 301 and accompanying text (discussing relevance of market practice to Supreme Court’s construction of term “security”).

433. See supra notes 285-301 and accompanying text.

434. Cf. Radin, A Short Way With Statutes, supra note 36, at 394-97 (noting that, under American system, legislature is not and cannot be sovereign; sovereignty resides in constitution and people; business of legislature is to get statute on books and, once that is complete, task of interpretation shifts to coordinate branches of government).
inferior organ to the legislature or because it is better equipped than the regulated to ascertain the intent of the legislature, but because convention has it that the coercive power of the community will be deployed in favor of the interpretation given by the court—whatever the source of that interpretation. The court is called to intervene only when extant interpretations by the regulated become irreconcilable. Thus, in the vast majority of cases, interpretation goes on among the regulated with very little input from legislators or the judiciary. Structuralism recognizes and makes use of this reality by insisting that a judge search not for "legislative intent," but that she attempt to discover meaning by inquiring into the practices of the regulated, as well.

Current conventional adjudicative practice is not entirely devoid of some of the elements of structuralism as a mode of interpretation. One feature of contemporary adjudication is the evidentiary doctrine of "taking judicial notice" of a practice or state of affairs. Unfortunately, however, "judicial notice" commonly is said to be appropriate with regard to those facts—and only those facts—that are "generally known" and whose existence is so clear as to be beyond dispute. Its incorporation into judicial decisionmaking may thus be said to be one of mechanical, unexamined absorption. By contrast, "structuralism" insists on a critical review of practice that does not simply accept surface meaning, but demands intensive probing into both the conscious and unconscious stimuli of the practice and surrounding institutions.

A judge first seeks to understand the relevant practices as related to her by the participants and as a detached observer. Next, she critiques the practices. She does so for two reasons. First, it is with the understanding gained from such investigation that she would feel confident of requiring that her insights be incorporated into the broader social setting within which they must function. Second, only with such a critical understanding would the judge be in a position to transmit effectively her understanding of the practice to others, including those whose conduct she wishes thereby to influence. In order to be useful, then, a judge's understanding of practice would include knowledge of the formal rules (that is, the "text" of practice), the formal and informal conventions that undergird the interpreta-

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435. See, e.g., GLEN WEISENBERGER, WEISENBERGER'S FEDERAL RULES OF EVIDENCE §§ 201.1-09 (1987); cf. Fed. R. Evid. 201 (allowing judge to take notice of "adjudicative facts," thereby eliminating necessity that party "prove" such facts).

436. See WEISENBERGER, supra note 435, § 201.1; cf. id. § 201.2 (noting that judicial practice is to take note of a broader set of "facts," which he terms "legislative" (as distinct from adjudicative)).

437. See supra note 13 and accompanying text.
tion of those rules by the practitioners (that is, their interpretation of the rules), and the interaction of the practices in question, the participants, and the institutions within which they interact. Structuralism insists on viewing the interpretive function as arising out of an understanding of those with interest in the regulated activity and the role that interpretation plays in defining and cementing the contours of the law—not merely as a statement of special needs, but as the principled assertion of communal interests.

The judge as interpreter is thus required to undertake the difficult exploration of these interactions as a socio-humanist. Structuralism would require the investment of effort at exposing implicit assumptions and at decoding complex relationships. The result is that while conventional abstractions speak in terms of "legal rules" and "legal standards," structuralism's abstractions are about institutional practices and social objectives.

These are not skills emphasized in the conventional approach to interpretation. They are integral, however, to a proper functioning of an interpretive method. The search for meaning demands subjective evaluation and intersubjective communication of the results of the evaluation. The process is neither a purely rational one, nor can it do without some method for rationalizing the interconnected relationships. The underlying argument for its use is that it embraces what already takes place in an integrated system (of which law is but a part, albeit an important one) that is characterized by exchanges and the exertion of influences—institutional and personal. To illustrate the point, let us take another look at the section 12(2) problem faced by the Ballay court.

For fifty years following the enactment of section 12(2), there was virtually no debate as to whether its provisions applied to oral communications between a broker and her customer, regardless of whether the transaction was part of an initial offering or in a secondary market. On the occasions when courts faced the issue they assumed, axiomati-

438. Cf. Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1 (1983) (discussing effects on judiciary of demands of administrative state); Robert Weisberg, The Calabresian Judicial Artist: Statutes and the New Legal Process, 55 Stan L. Rev. 213, 256-57 (1983) (using Guido Calabresi, A Common Law for the Age of Statutes (1982), as basis for discussion of judicial process as it relates to legislation, and expressing skepticism as to viability of "heroic judge" able to "digest an extraordinary variety of materials—legal doctrine, popular belief, science, history, and so forth—and transform them into a coherent vision [capable of educating] the legislature . . . [and] the laity"). The skepticism may be overblown. Judges are already engaged in, and their views are informed by, many of these tasks. As contended below, however, the advocacy role of lawyers and their clients, if expressly relied on by courts, can help sharpen (if not narrow) the choices available to the judge and other interpreters. In a real sense, the issue is not about the breadth of the inquiry, but rather about the appropriate sources of relevant information.
cally, that section 12(2) applied without regard to the character of the market.439 Within the last half-dozen years, however, the landscape has changed dramatically. Today, the trend is toward a diametrically opposed presumption: that section 12(2) is inapplicable.440 Structuralism provides a powerful tool for analyzing and understanding these divergent interpretations of section 12(2).441

As a preliminary matter, section 12(2) must be viewed not only as a communication from Congress to the courts or from the courts to securities sellers, but also as part of the flow of communication between sellers and buyers in the securities industry. Indeed, the primary value of whatever import section 12(2) carries lies in the interpretation given to it by those participants whose relationships it seeks to regulate; namely, the seller and the purchaser of a security. As long as the views of these participants did not diverge (or, more accurately, as long as there was no need on the part of either party to


441. The issue here is neither one of statutory obsolescence nor of any change in statutory text. See Calabresi, supra note 81 (passim) (arguing that judges should be able to revise obsolete statutes through the common law); see also Donald C. Langevoort, Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation, 85 Mich. L. Rev. 672, 729-33 (1987) (discussing judicial updating of legislation to meet current needs through process of what Professor Aleinikoff has termed "nautical interpretation").
press any divergence), it really did not matter what Congress intended or what the courts believed section 12(2) stood for. A starting-point for structuralist analysis, then, is what view, if any, market participants shared about section 12(2) and why that view either came to diverge in the 1980s, or, assuming such divergence to have existed all along, why it emerged into the forefront in the 1980s.

It may be empirically possible to demonstrate the views held by market participants as to the meaning of section 12(2) prior to the mid-1980s. If so, such verified views ought to be considered with the other factors noted below as part of a structuralist analysis. Actual ascertainment of empirically verifiable evidence of such views, however, is not crucial for the purposes of the position being advanced here. Whatever the pre-1980s views, surely they were fostered as much by the market participants' evaluation of their relationships, inter se—including how best to maintain the relationship at an even keel—as by their interpretation of the judicial construction (actual and putative) of section 12(2).

What then can be said of the views of market participants? The direct representations of the market participants themselves must be accepted as highly relevant. To the extent these representations are found in legislative history material and litigation briefs, it might be argued that contemporary interpretive methods already take account of the views of market participants. But these types of representations acknowledge only those issues about which the representatives believe their immediate audience to have some concern. Missing are introspection and self-analysis seeking to clarify underlying assumptions or to reveal understandings or concerns about topics that have yet to become the subject of public conflict. By juxtaposing the incomplete picture that emerges from direct representations with the internalized assumptions revealed by the deconstruction of institutional practices, structuralism functions to provide a fuller and more coherent meaning of legislation.

Section 12(2) as part of the 1933 Act purports to regulate two practices related to the sale of securities: material misrepresentations contained in a prospectus, and material misrepresentations contained in oral communication. It does so by providing that the purchaser of a security transaction tainted by either practice may obtain redress either by rescinding the transaction or, where such is impractical because the purchaser no longer holds the security, by monetary award equal to the difference between the purchase price and the resale price.

442. I am unaware of any data on which the empirical demonstration can be made.
Conventional structural analysis, as expounded in *Ballay*, is surely correct that the statutory reference to “oral communication” cannot be understood independently of the reference to “prospectus.” The analysis falls short, however, when it contends that the nature of the interdependence is to be found solely or even primarily by looking to the definition of “prospectus” as used elsewhere in the statute. This approach may give sustenance to the chimera of adherence to legislative intent, but it undercuts the utility of structure.

Consider, for example, if a court were asked to define “rescind” within the remedy provision of section 12(2). Would it suffice for the court to point to the proximity of the monetary award and rescission provisions and then look to the definition of monetary award elsewhere in the statute to define “rescind”? Such an approach would appear to lawyers as remarkable; not because Congress did or did not “intend” that the rescissionary measure should be evaluated in the context of monetary relief, and certainly not because the term “rescind” has any self-evident meaning independent of what Congress did or did not intend it to mean. Rather, recognizing the word “rescind” as primarily a legal one, we focus on the varied ways in which it has been defined and ask how such definitions may have interacted with the socio-economic issues that gave rise to the need to define this remedy in the past, including the possible relationship of those issues to the congressional use of the term in the statute. In the process, we explore the social and economic structures giving rise to the dispute, the judicial role in fashioning relief, and the congressional interest in providing relief under the scenario presented by the litigants. The issue is neither congressional nor judicial intent, but appropriate means for promoting or deterring social and economic relationships.

Similarly, it is insufficient to ground the interpretation of “oral communication” solely or primarily by reference to the various definitions of “prospectus” in sections 2(10) and 10 of the 1933 Act, including their significance for the regulation of the use of prospectus in sections 5, 11, and 12(1) of the Act. Rather, the crucial relationships are those among persons in and outside the regulated industry who use the prospectus and oral communication in the buying and selling of securities. It is by comparing 1933 selling practices and their rela-

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444. This illustration is not as far-fetched as it might first appear. Consider, for example, an action by the donee of a security purchased under a tainted transaction to “rescind” the transaction. While the crucial issue raised by such an action may well be framed as one of “standing,” it can just as readily be presented as one relating to the meaning and scope of “rescission” as a judicial remedy.
tionship to the securities industry with 1980s practices and relationships that one arrives at the proper meaning of section 12(2) and can state whether the courts indeed do have it right.

The term "prospectus," no less than the terms "rescind," "money damages," and "oral communication," had its genesis well before the 1933 Act and continues to have delineable attributes that are not anchored by the Act. This is equally true of the phrase "oral communication." While congressional use of these terms indicates Congress' awareness of their existence and at least some knowledge of their import, it does not follow that Congress was thus expressing an all-encompassing intent on the reach of section 12(2). One may fairly ask (and a court ought to inquire) whether Congress' understanding of the usage of the term in question comports with and exhausts the possible meanings available. The construction of the term "oral communication" must be informed by our understanding of "prospectus," but this is so not simply on the basis of linguistic rules or intersectional statutory analysis, but because persons in 1933, as in 1993, sold securities both by using "prospectuses" and by oral representations to purchasers.

The appeal to intersectional analysis may help explain the extent to which Congress believed it was regulating the securities industry, but it does not tell us the extent to which Congress in fact regulated the industry. The answer to the latter question (and it is that answer that counts for the interpreter) requires finding out how those being regulated reacted—that is, an incorporation of their interpretation of the legislation. That interpretation is a function (1) of their understanding of the instruction being issued to them and, more importantly, (2) the fit of that instruction to the core activities of their enterprise. Such incorporation is central to an understanding of the problem the legislature or the court purportedly resolves when it enacts or interprets a statute.

Under this approach, structural changes in the securities industry over the last sixty years merit explicit judicial consideration and articulation in interpreting the reach of section 12(2). Such institutional factors as broker-customer relations explain participants' acquiescence in the broad reach of section 12(2) before the mid-80s, in contrast to the current active fight by securities industry sellers to overturn those previous decisions.

446. Thus, it is not illogical to appeal to the use of the disjunction "or" and to the broad definition of "prospectus" in § 2(10) to support the claim that Congress may well have believed itself to be regulating all aspects of the sale of securities. Whether Congress was actually doing so and, therefore, what "oral communication" actually means, invites inquiry into the understanding of the regulated.
A structuralist methodology thus would recognize and explicitly acknowledge the impact of the situations of the parties on the arguments they advance and the concurrent influence of those arguments on a court's ultimate interpretation of the statute. The courts and the legislature are, by conventional accounts, seemingly the sole participants in the process of statutory interpretation. Structuralism recognizes and accords specific acknowledgement to the role of the litigants. It does so by seeking to understand their contentions both as they represent them and, more significantly, as they might represent them. The litigants' interpretation is a product of their perception of their interests, their evaluation of how others perceive their interests, and the need to conform their understanding of their interests to the practical limits placed by the perceptions, influence, and power of others.

Structuralism seeks to create an interpretation that can be effectively communicated intersubjectively to all whose conduct the statute regulates. Because all interpretation is thus locational, structuralism strives for an interpretation that embodies the perspectives of the courts, the Congress, and the parties.

Thus, in the context of section 12(2), a structuralist interpretation would confront the fact that among the changes that have swept through the securities industry between 1933 and now, which is of particular relevance to the issue posed by the Ballay decision, is the means of communication between sellers and buyers. The securities markets sought to be reformed by the 1933 and 1934 acts essentially functioned as capital-raising institutions.\textsuperscript{447} Until the 1920s, the relationships between those who sought to raise capital and their investors were primarily insular and long term.\textsuperscript{448}

The focus of the 1933 and 1934 Acts—particularly as interpreted by the courts—was to elevate the role of the prospectus. It did so by requiring its use in all but the most restricted of circumstances\textsuperscript{449} and

\textsuperscript{447} See, e.g., Committee on Federal Regulation of Securities, Report of Task Force on Sellers' Due Diligence and Similar Defenses Under the Federal Securities Laws, 48 BUS. LAW. 1185, 1186 (1993) (observing that "traditional underwritten public offering," which was once viewed as "high ceremony of capitalism," has, in recent years, "degenerated . . . into a series of bargain-basement brawls").

\textsuperscript{448} See, e.g., John K. Galbraith, The Great Crash: 1929 46-65 (1988); Joel Seligman, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance 24-25 (1982); cf. Committee on Federal Regulation of Securities, supra note 447, at 1186 (stating that effect of certain changes in underwriting market has been to accelerate transition in interactions between underwriters and issuers "from 'relationship' to 'transactional' investment banking").

by prescribing a high level of specificity in its contents,\footnote{See, e.g., Securities Act of 1933 \textsection{} 10, 15 U.S.C. \textsection{} 77j (1988); see also SEC Rule S-K, 17 C.F.R. \textsection{} 229 (1993).} as well as the manner of its use.\footnote{Exchange Act of 1934, \textsection{} 14, 15 U.S.C. \textsection{} 78n (1988 and Supp. 1993) (requiring issuance and distribution of proxy and tender offer materials in connection with annual and special shareholder meetings and public tender offers for shares of publicly traded companies).} The rationale for this approach to regulation was the debatable proposition that the market crash of 1929 was the product of the use of fraudulent prospectuses.\footnote{See, e.g., Securities Act of 1933 \textsection{} 5, 15 U.S.C. \textsection{} 77c (1988); id. \textsection{} 8, 15 U.S.C.S. \textsection{} 77h; see also 17 C.F.R. \textsection{}
{\textsection}30.430-435 (1999).} Coincidentally, it was of course significantly easier for the regulators to monitor and enforce adherence to the prospectus requirements than those relating to oral communication. Hence, the vast majority of rulemaking and enforcement actions brought against sellers in the market related to the prospectus. Issues related to oral communications were, at most, appendages to these actions. Meanwhile, as long as the market remained primarily a capital raising one and the regulatory environment focused on the prospectus, there was relatively little incentive for sellers and buyers alike to dwell on misrepresentations in oral communications.

For a variety of reasons, the current structure and function of the securities markets are distinctly different from those of the 1930s and immediately succeeding decades.\footnote{\textit{Cf.} Thel, supra note 313, at 408-24 (opining that excessive speculation and short-selling caused crash).} The central role of the stock (or "equity") arm of the industry — the sector that has given rise to most of the section 12(2) actions — appears to be one of trading, not capital raising.\footnote{The last half-century and more have seen developments that would have astounded the drafters of the 1933 and 1934 Acts. Among the changes cited by the Task Force are greatly expanded public holdings (and one should add trading) of securities, revolutionary changes in the technology of communications, drastic changes in SEC administration of registration procedures, "unprecedented institutionalization and globalization of the securities markets, and radical changes in the techniques and economics of the distribution of securities." \textit{Id.} at 1186.} Changes in trading relationships between brokers and
investors in the late 1960s and 1970s from their formerly insular character, resulting changes in administrative and legislative rules, changes in the judicial construction of section 10(b) and Rule 10b-5, and the relative attractiveness of returns on equity investments in the 1980s, shifted the core relationships in the securities industry from those between the issuer and the buyer to that between the broker and the principal. Issues of broker-dealer regulation—which, for the most part, had been peripheral to securities regulation—emerged to the forefront. Just as the regulatory framework that emerged in the post-1933 era transformed the prospectus from a secondary to a primary instrument of transaction, the telephone and the volatility of the trading markets ensured that oral communication would be dominant in transactions between brokers and their principals in the contemporary era.  

on relative proportions of the market that implicates these transactions, not on aggregate figures. Finally, "securitization" (bundling of individually highly risky debts, such as mortgages or aircraft leases, and then selling participation interests in the package to a multiplicity of persons), which has been a significant feature of transactions in the securities markets over the last decade-and-a-half, tends to be structured as trading rather than as capital-raising. Indeed, its basic attribute is the same as that which undergirds the existence of trading markets: the liquefaction of the market for the underlying assets.  


During the New Deal period, the SEC had focused its enforcement efforts on the New York Stock Exchange and the leading securities broker-dealers on the assumption that sustained scrutiny of the industry's leaders would stimulate the most vigorous industry self-regulation. By contrast, the SEC during the Eisenhower years tended to share with the NYSE the assumption that securities fraud was unlikely to be perpetrated on the leading exchanges or by the leading broker-dealers. 

Id. at 278-79. The contention in the text is that such perceptions, as articulated or demonstrated by the actions of the regulated, are highly relevant to any judicial interpretation of the reach of § 12(2).  

456. See, e.g., Marc I. Steinberg, The Propriety and Scope of Cumulative Remedies Under the Federal Securities Laws, 67 Cornell L. Rev. 557, 557-59 (1982); cf. SELIGMAN, supra note 448, at 346 (describing impact, on actions by private parties against brokers, of SEC's interpretation of application of § 10(b) and Rule 10b-5 to impersonal transactions on exchanges in In re Cady Roberts & Co., 40 S.E.C. 907 (1961)).  

457. See Donald C. Langevoort, Information Technology and the Structure of Securities Regulation, 98 Harv. L. Rev. 747 (1985). Professor Langevoort has observed in a slightly
These changes in the functions and practices of the securities marketplace were also reflected in the nature and identities of the participants. The most visible and powerful participants became brokers and traders, rather than investment bankers. Firms such as Merrill Lynch, traditionally known for their trading as opposed to investment banking prowess, gained ascendancy. Well-known financial institutions were bought out by establishments better known for their merchandising skills than for innovative investment banking abilities. These transformations resulted in changes in the attitudes and approaches to problem-solving adopted by these new participants, the arguments they presented to the courts, and the resources brought to bear in making those arguments.

A structuralist approach to interpretation insists that a court is bound to explicitly consider these relational grounds in interpreting a statute. These factors were instrumental in giving meaning to sec-

different context that the advent of computer technology may necessitate changes in the interactions between regulators, the regulated, and participants in the securities marketplace. Id. at 754-63. The following observation, which he made after noting that such technology would affect the way information is discovered, stored, retrieved, and disseminated, is particularly trenchant and apropos: "Technology also affects the securities markets on a more fundamental level. It alters the market's structure . . . . The changed structure of the marketplace, in turn, may require a different approach to regulation." Id. at 748 (emphasis added).

458. This is not to deny that investment bankers continued to have high profiles in mass reporting of the goings-on in the securities industry. See, e.g., Brian Burroughs & JohnHeylar, Barbarians at the Gate (1990). Their influence, however, was significantly diminished relative to that of traders in the secondary markets. See, e.g., James B. Stewart, Den of Thieves (1992).

459. Thus, Sears Roebuck and Co. (the archetypal American mass merchandiser of products) acquired Dean Witter Reynolds; American Express (a mass merchandiser of credit) bought Shearson Lehman Brothers; and Travellers Insurance Co. bought Prudential Bache Securities.

460. For example, it is probably no accident that Shearson/American Express, Inc.—the offspring of American Express' acquisition of Shearson Lehman—championed the overruling of the Supreme Court's decision in Wilko v. Swan, 346 U.S. 427 (1953), overruled by Rodriguez De Quijias v. Shearson/American Express, 490 U.S. 477 (1990), and played a pivotal role in the Court's holding that arbitration agreements with brokers under the securities laws should be enforced by the courts. See Shearson/American Express v. McMahon, 482 U.S. 220 (1987).

461. Cf. Basic, Inc. v. Levinson, 485 U.S. 224, 250, 253-54 (1988) (White, J., concurring in part and dissenting in part) (noting that "fraud-on-the-market theory" adopted by majority is based on "efficient-capital-market hypothesis"). To the extent that the conduct and interpretation of market participants is influenced (that is, regulated) by such a theory, structuralism argues that it should form part of the arsenal that a judge—and, indeed, anyone else seeking to regulate the capital markets—must bring to bear directly on her analysis of the interpretive problem raised by a conflict among the parties. For a recent discussion of the "efficient-market hypothesis" and its impact on the regulation of the securities markets, see Donald C. Langevoort, Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited, 140 U. Pa. L. Rev. 851 (1992). For an evaluation of the impact of the theory on 10b-5 litigation, see Robert G. Newkirk, Comment, Sufficient
tion 12(2) for broker-dealers and investors. Their understanding of section 12(2) must be interwoven into the fabric constituting the meaning of the statute.462

All legislation responds to practical concerns—real or perceived. Once enacted and interpreted, these perceptions become an integral part of the body of communication processed by those who act on and are acted on by those concerns. Institutional structures are thus no less relevant to the interpretation of statutes than are the placement of words or sections within the statute.

Nor should structuralism be constrained by the conventional claim that the judicial role must be limited to ascertaining legislative intent or legislative purpose. Beyond the already demonstrated incoherence of these terms, and the failure of the conventional methodologies to achieve this goal, such a limitation is inappropriate because the legislative process is itself an interpretive one. Legislatures engage in the process of deconstructing institutional relationships, and legislation is communication based on the legislature’s understanding of such relationships. As such, legislation is an invitation for further review and deconstruction by the parties, the courts, and, increasingly, administrative agencies.

Much in the conventional presentation of the structure of the appropriate relationship between the Congress and the courts strengthens this structuralist understanding of legislation itself. The exploration of the views of those to be regulated and their understanding of extant laws relating to their interactions with each other and with society at large is not only a mainstay of the legislative process, but one that is universally applauded. The use of legislative history confirms and legitimizes the practice. It is also quite freely accepted, even by textualists, that legislatures often leave it to the courts to decide the scope of the legislation.463 And, whatever the theoretical justification, it is now beyond peradventure that courts give statutes reach and meaning not envisaged by the enacting legisla-

462. To suggest that these factors be given explicit consideration, of course, is not to recommend a particular outcome. It is, however, a normative claim that an interpretive methodology inviting the counter-arguments bound to follow from such explicitness is preferable because it is more likely to lead in more cases than otherwise to a preferred outcome.

463. See e.g., Easterbrook, supra note 115, at 548-49 (discussing need for gap filling).
ture. Structuralism provides an intelligible mechanism for assisting and guiding the ongoing processes of interpretation.

Finally, because structuralism imposes on the judge the activist role of critiquing contemporary practices and institutions, it necessarily calls on the judge to anticipate future developments and how these developments might be shaped by her interpretation.

Again, this is a role that is not unique to the structuralist judge. It is a feature of conventional interpretive methodology frequently referred to as "policy." It is invoked by the parties and the legislature alike in justifying their desired outcomes, with the unmistakable assumption that the "general interest" would be best served if their preferred outcome is replicated in similar disputes in the future.

Structuralism differs. Rather than assuming the self-evident correctness of the asserted "policy," it places it in the context of the demonstrated relationships and the critique of those relationships. It thus openly invites counter-arguments as to the correctness of the analysis of the past, but especially the likelihood that the past and present are indeed prologues to the future. If there is reason to doubt the continuity and wisdom of the present extended into the future, then

464. See supra note 76 and accompanying text.

465. Recent literature suggesting that Congress actively interacts with judicial interpretation of statutes by reenacting statutes with whose judicial interpretation it disagrees strongly supports the structuralist approach. See, e.g., William N. Eskridge, Jr., Overruling Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331 (1991). It strengthens the argument for viewing the courts, the legislature, and the regulated as interactive participants in the interpretive process, and it undercuts the traditional argument for a static view of congressional intent grounded on the notion of legislative supremacy. For a recent example of such interaction, consider the compromise embodied in the Federal Deposit Insurance Corporation Improvement Act of 1990, § 476, 15 U.S.C. § 78aa-1 (Supp. 1993) (amending the Securities Exchange Act of 1934 by inserting § 27A), which only partially reversed the Supreme Court's decision in Lampf, Pleva, Lipkind Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), by denying that decision retroactive effect. Congressional action, in turn, furnished the Supreme Court a basis for ruling that a right to seek contribution exists among tortfeasors under § 10(b) of the 1994 Act. See Musick, Feeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085 (1993).

466. Professor Aleinikoff concludes his essay, Updating Statutory Interpretation, supra note 35, at 66, with this ringing (and I think correct) cry: "Better be prophetic than archeological, (better deal with the future than with the past . . . .)" (quoting Charles P. Curtis, A Better Theory of Legal Interpretation, 3 VAND. L. REV. 407, 415 (1950)). Yet, he argues elsewhere in the text that the task of his preferred approach to interpretation (which he terms "nautical") "is not to make current policy judgments . . . but to make sense of a statute's language and structure in light of the current social and legal context." Id. at 54. If an interpretive methodology aspires to more than merely redistributing already incurred losses among the parties immediately before the Court, it must, I contend, necessarily engage in "policymaking"; that is, it must identify and prescribe a normative future. Interpreters, therefore, should bear in mind this credo: "Better pay a decent respect for a future legislature than stand in awe of one that has folded up its papers and retired to the golf course or cemetery."
structuralist interpretation must take account of such doubt and accordingly limit its pronouncements.

Would the application of structuralism have yielded a different result in Ballay than that reached by the Third Circuit? The answer depends in large measure on an analysis of the function of the brokerage industry in channelling investments, as well as the extent to which that function is and can be influenced by the imposition of liability on brokers for arguably unintended errors in making recommendations to their clients. These are not solely empirical concerns, and they are not resolved by a truncated inquiry that focuses on linguistic rules or the competence of congressional draftsmanship. The structuralist approach, taking its cue from institutional relationships rather than abstractions about legislative intent, would have guaranteed a significantly different opinion.

This opinion would have been richer in its exploration and demonstrated understanding of the social and economic forces that, together with legal rhetoric, determine the effect that law has on our institutions and on their participants. As an illustration, the opinion might have begun by framing the issue for resolution in the practical or operational terms that are ultimately determinative for social relationships: whether a broker should be liable to her customer for injury sustained as a result of the broker’s negligent misrepresentation in recommending the purchase of a stock? This recasting of the issue is significant for several reasons. It is, after all, the way the parties most likely viewed the issue. It represents the appropriate stresses the parties placed on their arguments to the court. It acknowledges the relatively captive role of the judge as interpreter. It places the relevance of the texts of the statutes in their proper context.

In resolving the issue thus reframed, both sections 12(2) and 10(b) are correctly viewed as providing some of the textual structure for evaluating the contentions of the parties. Their relevance, however, is only partial. The sections may be read together to provide one answer, or they may be read to suggest a variety of answers—some of them inconsistent. The appropriate answer cannot be determined on the basis of statutory text alone—even in the limited framework of broker-customer relations—but necessarily implicates the broader social and economic functions performed by the institutions represented by the parties.

Thus, the reformulated query would place appropriate stress on a factor barely acknowledged by the Third Circuit: that Ballay, the
plaintiff, relied both on sections 12(2) and 10(b). Her argument under both sections emphasized the same basic claim: that the negligence in the representations made to her by her broker breached a close social relationship in which she had developed built-in expectations. The provisions of sections 12(2) and 10(b) did not themselves create those expectations, but rather reflected their existence. These statutes were thus no more than instrumental avenues for relief. Her interest was in compensation for the loss she sustained when she acted on the recommendation of Legg Mason.

Legg Mason's interest was in avoiding liability. The debate over the choice of the appropriate statutory section is essentially tactical. The technical argument that section 12(2) applies only to "initial distributions" is thus a purely adventitious one because it was acting here as a broker, not as an underwriter. Had Legg Mason dealt with Ballay as an underwriter, it would have claimed—with the same plausibility—that it was not a "seller" within the meaning of section 12(2).

Although the plaintiff and the defendant alike can use the texts of sections 12(2) and 10(b) elastically to clothe their practical interests, the institutional role of the court is to respond directly to their arguments as they formulate them and to do so in a manner intelligible to them and others similarly situated. Thus, the focus of the court is on the liability of a broker—or perhaps a full service broker—in a secondary sale, not that of an underwriter in a primary transaction.

For a structuralist judge, there would be no avoiding the essence of this issue. Would it be in contemporary society's interest to hold such a broker liable for the injury to her customer when she communicates a negligently arrived at recommendation to the client? The answer is not self-evident. It requires placing values and priorities on the different roles of brokers and securities purchasers as part of an effectively functioning capital accumulation and distribution network, the judi-


468. In a different setting, of course—for example, where the focus is on the measure of damages—the issue might be relevant.

cial system's tolerance for reexamination of prior decisions, and the extent to which the judge believes that any particular interpretation is likely to influence prospectively the conduct of those similarly situated to the parties.\textsuperscript{470}

If a judge believes that her interpretation has significance only for the distributive results experienced by the parties immediately before the court, then the interpretive role of adjudication would be minuscule indeed. Structuralism operates on a different and more ambitious belief.

Whatever choice an interpreter makes, structuralism forces her to articulate and defend that choice explicitly. The defense is framed both in the context of the particular arguments and positions of the parties before the court, as well as the broader social interests they represent. Structuralism urges the interpreter to engage in a critique of the positions of the parties, the choices available, and the decision at which she arrives.

\begin{center}
\textbf{C. The Determinacy and Legitimacy of Structuralism}
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Any satisfactory tool of interpretation must adequately withstand two sorts of evaluations: that it yields a determinate meaning and that such meaning be generally accepted as legitimate. Before discussing how structuralism satisfies these conditions, it is useful to restate the reasons for their significance. The premise is that our interest in the practice of legal interpretivism is functional. Legal interpretive methodology is worth inquiring into and understanding predominantly because of its practical role in organizing social institutions and in shaping human relations. Legal interpretation works only to the extent that it helps explain these phenomena and that it permits the effective transmission of that understanding. This means that law, and therefore legal interpretation, is circumscribed by the need that

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\item \textsuperscript{470} The more reflective post-\textit{Ballay} district court decisions interpreting § 12(2), while still mired in the search for "legislative intent," appear to be groping for ways to engage in some of the institutional critiques urged here. Thus, in Fujisawa Pharmaceutical Co. v. Kapoor, 814 F. Supp. 720, 730 (N.D. Ill. 1993), the district court, rather than simply citing to \textit{Ballay} as authority for the dismissal of a § 12(2) claim resulting from the secondary sale of securities, took the position that where the seller is a corporate insider who exercises control over the corporation, the transaction might merit a different treatment than that indicated by \textit{Ballay}. See also Budget Rent A Car Sys. v. Hirsch, 810 F. Supp. 1253 (M.D. Fla. 1993) (restrictively reading \textit{Hedden} decision to require that stock be distributed through "controlling distributor," that all of outstanding stock of corporation be put up for sale, and that stock be offered to public); Hedden v. Marinelli, 796 F. Supp. 432, 435 (N.D. Cal. 1992) (holding that § 12 may apply when corporate insider sells his own stock in manner that sale takes on characteristics of new offering); Newman v. Comprehensive Care Corp., 794 F. Supp. 1513, 1524 (D. Or. 1992) (finding that "secondary" transaction may take on characteristics of initial offering).
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those making the law and those being governed by it subjectively agree as to the practicality of a specified course of action.

The difficulty of realizing this goal has led legal scholars to emphasize the coercive features of law. Seemingly implying that the authentication of the feature is to legitimize it, these scholars have tended to focus on the effectiveness of directives in compelling obedience and on whether the sources of the directives are politically empowered to issue them. Alternatively, radical social critics, who find coercion an illegitimate means of justifying social interaction, have expressed skepticism about any legitimating arguments for the practice of law and legal interpretation. If law and legal interpretation amount to no more than the periodic issuance of instructions at the whim and caprice of those with power to enforce compliance, then the theory and practice of legal interpretivism has very little to recommend it because, by definition, arbitrariness cannot be predicted.

The vast majority of contemporary legal scholars are neither positivists nor such radical critics. Most legal scholars acknowledge, however reluctantly, the relevance of coercion to law. In varying degrees, they contend that coercion in and of itself neither legitimizes nor delegitimates the functions of law. Interpretation has the descriptive and analytical roles of exploring the relationship of coercion to compliance, of the intended message to that sent, and of that received to actual behavior. Questions of determinacy and legitimacy are not mechanistically answered, but flow from highly contingent normative political beliefs and values.

The arguments for structuralism advanced in this piece are consistent with this view. It assumes that coercion continues to be a dominant feature of law and that it operates as an intrinsic determinant of the interpretive method. It postulates, however, that the brutish (and, therefore, readily perceived and acknowledged) forms of coercion—far from being pervasively integral to the interpretive method—have been replaced by perhaps equally pernicious, but immensely more subtle, forms of coercion. Such coercion, which, after all, may be no more than the absence of an incentive, may be unavoidable as a means of intersubjective communication. What is important, then, is understanding its nature, how it is replicated, and how it functions to regulate human interactions.

The need and search for determinacy and legitimation are two ways we internalize and rationalize coercive principles. They in turn influence our construction of the normative rules we use to evaluate the correctness of particular laws or legal principles. Concerns for determinacy and legitimacy, therefore, flow from two interrelated factors. The first is the belief that they influence the way persons receive and
appraise legal principles. The second is that we must therefore take them into account in constructing normative rules that we propose to communicate to others.

One may question whether structuralism meets these criteria. On its face, structuralism appears to compound the problem of determinacy by seemingly inviting an open-ended inquiry by the interpreter into the institutional structures of social practices, subject only to the constraint of the amorphous concept of relevance. The resulting perception is that the process lacks determinacy, because it is incapable of producing a bounded authoritative pronouncement. Such a perception, however, should not survive scrutiny.

To the extent that structuralism demands that the interpretive process go beyond legislative text, history, and the judicial gloss of structure, it is, under conventional methodology, embarking on uncharted waters. This is not, however, the same thing as being indeterminate. The institutional structures that provide the fodder for structuralist analysis are the products of socio-cultural, economic, political, and like experience, not the apparitions of fantastic imaginations. Structuralism's contribution is to ask that these forces—which are, under conventional methodology, artificially excluded from the sphere of inquiry—be assembled and integrated into the interpretive regime. Indeed, structuralism posits that much of such analysis may very well be going on in the subterranean world of unarticulated and unreflected on practice. Moving such considerations from the surreal world into the limelight may not, in some cases, necessarily alter the outcome, but it should provide a more tenable coherent explanation for them. In other cases, the interrogation of those practices, and the concomitant interpretation those directly affected by statutes give them, should compel reevaluation of conclusions reached under the sterile academic analysis to which the talismanic search for some legislative intent or purpose has given rise. In either case, factoring in the relevance of forces other than those that seem to have immediately shaped legislative action, or that courts are forced to take cognizance of because of their procedural impact on litigation, is called for.

471. Cf. Eskridge, supra note 465, at 353-89 (demonstrating relevance to Supreme Court's interpretation of statutes of Court's perception of distribution of power within Congress and between Congress and executive branch.); see also William D. Popkin, The Collaborative Model of Statutory Interpretation, 61 S. Cal. L. Rev. 541 (1988) (advancing collaborative model of statutory interpretation that takes account of interplay of judicial and legislative lawmakers as indisputable features of lawmaking in contemporary society).

472. Cf. Eskridge & Frickey, supra note 35, at 324-45 (arguing that standard interpretive theories fail adequately to explain and justify Supreme Court decisions, but that "practical reasoning" as alternative mode offers better insight into those decisions in addition to being normatively preferable).
because it more accurately represents human realities than the truncated inquiry of conventional interpretive methodologies.

Moreover, the inquiry, while more open-ended than current practice, is not without boundaries. Shared experiences within identifiable spheres of life form the outer walls of the inquiry. Within these, shifting break fire-walls will doubtless emerge. What is crucial is that these boundaries are not static and that they reflect the composite and myriad influences that shape our understanding of a statute. Thus, possible interpretations of a statute will not in practice be infinite. They will be shaped by the contending interests of the parties, and a court will be presented with a finite set of intersecting relationships to put on the scale. What structuralism would most likely do is enhance the range of arguments available to the parties and to a court in articulating, dissecting, and resolving a dispute.

The "legitimacy" of an interpretive concept is at heart an issue of familiarity. Ordinarily confirmed by widespread adherence to specified prescriptions, the question of legitimacy is often raised with regard to concepts that do not yet command broad acceptance. The question is particularly poignant where the interloping concept challenges central tenets of a political system.

In framing the goal of statutory interpretation as the search for legislative intent, conventional methodologies present the interpretive process as essentially a hierarchical one in which the legislature (at least when acting with the consent of the president) is supreme, and the judiciary a junior partner.473 No one else is acknowledged to have a formal role in the process. Indeed, as already demonstrated, the exercise of independent judgement by judges and references to the views of nonlegislators are justified and pigeonholed simply as part of the search for the mental state of the enacting legislature.474 But the idea of legislative supremacy is no more than a social construct handy to justify the ideology of the search for "legislative intent." Much that occurs in current interpretive practice is fully at odds with the justification. Moreover, even as a statement of ideology, it comes smack-up against others that are also frequently declared to regulate interpretive conduct. Thus, it is quite commonplace for the courts to assert that the legislature and judiciary are co-equal branches of government475 or that it is the province of the courts to declare the law.476

473. See supra note 35 and accompanying text; cf. Dickerson, supra note 26, at 7 (suggesting this as the first general point of statutory interpretation). See generally Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281 (1989).
474. See supra notes 44-47 and accompanying text.
475. Although this statement is generally offered as an explanation of why the Court should defer to an asserted legislative choice—the underlying supposition being that the
As long as one accepts the interpretive function as unavoidable to law-making, these claims do not, and cannot, furnish the boundary lines as to appropriate methodology. Whatever the interpretive process that is adopted, a bill introduced by a member of Congress, passed by both houses, and signed by the President will most likely be termed a "law."\(^{477}\) It is not such terminological nicety, however, that constitutes legitimation. Similarly, where a party relies on a duly enacted legal text to assert a right or a defense, the viability of the claim depends not on some axiomatic and self-enforcing definition of the text, but on the intervention of a human agent, usually someone other than the enacting person. The method employed to make sense of the "law" does not in and of itself affirm or refute the contingent claim of legislative supremacy. Structuralism, as an interpretive method, while questioning the dominant role assigned the ascertainment of "legislative intent," does not speak to the political supremacy of the legislature or the judiciary.\(^{478}\) It cannot because the premise that undergirds structuralism is that such an allocation of power is not static. To the extent that "legislative supremacy" does exist, it is simply an element of the calculus with which an interpreter must engage.

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476. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1804) (explaining that it is duty of judicial department to say what law is).


478. My argument is not that the source of a pronouncement is irrelevant or unimportant to the weight or authoritativeness that a society ought to accord it as an organizing or regulatory principle of conduct or behavior. Rather, my position is that the "legitimacy" that is of primary concern to one interested in exploring how those who are already acknowledged as having the authority to impart meaning to text focuses on methods for deriving meaning that would command acceptance or assent from the participants. The legitimacy (or indeed authoritativeness) of the interpretation in this latter sense does not depend on a hierarchic framing of the relationship between the writer of the text and the interpreter. See, e.g., Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. Cal. L. Rev. 277 (1985). But see Farber, supra note 473, at 282 (arguing that supremacy principle leaves courts considerable but subordinate role to legislatures in policymaking). Cf. William N. Eskridge, Jr. Spinning Legislative Supremacy, 78 Geo. L.J. 319, 322 (1989) (stating that what is important in statutory interpretation is not legislative supremacy, but the nature of interpretation itself).
Structuralism suggests, however, that the existence of such “supremacy” ought not to be assumed, but must be demonstrated as part of the interpretive process.

Although structuralism departs both from the hierarchic structure of conventional interpretive methodologies and their underlying justifications, it possesses the legitimation of a coherent set of principles or concepts that are logically consistent and fit within a recognizably rational construct.\footnote{See, e.g., Hyde, supra note 17, at 399 n.45 (discussing Jürgen Habermas’ conception of “reconstructive” legitimation as requiring simply that there be good arguments for political order’s claim to be recognized as right and just, hence rendering a claim of legitimacy merely one of contestable validity). Hyde noted: Claims of legitimacy must be evaluated as “a question of finding arrangements which can ground the presumption that the basic institutions of the society and the basic political decisions would meet with the unforced agreement of all those involved, if they could participate, as free and equal, in discursive will-formation.” Id. (quoting JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 186 (Thomas McCarthy trans., Eng. ed. 1979)).} This Article, in its entirety, is precisely an attempt to demonstrate that the concepts which undergird the structuralist method already have their seeds within contemporary theory and practice and that, if nourished, the resulting flowering of ideas should draw practice and theory closer. Moreover, the concepts embedded in structuralism are surely no less ascriptive of the last decade of the twentieth century interpretive regime of American law than the use of precedents, the invocation of law and economics, and of narrative as tools of statutory interpretation. In questioning the centrality of legislative intent to statutory interpretation, structuralism, far from being unique, is emblematic of widespread dissatisfaction with the fit of conventional explanations to actual practice. Structuralism’s answer—that the interpreter focus integrating subjectively arrived at textual constructions with intersubjectively demonstrable institutional needs—is both internally coherent and responsive to the problem.

V. Conclusion

Structural analysis provides a functional means of bridging the gap between the reality that the interpretive act is unavoidably a subjective act, and the equally present reality that in order for the act to be socially meaningful, it must be effectively communicated to others. The invocation of “structure” under the conventional approach to statutory interpretation fails in bridging this gap because of the stilted attempts to conform the structural method to the search for “legislative intent.” Structuralism, by jettisoning the search for particularized intent—whether of the legislature, the court, or the practitioner—and
by focusing instead on the messages conveyed by institutional practices and their fit with subjective understanding, provides a more useful tool for bridging the gap. Structuralism as an interpretive tool in the hands of academics, judges, lawyers, and laypersons alike, possesses qualities of contextualization that permits it to be tautly malleable in confronting the numerous dialectical issues that arise in any genuine attempt at faithful engagement in statutory interpretation. It goes some way in enabling the interpreter to bridge such well-known fissures of the interpretive process as internal coherence and external ideological constraints, concrete practice and abstract theorizing, individual subjectivity and interpersonal communication, temporal and transcultural boundedness, deconstructive criticism and constructive pragmatism. Structuralism straddles these gaps by asking that the interpreter, although engaged in what is primarily a subjective undertaking, go out of her way to ascertain and incorporate the essentially subjective practices of those whose conduct her interpretation is intended to control. This approach requires recognition and acceptance of the subjective character of the interpretive process, as well as the aspiration to and belief in the possibility of effective intersubjective communication. It values practice as a competent source of beliefs and aspirations, and it contends that an acceptable prescriptive norm should be the product of the interplay of such practice and normative abstractions of what constitutes good law.

480. It may be worth noting what the argument for structuralism is not about. It is not about imposing candor on judicial decisionmaking. Cf. Zeppos, supra note 102 (outlining and critiquing arguments for judicial candor in interpretive process). I have argued for judicial candor in a different context. See Chibundu, supra note 23, at 158-67 (arguing for judicial candor in framing substantive issues involved in Title VII lawsuits where basic norms such as meaning of discrimination remain undefined). Courts may or may not be candid in their statement of their understanding of "legislative intent," and there is good reason to believe that conventional structural analysis may suffice to force courts to be "candid." See, e.g., Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085 (1993) (prefacing its resort to structural analysis by first explicitly acknowledging that "[i]nquiring about what a given Congress might have done [is] not a promising venture as a general proposition" and that "[i]t is true that the initial step, drawing some inference of congressional intent from the language of Section 10(b) itself yields no answer"); see also supra notes 260-61 and accompanying text (discussing Ballay court's candid explanation of relevance of its holding to needs of economy for effectively functioning capital-raising mechanisms). But the truthfulness or otherwise of courts is not the primary concern here. The underlying rationale for structuralism (as opposed to conventional structural analysis) is that it permits and legitimizes broader reflection on the issues, interests, and participants that influence and determine the interpretation of statutes.