Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning in California Courts

"Good fences make good neighbors."[1]

INTRODUCTION

In the California Code of Civil Procedure, two uneasy neighbors — plain meaning[2] and legislative intent[3] — share a boundary in the general principles of evidence. Plain meaning resides in section 1858, which provides the general rule for construing statutes:

> CONSTRUCTION OF STATUTES AND INSTRUMENTS, GENERAL RULE. In the construction of a statute or instrument, the office of the judge is to simply ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.[4]

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[1] ROBERT FROST, *Mending Wall, in* THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED 33 (Edward Connery Lathem ed., 1969).

[2] *See, e.g.*, Lungren v. Deukmejian, 755 P.2d 299, 303-04 (Cal. 1988) (explaining that words used in statutory or constitutional provisions should be given ordinary meaning); *In re* Lance W., 694 P.2d 744, 752 (Cal. 1985) (noting that when statutory language is unambiguous, there is need for neither construction nor reliance on indicia of legislative intent).

[3] *See, e.g.*, People v. Pieters, 802 P.2d 420, 422 (Cal. 1991) (explaining that fundamental purpose of statutory construction is to ascertain lawmaker's intent, thus effectuating purpose of law).

[4] *See* CAL. CIV. PROC. CODE § 1858 (West 1983). Sections 1858 and 1859 appear in the 1872 codification. These sections of the 1872 codes, unlike the other sections, do not have counterparts in Field's draft, which was the primary basis of the California codification effort. The predominant thrust of the numerous California cases provided by the Code Commissioners is that the court considers the whole act together. *See* Smith v. Randall, 6 Cal. 47, 50 (1856) (noting that legislative intent, where it can be ascertained from whole statute, must govern statutory construction); *see also* Burr v. Dana, 22 Cal. 11, 23 (1863) (holding as dispositive reference to extrinsic evidence of map used in legislative enactment); Souter v. The Sea Witch, 1 Cal. 162, 164-65 (1850) (holding construction of phrase "vessel used in navigating the waters of this state" did not apply to ship briefly in San Fran-

Section 1859, the home of legislative intent, demands that in construing statutes the court should, if possible, pursue the intention of the Legislature:

> THE INTENTION OF THE LEGISLATURE OR PARTIES. In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.[5]

Both sections counsel against judicial activism. However, this common goal has not led to harmonious relations between the two statutes. The means they prescribe to that end are in fundamental tension: one focuses on the language itself, and the other on a posited abstraction behind the words which may or may not represent it.[6] In this contention, the intentionalist idea has dominated for much of the last thirty years.[7] As a result, extrinsic evidence of legislative intent has frequently appeared in decisions with little thought to its credibility or the theoretic problems accompanying its use. The plain meaning standard has often been ignored[8] or treated as a relic.[9]

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cisco Bay); Seabury v. Arthur, 28 Cal. 142, 150 (1865) (noting that legislative act to be interpreted according to intention of Legislature apparent on its face, and technical rules of construction yield to legislative will).

[5] *See* CAL. CIV. PROC. CODE § 1859 (West 1983).

[6] *See* Unzueta v. Ocean View Sch. Dist., 8 Cal. Rptr. 2d 614, 615 (Ct. App. 1992).

> So you will see that a judge is in a contradictory position; he is pulled by two opposite forces. On the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed.

Id. (quoting LEARNED HAND, THE SPIRIT OF LIBERTY 109 (Irving Dilliard ed., 1952)). *See generally* Benjamin Lee Whorf, *Science and Linguistics, in* LANGUAGE, THOUGHT AND REALITY 207 (John B. Carroll ed., 1956) (noting false, common belief that use of language is merely incidental process for expressing what is already formulated nonlinguistically); *cf.* JEREMY CAMPBELL, GRAMMATICAL MAN 238-53 (1982) (noting fundamental dichotomies in thought and language, such as connotation and denotation, which appear to reflect brain function asymmetry); GEORGE STEINER, AFTER BABEL (1975) (examining extensively universalist and particularist strains in linguistic theory, addressing problem of translation, and emphasizing unique character of particular languages).

[7] *See infra* Part I (discussing history of plain meaning rule).

[8] *See* Friends of Mammoth v. Board of Supervisors, 502 P.2d 1049, 1054 (Cal. 1972)

In the last decade, however, the conceptual underpinnings of intentionalism, and the corresponding use of legislative materials as extrinsic evidence of intent, have weathered a severe criticism.[10] Some members of the judiciary, such as Justice Breyer[11] and federal judge Patricia Wald,[12] have argued a pragmatic need to resort to legislative history. Others, like Justice Scalia[13]

(noting that when more than one meaning is apparent on face of statute, court must provide interpretation based on legislative intent).

[9] *See* Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d. 641, 644-45 (Cal. 1968) (admitting evidence to explain statute's meaning not based on its plain and unambiguous meaning).

[10] *See, e.g.*, INS v. Cardoza-Fonesca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) (noting that court cannot replace clear language of law with unenacted legislative intent); OFFICE OF LEGAL POLICY, UNITED STATES DEPARTMENT OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989) [hereinafter USING AND MISUSING LEGISLATIVE HISTORY] (arguing that prevailing theory of statutory interpretation and its use of legislative history is seriously flawed); Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 403 (1994) (arguing that Scalia's approach, though not absolutely opposed to intentionalism, is to strictly construe statutes, and its most important contribution concerns need for sound approaches to statutory construction); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 424 (1992) (arguing that conception of law as legislative intent is subverting coherence and accessibility of law, and should be replaced by philosophy of law as statute); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1007 (1992) [hereinafter Note, *Learned Hand*] (arguing that even if judges assume role of congressional agents who interpret laws by analogizing to legislative bargains, they should still refuse to examine legislative records under any circumstances); Justice Antonin Scalia, Use of Legislative History, Address at various law schools (Fall 1985 and Spring 1986) [hereinafter Scalia, Legislative History Speech] (transcript on file with *U.C. Davis Law Review*) (criticizing resort to legislative history in general, and noting that if legislative history was meant to restrain judicial activism, cure is worse than disease).

[11] *See* Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) [hereinafter Breyer, *Legislative History Lecture*] (maintaining that use of legislative history is pragmatically sound and that attacks on it should focus on abuses and not practice itself).

[12] *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197-98 (1983) [hereinafter Wald, *Legislative History Use by 1981 Supreme Court*] (noting that not once in that session was Court confident enough of clear meaning of language not to double check its meaning; concluding plain meaning rule has been effectively laid to rest). *But see* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United State Supreme Court*, 39 AM. U. L. REV. 277, 281 (1990) (re-evaluating her opinion in light of Justice Scalia's assault on legislative history).

[13] *See, e.g.*, Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988) (holding that in absence of any statutory language to interpret, legislative history is without legal effect even if it evidences clear intent).

and federal judge Frank Easterbrook,[14] have campaigned vociferously against it.

The issue of legislative intent history has even escaped, on occasion, the narrow confines of the law journals and entered the popular media.[15] A variety of scholars and judges, in a movement sometimes referred to as "new textualism," have refined modern notions of plain meaning. This movement has rekindled a belief that the plain meaning standard should figure prominently in statutory construction.[16]

What, then, is the status of plain meaning and statutory construction in current California law? Not surprisingly, two starting places coexist: the intention of the Legislature[17] and plain meaning.[18] Frequently, both standards are fused in the imperative that to determine the intent of the Legislature, the court first consult the words of the statute, giving them their plain meaning.[19] Routinely, the courts then invoke an implication of the plain meaning doctrine, stating that when the language at

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[14] *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (stating that legislatures do not have hidden yet discoverable intents; they only have outcomes). Judge Easterbrook further argues that courts cannot possibly reason from one statute to another or from one section of a statute to another to resolve problems that the statute does not address. *Id.*

[15] *See, e.g.*, Joan Biskupic, *Asking the Court to Read Between the Lines*, WASH. POST NAT'L WKLY., May 9-15, 1994, at 32 (discussing difficulty of writing, and potentially undesirable effects of demanding Congress to write, completely explicit statutes); Joan Biskupic, *Scalia Sees No Justice in Trying to Judge Intent of Congress on a Law*, WASH. POST, May 11, 1993, at A4 (explaining that Justice Scalia dismissed legislative history, calling it Saint Jude of hagiology of statutory construction, and that Representative Barney Frank discouraged use of explanatory comments in committee report by uttering Scalia's name); Robert Pear, *A Fight over Legislative History*, L.A. DAILY J., Nov. 19, 1991 (concerning dispute between President Bush and Congress over Civil Rights Act of 1991 and enhancement of executive branch power through restriction of legislative intent materials).

[16] *See infra* Part I (discussing evolution of new textualism).

[17] *See* Kimmel v. Goland, 793 P.2d 524, 527 (Cal. 1990) (noting that analysis begins with basic premise that aim of statutory interpretation is to ascertain and effectuate legislative intent); *see also* Lungren v. Deukmejian, 755 P.2d 299, 303 (Cal. 1988) (explaining that words used in statutory or constitutional provisions should be given ordinary meaning).

[18] *See, e.g.*, Kizer v. Hanna, 767 P.2d 679, 683 (Cal. 1989) (asserting that analysis must begin with statute's language, and that plain meaning of language governs if language is clear since court should presume Legislature meant what it said).

[19] *See, e.g.*, DaFonte v. Up-Right, Inc., 828 P.2d 140, 144 (Cal. 1992) (explaining that in determining legislative intent, court should first look to words themselves and give them their usual and ordinary meaning).

issue is clear, the courts should not indulge in statutory construction.[20] In these circumstances, the courts may still determine whether the literal meaning of a statute comports with its inferred purpose.[21]

If the courts find that the language is not clear, they must, of course, wrestle this two-headed dragon, often to analytically contradictory conclusions.[22] Assuming the words are unambiguous, the courts are theoretically compelled to apply their plain meaning, unless this would result in absurdity[23] or frustrate the manifest purpose of the act.[24] If a literal reading does result in absurdity, the intent, whatever that may be in this case, is to prevail over the letter.[25] At the same time, this power is limited by the rule that a court may not rewrite a statute to express an intent which finds no expression in the statutory language.[26]

This framework implicates plain meaning in three distinct situations. First, where the court finds that the language at issue is plain and unambiguous, and the result is not absurd, the court goes no farther.[27] Second, where the court finds that the

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[20] *See id.*; *see also* Solberg v. Superior Court, 561 P.2d 1148, 1158 (Cal. 1977) (concluding that when statutory language is clear and unambiguous, court need not construe language nor indulge in it) *construed in DaFonte*, 828 P.2d at 144.

[21] *See, e.g., Lungren*, 755 P.2d at 304 (holding that plain meaning rule does not prohibit courts from examining language in light of overall purpose or whether construction of one provision is consistent with other provisions).

[22] *See In re* Rudy L., 34 Cal. Rptr. 2d 864, 866 (Ct. App. 1994) (stating that court must follow statutory language and give it its plain meaning, even if Legislature probably had different goal in mind); Oden v. Board of Admin. of Pub. Employees' Retirement Sys., 28 Cal. Rptr. 2d 388, 392-93 (Ct. App. 1994) (holding legislative intent controls and intent dominates letter of law, and if possible, court should read law to harmonize with spirit of act).

[23] *See, e.g.*, People v. Broussard, 856 P.2d 1134, 1136 (Cal. 1993) (holding that courts should apply plain meaning unless plain meaning would produce absurd results). Absurdity is defined as a result "repugnant to the general purview of the act." *Id.* at 1137.

[24] *See, e.g., DaFonte*, 828 P.2d at 144-45 (holding that construction principles apply equally to initiatives as well as legislative statutes).

[25] *See Lungren*, 755 P.2d at 304 (stating that if literal construction is contrary to legislative intent, intent prevails over letter).

[26] *See, e.g.*, Mutual Life Ins. Co. v. City of Los Angeles, 787 P.2d 996, 1002 (Cal. 1990) (citing *Hennigan v. United Pac. Ins. Co.*, 125 Cal. Rptr. 408, 412 (Ct. App. 1975), and stating that courts may not guess legislative intent nor may they rewrite statute to indicate unexpressed intention).

[27] *See infra* Part III.A (analyzing *Unzueta v. Ocean View Sch. Dist.*, 8 Cal. Rptr. 2d 614 (Ct. App. 1992), in which court applies plain meaning of statute which is clear and unambiguous, despite its discontent with results).

language at issue is ambiguous, it turns to extrinsic evidence, particularly legislative history.[28] Finally, where the court finds that the language at issue is unambiguous, but the result it commands is absurd, the court may ignore the plain meaning.[29]

The issue in the first instance is how ambiguous statutory language must be before a court may construe it. In the second instance, the issue is how to weigh the extrinsic evidence of legislative history. In the third instance, the issue is under what circumstances the court is to trump unambiguous statutory language with its own notions of what is absurd.

This Comment will examine each of these three fundamental situations to show the benefits of a strengthened plain meaning rule. California judicial opinions in the last decade show a distinct resurgence in resort to the plain meaning standard.[30] While this trend is not universal, and the law remains inconsistent,[31] awareness of this movement's nature, and the careful

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[28] *See infra* Part III.B (analyzing *J.A. Jones Construction Co. v. Superior Court*, 33 Cal. Rptr. 2d 206 (Ct. App. 1994), in which court resorted to extrinsic evidence of legislative intent in interpreting ambiguous statute).

[29] *See infra* Part III.C (analyzing *California Sch. Employees Ass'n v. Governing Bd. of the Marin Community College Dist.*, 878 P.2d 1321 (Cal. 1994), in which court stretched absurdity exception to plain meaning rule); *see also* Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (holding it absurd to construe law relating to estate distributions to secure benefit of will to legatee who has killed testator to prevent will's revocation).

[30] A computer search for California cases holding that if the meaning of the statute is without ambiguity or uncertainty, then the statutory language controls and the court should not interpret or construe the text reveals 21 cases between 1985 and 1989. The same search reveals 66 cases between 1990 and 1994. Similarly, a search for cases holding that courts should give the words of a statute their common, everyday meaning unless the statute otherwise commands turns up 26 cases from 1985 to 1989. The same search shows 115 cases between 1990 and 1994. Search of LEXIS, States Library, CACTS File (Jan. 5, 1995).

[31] *See* California Teachers Ass'n v. San Diego Community College Dist., 621 P.2d 856, 860-61 (Cal. 1981) (noting generally that legislative statements were of dubious relevance). The use of author statements as evidence of legislative intent exemplifies the theoretical inconsistency in California law regarding the use of extrinsic legislative history. Further, courts throughout the state have gone on to cite author statements with and without regard to the analysis in *California Teachers Ass'n*. *See, e.g.*, Commodore Home Sys., Inc. v. Superior Court, 649 P.2d 912, 916 n.9 (Cal. 1982) (using legislative history dealing with statutory amendments, where parties do not oppose such use); Cisneros v. Vueve, 44 Cal. Rptr. 2d 682, 685 (Ct. App. 1995) (citing legislative history but finding that it does not support party's argument); Wells Fargo Bank v. Bank of America, 38 Cal. Rptr. 2d 521, 527 (Ct. App. 1995) (relying on legislative history where author's comments were presumably considered during Legislature's deliberations on bill); Van de Kamp v. Gumbiner, 270 Cal. Rptr. 907, 918-19, 925 (Ct. App. 1990) (determining that use of legislative history was nec-

textual analysis it demands, are of crucial importance to practitioners arguing from statutes. Simply stated, the thesis of this Comment is that California cases in the last ten years show a clear trend towards a textualist approach to statutory construction.

Part I of this Comment reviews the historical background of this subject. Part II then turns to the contemporary debate, focusing on a national perspective. In this respect, it will examine the theoretical questions raised by the critics of intentionalism and legislative history, and the movement's basic schools of thought. These voices articulate the benefits of a heightened plain meaning standard. Part III of the Comment focuses on California, showing how these forces are at work in our own state.

The Comment examines three cases in depth: where the statute is clear, where the statute is ambiguous and resort to legislative history is appropriate, and where the statute, though clear, is deemed absurd. In the two cases discussed in subparts III.A and III.B, the intermediate appellate court decisions represent sound application of the plain meaning standard. These decisions demonstrate the benefits of this standard in terms of analytical consistency and appropriate separation of powers, and illustrate the rising textualist methodology in California. In contrast, in the opinion reviewed in subpart III.C, the California Supreme Court shows a willingness to ignore the plain meaning of statutory language without ambiguity or clear absurdity — a position this Comment criticizes. The conclusion calls upon the California courts to apply textualism more rigorously and explains why the California courts' recent shift to texutalism is so important to California advocates.

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essary to construe statutes).

I. THE HISTORICAL BACKGROUND OF THE PLAIN MEANING RULE AND THE USE OF EXTRINSIC EVIDENCE OF LEGISLATIVE INTENT

The interplay between plain meaning and intentionalism is a long standing legal concern. Blackstone makes detailed reference to it in his Commentaries. In discussing the interpretation of law and construction of statutes, he states that words are taken as generally understood, and statutes are taken in light of the mischief they intend to solve.[32]

The "golden rule" in England for construing Acts of Parliament was to look to the literal words of the statute and interpret them only as to their ordinary sense.[33] English courts were to modify such acts only in the case of absurdity or manifest injustice in the face of undisputed legislative intention.[34] Courts applied this potentially sweeping authority with much caution, generally construing words when plain and unambiguous "in their ordinary sense."[35]

In England, Chief Justice Jervis of the Court of Common Pleas noted in 1851 that statutory construction might necessarily dictate a result which, in a judge's eyes, was absurd or manifestly unjust.[36] This is because judges assume the functions of legislators when departing from the ordinary meaning of the statutory language. California in its early days adopted the common law of England.[37] The import of this is apparent in sections 1858

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[32] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *60, *87 (1765) (providing that courts should take words as popularly understood, and that when construing statutes, courts should look at legislator's intent at time it passed law, with special attention to mischief to be remedied).

[33] *See* HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 573 (5th London ed., Philadelphia, T. & J.W. Johnson & Co. 1870) (quoting Chief Justice Jervis's explanation of golden rule of statutory construction in *Abley v. Dale*, 138 Eng. Rep. 519, 524 (1851)); *see also* Castrique v. Page, 138 Eng. Rep. 1278, 1280 (1853) (giving ordinary meaning to act of Parliament unless it would lead to absurdity or injustice). This rule of construction was applied to other instruments, such as wills and deeds. BROOM, *supra* at 538-42. *But cf.* Willion v. Berkley, 75 Eng. Rep. 339, 351 (1601) (holding that courts should consider intent of legislative act and construe Legislature's words accordingly).

[34] *See* BROOM, *supra* note 33, at 573.

[35] *Id.*

[36] *See Abley*, 138 Eng. Rep. at 525; *see also* Woodward v. Watts, 118 Eng. Rep. 836, 838-39 (1853) (construing Legislature's words; not enacting law by including or excluding words in statute).

[37] *See generally* 1850 Cal. Stat. 93-96 (adopting common law to extent not repugnant or

and 1859 of the California Code of Civil Procedure on construction of instruments and the intention of the Legislature cited above.[38] While intentionalism is part of this method, it is constrained by a primary focus on the precise words of the statute.

Justice Holmes, discussing legal interpretation at the end of the 19th century, uttered the classic statement: "We do not inquire what the Legislature meant; we ask only what the statute means."[39] Using a contractual analogy, and noting that contracts and statutes are dealt with similarly, he states that "mere difference of intent as such is immaterial."[40] Earlier in that century, Justice Story enunciated a similar sentiment, with particular reference to extrinsic evidence of legislative intent. He remarked that the court must take the Legislature at its statutory word, and exclude the views of individual legislators made in floor debate.[41] The Supreme Court roughly echoed this statement in 1897 in *United States v. Trans-Missouri Freight Association.*[42]

By the 1930s and 1940s the limitation on the use of parol evidence to trump plain meaning was under heavy attack.[43] The

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inconsistent with United States Constitution and laws and constitution of California).

[38] *See supra* notes 4-5 and accompanying text (providing California statutes which restrict judicial construction to plain meaning of statutes while requiring consideration of legislative intent, when possible).

[39] Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) (noting that at first level of interpretation, one only considers general usage of speech).

[40] *See id.* at 418. *But cf.* Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (stating that plain meaning rule is more "an axiom of experience than a rule of law," and accordingly, persuasive evidence is not precluded from consideration).

[41] Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9662). Justice Story wrote,

> We must take it to be true, that the Legislature intend precisely what they say, and to the extent which the provisions of the act require, for the purpose of securing their just operation and effect. Any other course would deliver over the court to interminable doubts and difficulties; and we should be compelled to guess what was the law, from the loose commentaries of different debates, instead of the precise enactments of the statute.

Id.

[42] *See* 166 U.S. 290, 318-19 (1897) (emphasizing impossibility of determining statutory construction by numerous and often contradicting speeches of individual members, and thus, suggesting reliance only on language with occasional use of historical context).

[43] *See, e.g.*, Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 23-24 (1939) (concluding that plain meaning doctrine does not justify exclusion of extrinsic evidence of legislative intent, and that courts should not resort to extrinsic aids at outset of interpretation); James P. McBaine, *The Rule*

legal realism movement had brought into disrepute the nineteenth century reliance on supposedly objective abstract rules of interpretation and their philosophic presumptions.[44] Evidentiary rules as a whole were being reevaluated.[45] Scholarship of the time decried what it saw as the unrealistic, almost superstitious quality of the plain meaning rule.[46]

In California, by the 1940s, a schism had developed on the Supreme Court, with two of the Justices maintaining that extrinsic evidence could be introduced to vary the terms of a written instrument which was unambiguous on its face.[47] This line of thought reached its apogee in 1968 in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*[48] There the court ruled that a rational interpretation of a writing required at least a preliminary consideration of all credible evidence offered to prove the parties' intentions.[49]

At the same time as the plain meaning rule was falling into disrepute, Professors Hart and Sacks of Harvard Law School were developing theories encouraging the use of legislative history in statutory interpretation.[50] They conceived of statutes

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Against Disturbing Plain Meaning of Writings, 31 CAL. L. REV. 145, 146 (1943) (concluding that rule against disturbing plain meaning is unsound, unrealistic, and has no place in California law; no test can determine which words are plain and which are ambiguous); Charles B. Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509, 521 (1940) (concluding that ambiguous and unambiguous terms are meaningless, and courts should always be permited to discover legislative intention if possible).

[44] *See, e.g.*, AMERICAN LEGAL REALISM xv (William W. Fisher III et al. eds., 1993).

[45] *Cf. Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 74, 76 (1974) (supporting Supreme Court's rules for federal evidence law). In 1934, Congress initially authorized the Supreme Court to formally promulgate rules of evidence, which were highly innovative. *Id.*

[46] *See, e.g.*, McBaine, *supra* note 43, at 146-48, 158 (discussing formality of plain meaning rule succumbing to broader view allowing parol evidence).

[47] *Id.* at 162-66. The case at issue is *Universal Sales Corp. v. California Press Manufacturing Co.*, 128 P.2d 665 (Cal. 1942). Justice Traynor, whose views foreshadow his future dismantling of the parol evidence rule, concurred. *Universal Sales*, 128 P.2d at 679 (Traynor, J., concurring). *See also* McBaine, *supra* note 43, at 165-66 (supporting Traynor's use of extrinsic evidence).

[48] 442 P.2d 641 (Cal. 1968).

[49] *See id.* at 645.

[50] *See* William N. Eskridge, Jr. & Phillips Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 694-95 (1987). While Hart and Sacks are routinely challenged for their characterization of legislatures as rational and deliberative bodies available to purposive interpretation, these authors characterize their philosophy as a sophisticated blend of "deductive, formalist rules and inductive, anti-formalist policy." *Id.*

as intelligible purposive acts, promulgated by a legislature acting rationally pursuant to certain ends.[51] This point of view assumed the legislative procedure itself to be an informed, deliberative process that gives each proposal appropriate consideration.[52] In this regard, sound legislation is the product of sound procedure, which can withstand and channel the pressures of special interest groups into carefully reasoned solutions.[53] On these assumptions, a court interpreting a statute looks at the context of the action that produced it, the primary evidence of which is the legislative history documents.[54]

First, the court interpreting the statute assumes that the Legislature is made up of reasonable people in pursuit of reasonable goals in a reasonable manner.[55] Then, by analogy, the court devises its own rational solution to problems the Legislature may never have considered.[56] In the Hart and Sacks paradigm, justice arises when all branches of government cooperate in the creation of public policy in their respective areas of institutional competence.[57] The legal process approach had little reason to highlight the "plain meaning" of a statute in interpretation.[58]

Despite the idealistic characterization of the legislative process,[59] the Hart and Sacks paradigm formed the philosophical basis for resort to extrinsic evidence of legislative intent in statutory construction.[60] In his leading text on statutory construc-

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at 695.

[51] *See id.* at 695.

[52] *See id.* at 696.

[53] *See id.* at 697-98.

[54] *See id.* at 695, 699-700. Eskridge and Frickey note a "veritable explosion" of scholarship urging state courts to consult legislative history to establish the crucial context to reveal policies and purposes in statutes. *Id.* at 699.

[55] *See* 2 HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 1415 (tent. ed. 1958).

[56] *See* Eskridge & Frickey, *supra* note 50, at 695 (citing Hart & Sacks, *supra* note 55, at 1156, and postulating important law-making function for courts in which judge may serve as one person lobby for public interest).

[57] *See id.* at 698.

[58] *See* Edward J. Imwinkelried & Miguel A. Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1014 (1992).

[59] *See* Interview with Michael Salerno, Visiting Professor of Law, University of California, Davis in Davis, Cal. (Spring 1996) (referring to this idealization as "Ozzie and Harriet" view of legislative process).

[60] *See* OTTO J. HETZEL, LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS 205 (1980).

tion, Sutherland states that courts are increasingly willing to consider indicia of intent other than statutory language as the starting point of their inquiries.[61] One commentator notes that the plain meaning rule appeared to have received a death blow in 1940.[62]

Justice Frankfurter apparently wanted it both ways. In a 1947 law review article, he noted that "spurious use of legislative history must not swallow the legislation."[63] He also claimed that in ascertaining meaning, judges should not exclude anything that is logically relevant.[64] Justice Marshall took the intentionalist practice of resort to legislative history to its logical extreme when he stated that because the legislative history is ambiguous one must first look to the statutes to determine legislative intent.[65] Even in a case ostensibly decided on plain meaning, the Burger court in *TVA v. Hill*[66] gave the statutory text only cursory review and spent twenty pages analyzing the legislative history, language, and structure of the legislation.[67]

II. CRITICISM OF RESORT TO EXTRINSIC EVIDENCE OF LEGISLATIVE INTENT AND THE RESURRECTION OF THE PLAIN MEANING RULE

Courts imbued with the legal process philosophy justified the use of evidence of legislative intent history by the cooperative nature of the legislative act and the commitment of law-making to the Legislature. If, as Justice Holmes said, a "page of history

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[61] *See* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.07 (5th ed. 1992).

[62] *See* Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1301 (1975) (quoting Justice Reed in *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 545 (1940): "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'").

[63] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947).

[64] *See* HETZEL, *supra* note 60, at 175 (quoting Justice Frankfurter).

[65] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971).

[66] 437 U.S. 153 (1978).

[67] *See id.* at 184 n.29 (claiming that while Court usually does not look to legislative history when language is plain, its examination was geared to counter dissent's absurdity argument).

is worth a volume of logic,"[68] then the use of legislative intent documents serves only to make the decision more authoritative. The emphasis on the legislative process, rather than on the result, as well as a realistic distrust that words are self-defining,[69] made emphasis on statutory text seem narrow, unsophisticated, and undemocratic.

Criticism of these legislative process presumptions, present in varying degrees through their ascendance,[70] came to a head in the 1980s. The critics of the use of legislative intent history — most notably Justice Scalia — challenged the constitutional and conceptual underpinnings of the legislative process approach. William Eskridge has coined the term "the new textualism" to describe the features of this critique in general, and Justice Scalia's approach in particular.[71] Justice Scalia has emphasized the return to a nineteenth century tradition in his comments.[72] Eskridge, however, notes that the movement is distinguishable in its inspiration, drawing on modern developments in public choice theory, strict separation of powers, and ideological conservatism.[73]

The strongest arguments for limiting the use of extrinsic evidence of legislative history derive from constitutional requirements for legislative enactment of statutes and regard for separation of powers. The California Constitution, for example, requires that no law be made except by statute and no statute enacted except by bill,[74] and generally mirrors the U.S. Constitution in these respects. The California Constitution provides for bicamerality, in that no bill can be passed except by roll call

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[68] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[69] *See* McBaine, *supra* note 43, at 147-48 (stating that judges should not have high expectations of written language since it is subject to misinterpretation).

[70] *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 868-71, 881 (1930) (criticizing practice of relying on legislative intent in interpreting statutes).

[71] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 n.11 (1990). This excellent summary and critique forms the basis of much of what follows.

[72] *See* Scalia, Legislative History Speech, *supra* note 10 (citing commentaries from nineteenth century).

[73] *See* Eskridge, *supra* note 71, at 623 n.11.

[74] *See* CAL. CONST. art. IV, § 8.

vote of each house,[75] and presentment, since each bill must be presented to the Governor for signature or veto.[76]

The California Constitution also establishes a variety of explicit procedural requirements for bills. For example, it establishes how long a bill must be in print before it may be acted upon and the necessary number of votes for bills concerning certain topics.[77] The constitution also requires that bills embrace only a single subject.[78] While the California Constitution provides for the creation of committees to conduct legislative business, these committees have the power to only make recommendations, and their judgments are in no way binding on the Legislature.[79]

Neither the United States Constitution nor the California Constitution defines a method for statutory construction. However, the judiciary's role as interpreter of a law's meaning is clear.[80] In California, the constitution provides that, except under certain conditions, persons authorized to exercise one governmental power may not exercise either of the other governmental powers.[81] From this perspective, heavy reliance on unenacted legislative history to define meaning violates both separation of powers and the formal requirements of law making. It is the statute — and the statute alone — that has "run the gauntlet"[82] of the Legislature and has satisfied the requirements of bicameral approval and presentment.[83] Committee

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[75] *See id.*; U.S. CONST. art. I, § 7.

[76] *See* CAL. CONST. art. IV, § 10.

[77] *See id.* §§ 8, 12.

[78] *See id.* § 9.

[79] *See id.* § 11. The U.S. Supreme Court has acknowledged the necessity of delegation and has provided, for example, that legislative immunity may extend to aides. *See* Gravel v. United States, 408 U.S. 606, 616 (1972). The Court has also restricted the delegation of judicial functions to legislative entities. *See* INS v. Chadha, 462 U.S. 919, 951 (1983).

[80] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that role of judiciary is to say what law is); *see also* THE FEDERALIST, No. 78 at 525 (Alexander Hamilton) (Jacob E. Cook ed., 1961) (stating that interpretation of laws is properly sole province of courts); Felix Frankfurter, *Foreword to a Symposium on Statutory Construction*, 3 VAND. L. REV. 365, 366 (1950) (discussing judicial interpretation and legislative intent).

[81] *See* CAL. CONST. art. III, § 3. While the California Constitution establishes a division of governmental powers, the constitution does not define the scope of the judicial power. *Id.*; *see also id.* art VI (providing only that one branch of state government cannot exercise powers of other branches).

[82] J.A. Jones Constr. Co. v. Superior Court, 33 Cal. Rptr. 2d 206, 211 (Ct. App. 1994).

[83] *See id.* (stating that legislative history has no opportunity to be approved by legislature and vetoed by governor).

reports, author statements, and the like do not have this authority.[84] As Richard Posner has said, Congress does not legislate by committee report.[85] Justice Scalia describes the situation as potentially allowing law-making by unelected committee consultants.[86] Interestingly, Scalia notes that, in an unprincipled court, the same reliance on the minutiae of legislative history can place excessive law-making capacity in the judiciary.[87] The legislative imprimatur seems even more distant from the letters of support and author statements that California courts have used to buttress their constructions.[88]

In addition to these formalist objections to extrinsic legislative intent evidence, a variety of critics have attacked the conceptual underpinnings of the Hart and Sachs intentionalist approach.[89] The criticisms are essentially realist in nature, focusing on both the fictive nature of the intent construct and the true behavior of legislative bodies. In the 1930s, Max Radin attacked the concept of intent as merely a fictitious construction of the interpreter.[90] The difficulties attendant in discussing the intent of individuals is compounded in the legislative setting by both

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[84] *See supra* text accompanying notes 80-83 (explaining how separation of powers concerns prevent unilateral lawmaking).

[85] American Hosp. Ass'n v. NLRB, 899 F.2d 651, 657 (7th Cir. 1990).

[86] *See* Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (describing dangers of judicial activism as distorting constitutionally authorized law-making process). *But see* Eskridge, *supra* note 71, at 671-72 (explaining Scalia's view that court's reliance on legislative background material might violate constitutional structure of law making). Denying the relevance of legislative background materials as evidence is another matter. On the contrary, the ruling in *Chadha*, upon which Scalia relies in *Thompson*, exemplifies the use of legislative materials. *See* Ins v. Chadha, 462 U.S. 916, 959 (1983) (demonstrating reliance on record from Constitutional Convention to justify restraints of federal powers). This situation is not as straight forward as it may seem. Dictionaries, maxims of statutory interpretation, or for that matter, the Federal Rules of Civil Procedure, have never been presented and approved by both houses of Congress and the President.

[87] Eskridge, *supra* note 71, at 674 (discussing Scalia's theory that judicial reliance on legislative history places too much law-making power in the judiciary). The conclusion that Congress does all the law making is open to criticism, as some have argued that courts may act as normative institutions. *See id.* (stating arguments of republican theorists that courts' norm-creating activity was contemplated by Constitution).

[88] *See supra* note 31 and accompanying text (listing California cases on relevance and consistency of author statements).

[89] *See* Eskridge, *supra* note 71, at 642 n.79 (citing law review articles on statutory interpretation).

[90] *See* Radin, *supra* note 70, at 884-85 (discussing dangers of applying imaginary intentions to fictitious entities).

numerical and procedural considerations.[91] Is, for example, the chief executive's intent concerning a bill dispositive, given possession of the veto? How is a court to interpret intent evidence indicating that the majority passing the bill had no knowledge of its provisions? More fundamentally, do not our intuitive notions of how intent works, derived from interpersonal interactions, simply break down in this context?

As Judge Frank Easterbrook has stated, legislatures do not have hidden, yet discoverable, intents or designs.[92] While each legislator may or may not have a design, only outcomes arise from the body as a whole.[93] Even if we hypothesize a coherent intent, modern historiography and literary theory suggest that judges acting as sincere historians cannot clearly reconstruct it.[94]

Modern political science, particularly the work of public choice scholars, reinforces the common sense appeal of these arguments.[95] Public choice scholarship shows that legislatures are adversarial, deal-making institutions, rather than groups of reasonable people in pursuit of reasonable purposes in a reasonable manner, as Hart and Sacks contended.[96] Public choice studies point up the vital role that agenda control plays in how legislative choices are made.[97]

Though the legislative process may have been a more consensual, public-spirited activity during the New Deal, few would contend this is the case today.[98] Judges attempting to interpret

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[91] *See id.* at 885 (discussing reasons why intent is impossible to understand in consistent ways).

[92] Easterbrook, *supra* note 14, at 547.

[93] *Id.*

[94] Eskridge, *supra* note 71, at 644.

[95] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post Legal Process Era*, 48 U. PITT. L. REV. 691, 698-701 (1987) (questioning assumptions of traditional legal process method); RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM, 286-93 (1988) (criticizing narrowness of legal process method and setting forth alternative approach). *But see* Abner J. Mikva, *Forward to Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 170 (1988) (criticizing public choice school of analysis).

[96] *See* POSNER, *supra* note 95, at 288 (criticizing Professors Hart's and Sacks's view that court should ignore public sentiment since their approach allows judges to interject their own conceptions of public interest).

[97] *See* Easterbrook, *supra* note 14, at 547 (discussing legislative procedure and emphasizing importance and influence of agenda control in determining order of decisions).

[98] *See* POSNER, *supra* note 95, at 288-89.

legislative history in a Hart and Sacks mode run a great risk of imposing their own notion of public interest upon the inferred purpose of the language they interpret.[99] The compromise that is characteristic of statutory law makes such language unlikely to embody any single consistent purpose at all — a fact Hart and Sacks effectively ignore.[100] Furthermore, the "history" itself is vulnerable to manipulation.[101]

Statutes dependent on extrinsic evidence for their meaning create a variety of pragmatic problems as well. For practitioners attempting to ascertain the law and advise accordingly, the marginalization of statutory language makes it difficult to give sound advice, and creates significant research expense.[102] In this regard, Justice Scalia has also argued that statutory interpretation should be conducted in a way that promotes the democratic process.[103] In this sense, excessive use of vague legislative history fails to encourage Congress to draft laws carefully and leaves Congress confused as to what effect the statutes will have.[104]

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[99] *See id.* at 289.

[100] *See id.*

[101] *See, e.g.*, Note, *Learned Hand*, *supra* note 10, at 1017 (arguing that judges should refrain from relying on misleading legislative records); *see also* Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (stating that deference to committee report details can lead to misinterpretation of statutory meaning). Eskridge notes that lower court judges sympathetic to the cause used this case as a standard citation. Eskridge, *supra* note 71, at 650 n.114. Eskridge further notes that this line of attack — the failure of the committee reports to be "evidence of even a probable or made-up legislative intent" — has been criticized. *Id.* at 652 & n.120.

[102] *See* Slawson, *supra* note 10, at 424 (arguing that conception of law as legislative intent is subverting coherence and accessibility of law, and should be replaced by philosophy of law as statute); *see also* Scalia, Legislative History Speech, *supra* note 10, at 14-15 (criticizing judicial reliance on legislative history).

[103] *See* United States v. Taylor, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring in part).

[104] Eskridge, *supra* note 71, at 677 (noting that while this argument is premised on good holistic rationale, whether clarity of judicial interpretation would effect legislative behavior is questionable, since legislative compromise does not often arise in crucial areas of litigation). *But cf.* Joan Biskupic, *Asking the Court to Read Between the Lines*, WASH. POST NAT'L WKLY., May 9-15, 1994, at 32 (citing Representative Barry Frank of House Judiciary Committee and stressing tentative nature of statutory language, leaving room for interpretation). Though law-makers are not omniscient about what problems emerge from a statute in the future, the legislatures have a responsibility for writing clear laws, just as the courts have for writing clear decisions and administrative agencies have for promulgating clear regulations.

Critics of naive reliance on extrinsic legislative history have successfully brought the practice into question, and in its place offer a number of traditional tools. First and foremost, they advocate emphasis on the statutory text.[105] Judge Easterbrook's position is representative of the most extreme position, maintaining that statutes are inapplicable unless they clearly supply a rule of decision or delegate such rule-making power.[106]

Justice Scalia has assumed a slightly more restrained approach. He argues that legislative history should not be consulted unless the plain meaning reading renders an absurd result.[107] Representing a moderate stance, Judge Posner proposes that courts could still routinely resort to legislative history, but with a more pragmatic view of the legislative process and the judge's role as a creative agent.[108] Posner's position contrasts with Easterbrook's in allowing the statute to apply to a much wider variety of uncertain situations.[109]

To help with interpretation of statutes, the textualists champion a thorough examination of the statute as a whole.[110] In

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[105] *See, e.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring) (disagreeing with Court's use of legislative history and suggesting reliance on specific statutes); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part) (stating that judges should give fair and reasonable meaning to text of statutes). Justice Scalia has articulated this view extensively in his decisions and writings. *See* Slawson, *supra* note 10, at 424 (discussing philosophy of law-making).

[106] *See* Easterbrook, *supra* note 14, at 549 (noting that rule is consistent with liberal principles of American government, and Framers of Constitution contemplated that most social relations would not be issues of government); *see also* Note, *Learned Hand*, *supra* note 10, at 1021 (stating that if courts do not rely on legislative history, Congress would be forced to mention specific applications in statutory text).

[107] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (noting it is appropriate to consult legislative history only to verify seemingly inconceivable dispositions).

[108] *See* POSNER, *supra* note 95, at 289-90.

[109] *Compare id.* (proposing that legislative history consultation is appropriate with an eye towards legislative process) *with* Easterbrook, *supra* note 14, at 549 (proposing that legislative history should not be considered to fill gaps).

[110] *See, e.g.*, United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (construing Chapter 11 of Bankruptcy Code). Justice Scalia asserts that

> [s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . . .

analyzing the statute, the interpreter looks for both consonance and dissonance in the definitions and for overall patterns of assumption that reveal plausible meanings.[111] One might also look to how the language is used in other statutes, on the principle that *in pari materia* statutes of similar subject matter should be interpreted consistently.[112]

The textualists place great emphasis on the use of canons of statutory construction[113] as part of the careful reading of a statute, armed with logic and a good dictionary. A good example of a textual canon is the maxim *inclusio unis est exclusio alterius* (the inclusion of one thing implies the exclusion of the rest).[114] Justice Scalia used this maxim in *Chan v. Korean Airlines* to evaluate a statutory provision lacking an express negation of limits on liability for failure to notify. Because other sections of the statute provided such a remedy, he reasoned, Congress intended to deny a remedy in this instance.[115]

Id. (citations omitted).

[111] *See* Eskridge, *supra* note 71, at 661 (explaining Scalia's method for examining possible meanings of words within statute as whole); Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 131-34 (1989) (construing Warsaw Convention provisions that limit air carrier liability for passenger injury or death).

[112] *See* Eskridge, *supra* note 71, at 662 (noting Justice Scalia's use of technique in *Jett v. Dallas Independent School District*, 491 U.S. 701, 738-39 (1989)). Eskridge notes that these are hardly new ideas; what is striking, he contends, is the use of structural arguments to reach a plain meaning conclusion. *Id.*

[113] *See id.* at 663-64 (describing canons of statutory construction as "a homely collection of rules of thumb for interpreting statutes"). These canons have been the subject of much controversy in this century, and generally derided as arbitrary. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (noting that almost every canon is contradicted by another canon). Recently some scholars have defended canons of construction as useful tools to develop public values in statutory interpretation. *See* Eskridge, *supra* note 71, at 663 (discussing theory that court may employ policy canons to shape public values). *But see* Breyer, *Legislative History Lecture*, *supra* note 11, at 869-70 (arguing that canons of construction are inferior alternatives to legislative history). He points out their potential obscurity, the difficulties inherent in creating new canons, and their questionable utility in preference to legislative history. "Indeed, the average citizen interested in future interpretation of a statute would probably find legislative history far more accessible than a Blackstone 'canon' based upon eighteenth century land law." *Id.* at 870.

[114] *See* Eskridge, *supra* note 71, at 664.

[115] *See Chan*, 490 U.S. at 132-33. Eskridge points out that this particular maxim reflects no rule of grammar or logic nor does it reflect the congressional decision making process. Eskridge, *supra* note 71, at 664. At the same time, this rule is useful to practitioners, and if courts apply it in this way, practitioners are relatively clear on the law's meaning. Eskridge also shows that, as Llewellyn noted, the canons are exceedingly plastic, and that Scalia at

The textualist argument is complex, and much of it is still open to debate. While its criticism of the inadequacy of court dependence on extrinsic legislative history is well taken, its program for avoiding legislative history is subject to many of the same criticisms as what it seeks to supplant.[116] It is important to realize, however, that its invocation of plain meaning is not a return to nineteenth century notions.[117]

Today's textualist approach is based on a sophisticated epistemology of realist and formalist analysis, not a simple-minded notion of words that speak for themselves.[118] If nothing else, the textualist criticism demonstrates the inadequate theoretical basis for any resort to certain types of extrinsic legislative intent evidence, such as letters of support and opposition. Further, some scholars have devised hierarchies for evaluating the credibility of various genres of extrinsic evidence of legislative intent.[119]

Pragmatically, a "harder" plain meaning rule may offer several potential benefits. First, courts may save much time and energy by emphasizing statutory analysis.[120] Second, legal practitioners can place greater reliance on coherent interpretation of statutory text in giving advice. Third, if courts are repeatedly unwilling to act in co-dependence with dysfunctional legislatures, perhaps over time legislatures will address the concerns of courts and society. Whether or not these benefits come to fruition in the long term is less relevant to practitioners than the reality that, as

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times has ignored canons that cut against his position. *Id.* at 675.

[116] *See id.* at 680-81 (arguing that textualism depends on fictitious assumption that lawmakers are aware of judicial canons of statutory construction).

[117] *See id.* at 648-56 (comparing new textualism analysis to legislative history approach for interpreting laws). *But see id.* at 623 n.11 (stating that new textualism is return to nineteenth century approach).

[118] *See id.* at 648-56.

[119] *See, e.g., id.* at 636 (noting that U.S. Supreme Court seems to have established de facto hierarchy, with committee reports as most authoritative and subsequent legislative history as least authoritative); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990) (using funnel diagram to discuss pull of text, legislative history, purpose, and evolutionary considerations in statutory interpretation); Slawson, *supra* note 10, at 397 (discussing Supreme Court's increased use of legislative intent from 1938 to 1979).

[120] *See* Scalia, Legislative History Speech, *supra* note 10, at 14-15 (discussing large amount of time necessary to research legislative intent); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377-78 (emphasizing costs to private practitioners).

Section III demonstrates, the California courts are frequently acting in consonance with textualist analysis.[121]

III. THE USE OF EXTRINSIC LEGISLATIVE HISTORY IN CALIFORNIA AND THE RETURN OF THE PLAIN MEANING DOCTRINE

In a microcosm, the evolution of California's law of statutory construction generally reflects the national developments discussed in Parts I and II. The cases in the early part of the century reveal relatively few references to legislative history and a strong regard for literal construction of statutory language.[122] However, as noted above, the California Supreme Court began to express explicit distrust of the plain meaning rule in the early 1940s in *Universal Sales Corp. v. California Press Manufacturing Co.*[123]

Beginning in the 1930s, a number of law review articles examined sources of legislative history, a trend which continued to the 1970s.[124] Not all of these authors express unrestrained admiration for the use of extrinsic legislative intent evidence.[125]

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[121] See *infra* Parts III.A-B (discussing *Unzueta v. Ocean View Sch. District*, 8 Cal. Rptr. 2d 614 (Ct. App. 1992) and *J.A. Jones Construction Co. v. Superior Court*, 33 Cal. Rptr. 2d 206 (Ct. App. 1994)).

[122] *See, e.g.*, Donnell v. Linforth, 52 P.2d 937, 939 (Cal. Ct. App. 1935) (where language of statute is clear, interpretation is unnecessary and literal wording of statute must be followed); Fay v. District Court of Appeal, 254 P. 896, 903 (Cal. 1927) (stating that although court may consider evil sought to be remedied and propaganda preceding enactment, language of enactment controls construction); George v. McManus, 150 P. 73, 74 (Cal. Ct. App. 1915) (suggesting that, in construing statutes, courts must give each word some effect and construe act in accordance with plain import of its language).

[123] 128 P.2d 665 (Cal. 1942).

[124] *See, e.g.*, Jacobus tenBroek, *Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court*, 25 CAL. L. REV. 326, 326-36 (1937) (discussing use of congressional debates as evidence of legislative intent); Max Radin, *Case Study in Statutory Interpretation:* Western Union Co. vs. Lenroot, 33 CAL. L. REV. 219 (1945) (discussing "orthodox" procedure of examining legislative history); Bertha Rothe White, *Sources of Legislative Intent in California*, 3 PAC. L.J. 63 (1972) (discussing sources of materials establishing legislative intent); Note, *California Legislative Materials*, 4 STAN. L. REV. 367 (1952) (discussing use of legislative history).

[125] *See, e.g.*, Radin, *supra* note 124, at 222-23 (arguing that multiple legislators cannot have single intent); *see also* Walter Kendall Hurst, *The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria*, 12 PAC. L.J. 189, 192-93 (1981) (discussing reliability of various sources of legislative history).

Their presumption, however, is that courts will seek this evidence and are ready to rely on many different sources of it.[126] In 1979, the First District Appellate Court stated that trial courts have a "duty" to admit extrinsic evidence of legislative history.[127]

In contracts, a field of law which, like statutes, often requires construction of terms, California led the way in admitting extrinsic evidence despite clarity of contractual terms, with the decision in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*[128] Justice Traynor's opinion in this case treated the judge's linguistic education and experience as extrinsic evidence itself.[129] The opinion held that exclusion of other testimony contradicting the judge's beliefs reflected a primitive belief in perfect verbal expression.[130]

To whatever extent this is true in the related field of statutory construction, the disemboweling of the plain meaning rule meant that any legislative material was relevant and admissible, if not controlling.[131] In this regard, a notable decision is *Friends of Mammoth v. Board of Supervisors.*[132] In *Mammoth*, the court

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[126] *See, e.g.*, Radin, *supra* note 124, at 224 (suggesting that courts have come to rely on legislative history too much).

[127] *See* Pennisi v. State Fish & Game Dep't, 158 Cal. Rptr. 683, 687-88 (1979) (holding that extrinsic evidence was highly relevant to illustrate legislative intent underlying statute and that trial court had duty to admit extrinsic evidence to ascertain true legislative intent and effectuate law's purposes); *see also* Silver v. Brown, 409 P.2d 689, 691-92 (Cal. 1966) (holding that legislative intent derived from text and legislative history may avoid absurd results). This view is far from gone. *See, e.g.*, Title Ins. & Trust Co. v. County of Riverside, 767 P.2d 1148, 1154 (Cal. 1989) (holding that although language is unambiguous, aim of statutory construction is to determine legislative intent).

[128] 442 P.2d 641 (Cal. 1968). The court held in *Pacific Gas & Electric* that words do not have absolute and constant referents and that underlying the plain meaning rule is a primitive faith in the inherent meaning of words. *See id.* at 643-44; *see also* CAL. CIV. PROC. CODE § 1856(g) (West 1983) (providing that section does not exclude extrinsic evidence).

[129] *See Pacific Gas & Electric*, 442 P.2d at 643.

[130] *See id.* at 643-44.

[131] *See, e.g.*, California Teachers Ass'n v. San Diego Community College Dist., 621 P.2d 856, 865-66 (Cal. 1981) (Newman, J., concurring); *id.* at 866 (Bird, C.J., dissenting) (discussing full use of legislative material for statutory construction). Newman's concurrence indicts the majority's use of the "fortunately" discredited plain meaning rule which raises more problems of ambiguity and absurdity than it solves. *See id.* Bird's dissent cites *Stanton v. Panish*, 615 P.2d 1372, 1378 (Cal. 1980), reportedly decided on the notes of one member of an 80 person panel, recorded 14 years after the fact. *Id.*

[132] 502 P.2d 1049 (Cal. 1972). Failing to find a single definition of the word "project," the majority based its conclusion heavily on general statements of legislative intent. *Id.* at

sifted the minutiae of the legislative process to rationalize making the phrase "any project they intend to carry out" refer to private persons or corporations. This was done despite the phrase's presence in a section concerned with legislative bodies and local government agencies.[133]

Recently, however, California courts have reacted to this linguistic uncertainty and legislative effluvia by maintaining that, unlike literary deconstructionists, they recognize the possibility of an unambiguous text.[134] The proponents of this textualist philosophy argue that methods of statutory construction should afford primary consideration to the statutory text itself. This is because the statutory text is what has "braved the legislative gauntlet."[135] The last five years shows a startling increase over the previous five years in the number of cases holding that words should be given their ordinary meaning, and that courts should not construe plain language.[136]

Justice Blease of the Third District Court of Appeal has spoken extensively on the neglect of cogent statutory analysis, and his unpublished manuscript is consonant with a number of textualist criticisms.[137] His analysis decries the "conceptual slip-

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1054-55. The review of the various conflicting impressions of legislative players and government entities takes place with little analysis of their credibility or theoretical structure. *Id.* at 1055-57, 1074-75 (Sullivan, J., dissenting).

[133] *See id.* at 1053-62.

[134] *See, e.g.*, ACL Techs., Inc. v. Northbrook Property & Cas. Ins. Co., 22 Cal. Rptr. 2d 206, 217 (Ct. App. 1993) (quoting *Ideal Mutual Insurance Co. v. Last Days Evangelical Ass'n*, 783 F.2d 1234, 1238 (5th Cir. 1986), and criticizing deconstructionist idea that all text is ambiguous). In *ACL*, Judge Sills draws upon all his resources, from comic opera to the comic page, to hold, that for purposes of an insurance contract, whatever "sudden" means it does not mean "gradual." *Id.* at 215-16. *But cf.* Zipton v. Workers' Comp. Appeals Bd., 267 Cal. Rptr. 431, 435-36 (1980) (suggesting that statutory interpretation requires examination of relevant legislative history, especially since this case presents troubling set of facts and difficult issue to decide).

[135] Halbert's Lumber, Inc. v. Lucky Stores, Inc., 8 Cal. Rptr. 2d 298, 300-01 (Ct. App. 1992). In discussing statutory text, the court stated:

> It is that language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, remended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor.

Id.

[136] *See supra* note 30 and accompanying text (indicating increased frequency of California courts' reliance on plain language).

[137] *See* Coleman A. Blease, Late Night Thoughts About Statutes, Statutory Construction

page" from statute to case to policy to application to result, distancing controlling statutory language from the facts and transmuting statutory law into common law.[138] He notes that it is "distressingly common" to find attorneys arguing from a statute to be wholly unable to explain why the *language* of the statute justifies their conclusion.[139] This attitude is reflected in his opinions for the court.[140]

As noted in the introduction, three basic situations implicate the plain meaning standard.[141] First, a court conducts a threshold evaluation of the statute to determine if the language is unambiguous and unabsurd; if it is, statutory construction and resort to legislative history is inappropriate.[142] Next, if a court concludes the language is truly ambiguous, it may turn to extrinsic legislative history, but textualists contend that the court must read these materials with a critical and demanding eye.[143] Finally, if a court concludes that the language of the statute is unambiguous, but is absurd, it may then turn to extrinsic legislative history. Failing any suitable direction there, the court may fall back upon its own judgment.[144] Following are three case studies, each illustrating one phase of this process. These cases demonstrate California appellate courts soundly applying a textualist analysis. The final case also shows the California Supreme Court's willingness to ignore plain meaning and hide behind an elaborate and constructed supposition of intent. This Comment maintains that case is wrongly decided.

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and the Separation of Powers 3-4 (Dec. 2, 1993) (unpublished manuscript, on file with author).

[138] *See id.* at 4.

[139] *See id.* at 3.

[140] *See* City of Sacramento v. Public Employee's Retirement Sys., 27 Cal. Rptr. 2d 545, 548-50 (Ct. App. 1994) (criticizing appellant's desire to amend statute based on implied statutory intent as being outside scope of judicial power).

[141] *See infra* Parts III.A-C (discussing three situations implicating plain meaning standard).

[142] *See* Halbert's Lumber, Inc. v. Lucky Stores, Inc., 8 Cal. Rptr. 2d 298, 300-01 (Ct. App. 1992) (stating language controls if meaning is unambiguous).

[143] *See id.* at 301.

[144] *See id.*

A. Respecting the Plain Meaning of the Statute: Unzueta v. Ocean View School District

As noted above, the court looks first to the plain meaning upon its initial reading of the statute at issue.[145] If the language is clear and unambiguous, and the result it dictates is not absurd, the court's responsibility is to apply the language as written.[146] If the potential benefits of a strengthened plain meaning standard are to have significant effect, the courts must be willing to apply the standard in difficult cases. The Second District Court of Appeal faced such a case in *Unzueta v. Ocean View School District.*[147]

In *Unzueta,* a school teacher had been arrested and charged with possession and use of cocaine.[148] The District, under discretion granted it by the Education Code, suspended Unzueta.[149] As a first time offender, Unzueta entered and satisfactorily completed a drug diversion program.[150] At the end of his treatment, the court dismissed the charges.[151] Unzueta then resumed his teaching duties, and petitioned the trial court to compel the District to provide him two years back pay, pursuant to section 44940.5 of the California Code of Education.[152] This

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[145] *See supra* note 142 and accompanying text (describing court's threshold evaluation of statute to determine if language is unambiguous and not absurd).

[146] *See supra* notes 142-44 and accompanying text (describing three basic situations implicating plain meaning standard).

[147] *See* 8 Cal. Rptr. 2d 614 (Ct. App. 1992); *see also* DaFonte v. Up-Right, Inc., 828 P.2d 140, 141 (Cal. 1991) (holding that fifteen-year-old, new on job and without adequate supervision, whose arm is caught in mechanical harvester, will be significantly limited in his ability to recover non-economic damages, with court discounting unofficial enactment history to change plain import of this proposition).

[148] *See Unzueta,* 8 Cal. Rptr. 2d at 616.

[149] *See id.* The California Code of Education provides that a governing board can immediately place on compulsory leave any certificated employee charged with an optional leave offense, such as the simple possession of cocaine in *Unzueta.* CAL. EDUC. CODE § 44940 (West 1996).

[150] *See Unzueta,* 8 Cal. Rptr. 2d at 616; *see also* CAL. PENAL CODE §§ 1000-1000.5 (West Supp. 1996) (authorizing courts to divert from normal criminal process into local treatment programs suitable persons who are formally charged with first time possession of drugs, but have not yet gone to trial).

[151] *See Unzueta,* 8 Cal. Rptr. 2d at 616; *see also* CAL. PENAL CODE § 1000.3 (providing that criminal charges shall be dismissed if divertee has performed satisfactorily during diversion period).

[152] *See Unzueta,* 8 Cal. Rptr. 2d at 616; *see also* CAL. EDUC. CODE § 44940.5(c) (West Supp. 1996) (providing that if employee is acquitted or charges dismissed, employee shall

section provided that if the employee is acquitted or the charges dropped, the employee shall receive full compensation for the period of the leave.[153] The diversion statute provided that no record of an arrest which resulted in successful completion of a treatment program be used against a divertee to deny any benefit without the divertee's consent.[154] Read in conjunction with the diversion statute,[155] the language clearly indicated that Unzueta was due his back pay. The District conceded as much when they invited the trial court to use its equity powers to nullify the effect of the statute.[156] The trial court, however, ruled that Unzueta should receive his lost wages.[157]

In *Unzueta*, the court applied the plain meaning of the statutory language, despite unhappiness at the result.[158] In doing so,

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receive full pay for compulsory leave period).

[153] *See* CAL. EDUC. CODE § 44940.5(c).

[154] *See Unzueta*, 8 Cal. Rptr. 2d at 616; *see also* CAL. PENAL CODE § 1000.4 (providing that with successful completion of drug diversion, "arrest upon which the diversion was based shall be deemed to have never occurred").

[155] *See Unzueta*, 8 Cal. Rptr. 2d at 618. The court used the sort of analytical tool — an *in pari materia* examination — that the textualists want to emphasize. *See id.* at 617; *e.g.*, Chan v. Korean Airlines, Ltd., 490 U.S. 122, 129-30 (1989) (finding that delivering defective notice is not equivalent to failure to deliver ticket); United Savs. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (using holistic approach to statutory interpretation); Eskridge, *supra* note 71, at 662 (discussing Scalia's treatment of *Chan*, stating similar subjects should be interpreted harmoniously).

The court also relied upon *People v. Hull*, 820 P.2d 1036 (Cal. 1991) (Kennard, J., dissenting), another recent plain meaning case. In *Hull*, the court resolved an appellate court split on whether the determination of the disqualification of a judge could be reviewed other than by writ of mandate within 10 days of the decision. *See id.* at 1038. The question before the court was whether this rule of review applied to both challenges for cause and preemptory challenges. *See id.* at 1038-40. The appellate courts had split on the question through inconsistent reading of the same legislative history. *Id.* at 1039.

The California Supreme Court began by analyzing the intent standard and giving the words their plain meaning. *Id.* at 1040. It determined that the usual and ordinary use of the term "disqualify" plainly indicates a generic applicability to all disqualification motions, as does the appearance of the section in the chapter on the disqualification of judges. *Id.* The court further ruled that generic applicability fosters the general policy goals of the section in question, particularly judicial economy. *Id.* The dissent made a textual argument, concluding that the placement of the appeal language in the statute suggested that the Legislature did not intend it to apply to preemptory challenges. *Id.* at 1044-45 (Kennard, J., dissenting). While favoring the policy conclusions of the majority, the dissent maintained that the majority was actually rewriting the statute, which is a question for the Legislature, not the court. *Id.*

[156] *Unzueta*, 8 Cal. Rptr. 2d at 617.

[157] *Id.*

[158] *See id.* at 620 (cautioning that applying Education Code § 44940.5 to case may be

the court invoked the basic elements of the textualist program, explicitly acknowledging the separation of powers and applying *in pari materia* analysis to the relevant language.[159] In declining to invoke the absurdity exception to the statute, the court noted that judicial self-restraint should not rely upon "a rope of sand."[160]

Making explicit its perception of the limitations of the judiciary's role,[161] the appellate court declined the appellant's invitation to venture beyond the clear meaning of the statute.[162] The appellate court concluded that a dismissal is a dismissal, and that statutory efficacy of the diversion provisions

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unwise).

[159] *Id.* at 617-18.

[160] *Id.* at 619-20 (quoting MACKLIN FLEMING, THE PRICE OF PERFECT JUSTICE 160 (1974)).

[161] *See Unzueta*, 8 Cal. Rptr. 2d at 618. The court's enumeration of authority describing its analytical function began with *California Teachers Ass'n v. San Diego Community College District*, 621 P.2d 856 (Cal. 1981). The court cited this case for its holding that if the words of the statue are clear, a court should not add to or alter them to accomplish a purpose that fails to appear on its face or in the legislative history. *Id.* at 859. *California Teachers* denies the relevance of a legislator's letter stating intent when it does not reiterate the discussion and events in the legislature. *See id.* at 861.

The plain meaning argument here is subject to greater criticism than in *Unzueta*. *Id.* at 866-68. The *Unzueta* court then cited to *Mutual Life Insurance Co. v. City of Los Angeles*, 787 P.2d 996 (Cal. 1990), *Anderson v. I.M. Jameson Corp.*, 59 P.2d 962 (Cal. 1936), and section 1859 of the California Code of Civil Procedure, for authority to support its position that a court must not speculate or rewrite a statute to make it express an intention not expressed therein. The court in *Mutual Life Insurance*, by virtue of what it saw as the plain meaning of constitutional language, severely limited taxation of insurers' investments. *See Mutual Life*, 787 P.2d at 1005.

The *Mutual Life* decision is more notable for its passionate defense of plain meaning than the cogency of its analysis, because, as the dissent pointed out, the term "insurer doing business" is more ambiguous than the majority admits. *Id.* at 1008. The *Unzueta* court then addressed the issue of disregarding the plain meaning because of repugnance to the general meaning of the act. *Unzueta*, 8 Cal. Rptr. 2d at 618 (citing *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 144 (Cal. 1992), which defined "defendant" as generally understood, limited several liability for noneconomic damages, and denied resort to extrinsic evidence when language is unambiguous). The *Unzueta* court finally turned to an old case, *Jordan v. Retirement Bd.*, 96 P.2d 973, 977 (Cal. Ct. App. 1939), for the proposition that the court must allow the Legislature to fix hardships that result from court reliance on statutes as they are written. *Unzueta*, 8 Cal. Rptr. 2d at 618.

[162] *Unzueta*, 8 Cal. Rptr. 2d at 617. The trial court also responded that it could not rewrite the law. *See id.* Both courts mention other hypothetical situations in which the equities would be conceivably less than in Unzueta's case. For example, in one situation, a court suppresses crucial evidence, and the culpability would be greater than when a school teacher is rehabilitated pursuant to legislative direction. *See id.*

do not depend on the court's evaluation of the plaintiff's worthiness.[163] While the court is uncomfortable giving back pay to a drug abusing teacher,[164] it refused to sit as a "super-legislature."[165]

The alternative to the appellate court's decision is simply subjective judicial law making.[166] Experience has shown, said the court, that judicial legislation is unwise, and that legislatures are "better equipped, better informed, possess greater sensitivity, and exercise a broader vision in making new law than do the courts."[167] Acknowledging *Marbury v. Madison* and the judiciary's responsibility to construe law, the court simultaneously noted that refusal to honor plain meaning strips confidence from legislative enactments and the rule of law.[168]

The court acknowledged that ignoring literal meaning is appropriate to avoid absurd results, but declared that it should resort to such an exception only in extreme cases.[169] To do otherwise, the court noted, would violate the separation of powers doctrine.[170] The majority in *Unzueta* was unconvinced

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[163] *See id.*

[164] *See id.* at 615. The court's discomfort is illustrated by its use of a Learned Hand quote. *See supra* note 6 and accompanying text (describing tension between deferring to common will expressed by government and interpreting underlying purpose of expression of will). The court defined the task before it as a dilemma, but its decision is not especially in doubt. *Unzueta*, 8 Cal. Rptr. 2d at 615. It followed the statute's plain language, which it reasoned was sufficient to show the statute's underlying purpose. *See id.* at 620. The court stated unequivocally that it cannot simply enforce what it "thinks best." *See id.*; *see also* Wells Fargo Bank v. Superior Court, 811 P.2d 1025, 1035 (Cal. 1991) (asserting that court does not sit in judgment of wisdom of statute).

[165] *Unzueta*, 8 Cal. Rptr. 2d at 619 (citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952), which stated that court does not sit as super-legislature to judge wisdom of legislation). "The legislative power has limits . . . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare." *Day-Brite Lighting*, 342 U.S. at 423.

[166] *See Unzueta*, 8 Cal. Rptr. 2d at 620.

[167] *Id.* (quoting FLEMING, *supra* note 160, at 120).

[168] *See id.* at 619. In this regard, the court also follows a general trend in the new plain meaning cases of citing to older authority, by noting Lord Bramwell in the nineteenth century English case *Hill v. East & West India Dock Co.*, 9 C.A. 448, 464-65 (House of Lords, 1884). *Id. Hill* and related cases point out that what may be absurd to one man may not be to another. Even if absurdity results from a given construction, it is better to adhere to the words of an act and allow the Legislature to set it right than to change words according to one's notion of absurdity.

[169] *See Unzueta*, 8 Cal. Rptr. 2d at 619 (citing CAL. CONST., art. III, § 3).

[170] *See id.*

that the Legislature did not intend the court's conclusion,[171] contrary to the dissent's claim that they were slaves to literalness.[172] The majority framed its argument in terms of the constitutional separation of powers, the plain meaning of the text, its coherence with other statutes, and the underlying policy of the law.[173] The dissent responds primarily by arguing "[a]bsurdity — I know it when I see it."[174]

The dissent was clearly unhappy that the teacher, who in its opinion had already received a break in getting his job back, was suing for back pay.[175] It invoked the absurdity exception, and then proceeded on a long exploration of the seminal case of *Riggs v. Palmer*.[176] There a beneficiary murdered his grandfather to keep him from changing his will.[177] Drawing upon *Riggs*, the dissent maintained that monetary award is unjust and absurd.[178] If the majority is willing to invoke the absurdity exception to reduce his back pay by the amount earned in other employment, it should be willing to avoid paying him the balance.[179] The dissent ultimately decried the majority's allegedly

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[171] *See id.* The District urged otherwise, claiming that such a ruling violated common sense and rewarded drug use. *Id.* at 618. The court classified framing the issue in those terms as representative of the District's myopia. *See id.* Instead, the Legislature intended to "reward" productive citizenship to an experimental drug user who successfully completed diversion.

[172] *See id.* at 619, 622.

[173] *See id.* at 618. The court held that the purpose of diversion is two-fold: to identify and rehabilitate the tentative user in his own community without lasting stigma, and to conserve judicial resources for more serious criminal matters. *See id.* at 616.

[174] *Id.* at 621 (Gilbert, J., dissenting).

[175] *See id.* at 622-23 (Gilbert, J., dissenting) (stating that allowing Unzueta to recover back pay would be absurd under circumstances).

[176] 22 N.E. 188 (N.Y. 1889).

[177] *See id.* at 189. The majority in *Riggs* made a typical intentionalist distinction between the text of the statute and the interpretation of the statute. *Id.* The court further maintained that the Legislature could not have intended, through the general words providing for an orderly devolution of property, the unreasonable result of a murderer inheriting through his crime. *Id.* While *Riggs* appears to stand for a self evident proposition, the forceful dissent noted that the punishment for murder is established by the criminal code, that it had been imposed, and that deprivation of property is not required by public policy. *See id.* at 192 (Gray, J., dissenting). The rules of probate at the time were notoriously strict, and the dissent found itself bound by "the rigid rules of law" and not the "domain of conscience." *Id.* at 191.

[178] *See Unzueta*, 8 Cal. Rptr. 2d at 622-23 (Gilbert, J., dissenting).

[179] *See id.* at 623. The majority followed the urging of the District and reduced the award by what Unzueta had earned during his suspension, justifying the offset under the

"lifeless" literal interpretation of the statute, which, it contends, is contrary to public policy, common sense, legislative intent, and shared notions of justice.[180]

Despite the display of rhetorical fireworks at the end, the center of the dissent's argument does not withstand scrutiny.[181] The connection to *Riggs* is tenuous, as the text at issue in *Unzueta* is a remedial statute for first time drug offenders, not unrelated probate law.[182] The courts must presume that the Legislature knows existing law and fashions enactments with such law in mind.[183] If the Legislature did not wish to include diversion dismissals, it could easily have done so. Castigating the decision as contrary to public policy does a great disservice to the legislative judgment which created the diversion statute.[184] The dissent's most interesting contention, however, was that the decision ran counter to legislative intent — of which there was no evidence other than the language of the statutes![185]

The majority position in *Unzueta* is superior to the dissent. The majority pays attention first and foremost to the explicit text of the relevant statute, and to how that language works in the larger statutory architecture.[186] This is language that the Legislature considered and passed, and that the Governor signed. This is the language that lawyers and administrators, and even the population at large, look to when searching for answers to questions. While acknowledging the court's responsibility to

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rationale that the plaintiff would be made more than whole. *See id.* at 621.

[180] *See id.* at 623 (Gilbert, J., dissenting).

[181] *See, e.g.*, WILLIAM BUTLER YEATS, *The Second Coming*, *in* THE COLLECTED POEMS OF W.B. YEATS 184 (Definitive ed. 1956) ("Things fall apart; the centre cannot hold; / Mere anarchy is loosed upon the world").

[182] *See Unzueta*, 8 Cal. Rptr. 2d at 617 (discussing CAL. PENAL CODE § 1000.5 (West Supp. 1996)); *see also* People v. Superior Court (On Tai Ho), 113 Cal. Rptr. 21, 23 (1974) (stating that purposes of drug diversion statute are identification of experimental drug users, early correction of their problems, and reduction of pressure on criminal justice system).

[183] Rosenthal v. Cory, 138 Cal. Rptr. 442, 444 (Ct. App. 1977).

[184] The diversion statute keeps casual drug users from suffering disproportionate penalties and keeps the court system clear of minor cases. *See On Tai Ho*, 113 Cal. Rptr. at 23. Section 44940.5 of the California Code of Education serves the twin purposes of protecting the schools from potential criminals and protecting teachers from losing their back pay when suspended for infractions for which they are not convicted. *Unzueta*, 8 Cal. Rptr. 2d at 618.

[185] *See id.* at 623 (Gilbert, J., dissenting).

[186] *See id.* at 616-19 (examining text and context of relevant statutes).

interpret the law, the majority respects the limits of that role and the legislative branch's superior capabilities for formulating new law.[187] The majority did this despite the difficult equities of the case.

The decision avoids undercutting confidence in the law generally. The majority did not invoke the absurdity exception, which, given that this is a drug case within a drug diversion law, would be inappropriate. The dissent decried this as a lifeless reading, but the majority is animated by a keen appreciation of democracy and its method of lawmaking. The dissent, however, was left pointing at a ghost, the legislative intent, but can conjure up no evidence of this creature, other than the language of the act which it cannot accept. Our system of law was not designed to operate in this way.

B. Requiring Clear Statements from the Legislature: J.A. Jones Construction Co. v. Superior Court

We turn now to our second statutory construction situation, where the court finds the statutory language presented it to be ambiguous. When the court is unable to discern a plain meaning in statutory language, resort to extrinsic legislative materials is commonplace.[188] This Comment notes the criticism of resort to legislative history in general.[189] Yet the practice is intuitively

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[187] *See id.* at 619-20.

[188] *See, e.g.*, Slawson, *supra* note 10, at 385 (noting that despite almost universal use of legislative history, little agreement exists on controlling its use); Breyer, *Legislative History Lecture*, *supra* note 11, at 845 (commenting on practice of appellate courts in applying legislative history to statutory interpretation); Wald, *supra* note 12, at 295 (pointing to increasing use of legislative history in construing federal statutes). The number of cases in this regard is overwhelming. *See, e.g.*, Hartford Fire Ins. Co. v. Macri, 842 P.2d 112, 116-17 (Cal. 1992) (interpreting ambiguous underinsured motorist statute with reference to bill digests and caucus analysis); Oden v. Board of Admin. of Pub. Employees' Retirement Sys., 28 Cal. Rptr. 2d 388, 395 (Ct. App. 1994) (explaining that committee materials are properly consulted to understand legislative intent since it is reasonable to assume legislators considered them when deciding how to vote for statute).

[189] *See supra* note 10 and accompanying text (arguing that intentionalism, among other things, upsets need for sound and consistent approach to statutory construction).

appealing, implicitly supported by section 1859 of the Code of Civil Procedure,[190] and so ingrained that courts often find it obligatory.[191]

The practice of resorting to extrinsic legislative materials implicates the plain meaning doctrine in two fundamental ways. First, how ambiguous must the court find the text before resort to legislative materials is appropriate?[192] Second, what degree of clarity should courts require in legislative materials before they trump the text?

This section explores the second question in the case of *J.A. Jones Construction Co. v. Superior Court*.[193] This case represents an effective approach to critical examination of legislative materials[194] and highlights the responsibility of the court and the

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[190] *See supra* note 5 and accompanying text (stating that courts should follow legislative intent whenever possible).

[191] *See, e.g.*, Zipton v. Workers' Comp. Appeals Bd., 267 Cal. Rptr. 431, 436 (Ct. App. 1990) (expecting that parties would brief legislative history because case presented complex issues and troublesome facts).

[192] *See generally* Blease, *supra* note 137, at 13-18 (suggesting that process of determining ambiguity is always context specific). Justice Blease goes on to define ambiguity as "language [which] is indeterminate with respect to a *claimed* application . . . . To say that language is ambiguous is to say that there are semantically permissible candidates for its application, though it cannot be determined from the language which is meant." *Id.* at 19 (emphasis in original). Justice Blease describes the interpretive process as follows:

> If it is [sic] appears that the statutory language applies or does not apply so as to resolve the controversy before the court, that is the end of the matter. No question of ambiguity is raised. The predicate question is simply one of application, of applying the ordinary rules of usage to that end. If, in the course of the inquiry, a specific indeterminacy arises, certain tie-breaking rules are called for. Sometimes we are told how to do this by the statute; generally that we are to rule for one side or the other of the controversy. At other times extrinsic aids may be brought into play . . . .

Id. at 19-20 (citations omitted).

[193] 33 Cal. Rptr. 2d 206 (Ct. App. 1994).

[194] A basic textualist tenet is that requiring courts to adhere to a strong plain meaning standard will help to avoid undermining the drafting compromises of legislatures. *See, e.g.*, Easterbrook, *supra* note 14, at 544-45 (suggesting courts should only fill statutory gaps where Congress expressly grants them that power).

Legislature to communicate with each other in plain terms.[195] The court in this case overtly raises the textualist standard in California.[196]

The *J.A. Jones* court found itself in the arcane world of mechanic's lien[197] waiver forms.[198] The plaintiff had contracted to build a beach-front hotel for twenty-nine million dollars.[199] The contract called for Jones to send in payment applications for the last month's work accompanied by waivers which would release Jones's lien rights through the dates of the applications.[200] Late in the construction process, Jones made the mistake of signing a waiver in return for a payment which did not include its three million dollar claim for extra work already performed.[201] Jones did little additional work after that date.[202] While modifying the sum through various offsets, the trial court ruled that, under existing law, Jones had waived its right to the claim by signing the waiver form.[203]

On appeal the court found itself again construing the language of the lien waiver forms, as it had two years earlier in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*[204] The *Halbert's* court

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[195] Plain meaning advocates further hope that a stronger plain meaning rule will encourage clearer drafting. *See* USING AND MISUSING LEGISLATIVE HISTORY, *supra* note 10, at 119 (arguing that better draftsmanship is proper remedy for courts' failure to follow statutes that they do not understand).

[196] *See J.A. Jones*, 33 Cal. Rptr. 2d at 210 (noting that modern trend is to emphasize statutory language). While the court has some hesitancy about associating itself with textualism as a trend, its description of analytical concerns make its alliance clear. *See id.* at 210 n.6, 211-12 (considering formidable risks inherent in relying on extrinsic evidence of legislative history).

[197] *See* BLACK'S LAW DICTIONARY 981 (6th ed. 1990) (defining "mechanics lien" as claim created by state statutes for securing priority of payment for price or value of work performed and materials furnished in building trade).

[198] *See id.* at 923 (defining "lien waiver" as waiver which releases mechanic's lien so that owner or general contractor may receive draw on construction loan). The language and format of the forms are specified in the California Civil Code. *See* CAL. CIV. CODE § 3262 (West 1993).

[199] *See J.A. Jones*, 33 Cal. Rptr. 2d at 207.

[200] *See id.*

[201] *See id.* at 208.

[202] *See id.* (noting that Jones had supplied only $5000 worth of labor and materials after September 15, 1990).

[203] *See id.* This recitation simplifies the procedural and factual posture of the case.

[204] 8 Cal. Rptr. 2d 298 (Ct. App. 1992). *Halbert's* addressed the language of the lien waiver form, which the court characterized as shining "like a dim lantern though [sic] a frosty window in a snow storm." *Id.* at 299. The plaintiff in *Halbert's* was a lumber supplier

had ruled that a subcontractor, by signing the waiver form, had lost the right to be paid for material delivered but not yet billed.[205] This case set off shock waves in the Legislature in Sacramento.[206] Bills were introduced in both the Senate and Assembly[207] to respond to concerns about the decision.[208]

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who signed a lien waiver when the lumber at issue arrived on the job site, but was not yet recorded in the billing invoice. *See id.* at 299-300. The trial court ruled that the supplier had waived his lien, intending the waiver to be a release instead of a glorified receipt. *See id.* at 299. The opinion is particularly notable for advocating a statutory construction scheme that does not invoke legislative intent if the meaning of the words are clear. *See id.* at 300-01. The court spent much of its time construing the meaning of, among other phrases, the Latin phrase "*pro tanto*," which appeared in the lien waiver form. *Id.* at 305-07; *see* BLACK'S LAW DICTIONARY 1222 (6th ed. 1990) (defining "*pro tanto*" as for so much; for as much as may be; or as far as it goes). The waiver provided that upon the bank's payment of the check, "this document shall become effective to release *pro tanto* any mechanic's lien . . . the undersigned has on the job . . . to the following extent." *Halbert's*, 8 Cal. Rptr. 2d at 299. The waiver then gives a date and some qualifying language. *See id.* at 299-300. What was the effect of this Latin phrase? Did it mean to the extent of materials provided to that date? To the extent of the payment? To the extent of the billing? The court decided that the language was genuinely ambiguous, and concluded that resort to legislative history was appropriate. *Id.* at 307.

The court found that the legislative history, represented by committee analyses, letters of support, and statements from the bill's author, was no more conclusive than the language itself. *Id.* Further, the *Halbert's* court stated, "We do not consider these bits and pieces dispositive." *Id.* at 308. The court then crafted the only workable solution, in its opinion. *See id.* at 309. It based its solution on an interpretation that intended to provide releases which owners and lenders could rely upon. *See id.* at 308-09. The court did not adopt the lumber company's interpretation that material suppliers may still assert mechanics liens once a release had been signed. Such an interpretation would render waivers of lien rights useless even in situations where specific payment for the materials was made. *Id.* at 309.

[205] *See id.* at 298.

[206] *See generally J.A. Jones*, 33 Cal. Rptr. 2d at 213-14, nn.20-28 (enumerating various reactions to *Halbert's* decision). According to lobbyists, the contractors found themselves trapped between the *Halbert's* ruling and the statutory requirement that release forms be substantially equivalent to those in the Civil Code. *Id.* at 213 (quoting Letter from Paul Gladfelty and Dave Ackerman to Assemblyman Isenberg (Jan. 27, 1993)); *id.* at 211 (referencing Richard A. Holderness, *The Halbert's Case: A Dilemma for the Construction Industry*, AGC [ASSOCIATED GENERAL CONTRACTORS] 92-6 CALIFORNIA LEGAL BRIEFS 1, 2 (1992)). This letter and publication are part of the material compiled by the Legislative Intent Service and on file with the author.

[207] *See* A.B. 1845, 1993-94 Reg. Sess. (Cal. 1993); S.B. 1845 1993-94 Reg. Sess. (Cal. 1993).

[208] While the construction industry understandably disparaged the *Halbert's* decision, the lien forms at issue arose because of another case, *Bentz Plumbing & Heating v. Favaloro*, 180 Cal. Rptr. 223 (Ct. App. 1982), which had the effect of drying up construction lending in California. *See Halbert's*, 8 Cal. Rptr. 2d at 307. In *Bentz*, the court confronted a lien waiver dispute in which the subcontractor had signed off for portions of a project on forms

The day before a crucial trial court hearing in the *J.A. Jones* case, the Legislature passed Senate Bill 934 responding to *Halbert's*. This prompted the attorneys for Jones to bring a motion for reconsideration.[209] Jones maintained that the decision in *Halbert's* was vulnerable precedent, attaching as evidence a statement from the bill's author, Quentin Kopp.[210] The declaration stated that one of Kopp's purposes in introducing the bill was his belief that the court in *Halbert's* had misinterpreted the legislative intent of section 3262 of the Civil Code[211] which prescribes the waiver forms.[212]

Seizing upon this letter, Jones maintained that the introduction of the remedial bills indicated that the court had misconstrued the original legislative intent regarding the waiver forms.[213] In its decision, the *J.A. Jones* court responded by first establishing an analytical framework that gave preeminence to

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acknowledging payment, but had never been paid. *Bentz*, 180 Cal. Rptr. at 225. Bentz, the subcontractor, had furnished the waivers to the general contractor upon the representation that the contractor needed them to be paid. *See id.*

The court was faced with the problem of construing a 1972 amendment. It concluded that the Legislature intended the language of the amendment to protect contractors from overreaching owners and prime contractors. *Id.* at 226-27. The court noted continuing disputes in this area of mechanic's lien law since the nineteenth century. *Id.* at 226, n.2. The ensuing furor resulted in the introduction and passage of A.B. 844, 1983-84 Reg. Sess. Chapter 185 of 1984, which produced the lien form at the core of the *Halbert's* dispute. *Halbert's*, 8 Cal. Rptr. 2d at 307.

[209] *See J.A. Jones*, 33 Cal. Rptr. 2d at 209.

[210] *See id.*

[211] *See supra* note 198 and accompanying text (noting CAL. CIV. CODE § 3262 (West 1993) specifies the language and format of forms).

[212] *J.A. Jones*, 33 Cal. Rptr. 2d at 209. Author's letters of dubious validity play a key role in many of the debates on legislative intent and plain meaning. *See supra* notes 54, 127 and accompanying text (discussing various letters and statements as evidence of dubious relevance). This practice has received frequent criticism by the courts. *But see, e.g., In re* Marriage of Bouquet, 546 P.2d 1371 (Cal. 1976) (discussing use of letters in absence of other evidence of legislative intent). In examining Kopp's statements, two issues stand out. First, the specific language that Kopp used in his declaration indicated that *he* personally believed when he *introduced* the bill that the court had failed to properly interpret section 3262 of the California Civil Code. *See* Letter from Quentin Kopp, State Senator, to Pete Wilson, Governor of California 1-3 (Sept. 17, 1993) (on file with author) [hereinafter Kopp Letter to Wilson]. Second, Kopp's letter to Governor Wilson recommending that he sign the bill has a significantly different tone. *Id.* Kopp writes that the bill is intended to *redress* the decision in *Halbert's*, and that the case is an example of "bad facts making bad law" resulting in an unfair precedent. *Id.* Never does he say that the decision was wrong in either construing the statutory language or discerning legislative intent. *Id.*

[213] *See J.A. Jones*, 33 Cal. Rptr. 2d at 209.

the text over intention.[214] Second, the court demanded of the legislative history a clear statement about what the Legislature intended with regard to the lien waiver forms at issue in *Halbert's*.[215] This framework is an old idea given new life[216] by a court attempting to "read the tea leaves"[217] of ambiguous legislative history.

In reading the tea leaves, courts confront a heterogeneous collection of materials produced at very different times in the legislative process. The package of material sifted by the *J.A. Jones* court included the enacted bill,[218] an earlier version, another bill which failed passage,[219] committee analyses,[220] and

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[214] *See id.* at 209-10. The court's analysis makes section 1858 of the California Civil Code controlling authority over section 1859 because section 1859 implicitly allows the court to not give legislative intent effect if it is not possible. *See id.* at 210. The court implements its analytical structure from *Halbert's*, which makes no resort to legislative intentions if the meaning of the words are clear and do not result in absurdity. *See id.*

[215] *See id.* at 213. The legislative history fails to give guidance about its intention regarding the old lien waiver language, which is what the Legislature would need to address to overrule *Halbert's*. *Id.*

[216] *See, e.g., In re* Alpine, 265 P. 947, 949 (Cal. 1928) (holding that law-making body has duty to frame its intent in clear, plain terms so that people who must live by its dictates can understand legislative will); *cf.* Clavell v. North Coast Bus. Park, 283 Cal. Rptr. 419, 421 (Ct. App. 1991) (noting that while practice of judicial interpretation of legislative intent may be criticized, California is committed to it, and unlike instances which concerned Judge Easterbrook, this case does not involve search for amorphous intent, but "crystal clear" understanding).

[217] *J.A. Jones*, 33 Cal. Rptr. 2d at 212.

[218] *See id.* at 214 (referring to passage of bill); S.B. 934, 1993-94 Reg. Sess. (Cal. 1993). While Senator Kopp noted his intention in *introducing* the bill, *see supra* note 212, the bill was amended twice after introduction.

[219] A.B. 1845 1993-1994 Reg. Sess. (Cal. 1993). The court in *J.A. Jones* makes a number of references to this bill, noting that it stated clearly that it would overturn the ruling in *Halbert's*. *J.A. Jones*, 33 Cal. Rptr. 2d at 213. The court later states that if the Legislature had wanted to address a mistake in the *Halbert's* ruling it would have passed A.B. 1845. *See id.* at 215. The court is on shaky ground here as unpassed bills, though often referenced, have little value as legislative intent. *See* State Compensation Ins. Fund v. Workers' Compensation Appeals Bd., 152 Cal. Rptr. 153, 166 (Ct. App. 1979) (agreeing with view that unpassed bills provide little evidence of legislative intent). This skepticism is justified, particularly if we are assuming that the Legislature has only outcomes; a failed bill is a sort of non-entity. *See* USING AND MISUSING LEGISLATIVE HISTORY, *supra* note 10, at 110-16 (noting that bills fail to pass for any number of reasons and that judge-made doctrine of legislative acquiescence allows various experts to say that when Congress is silent, it is occasionally speaking). Opposition to a measure could easily introduce a bill aimed at overturning a case without any intention of trying to pass the bill, and thus taint the history.

[220] SENATE COMM. ON JUDICIARY, ANALYSIS OF S.B. 934 AS INTRODUCED 1 (Hearing Date:

committee file material (including the hand written notes of committee consultants and various statements of support and opposition from over nine different interest groups).[221] The court also considered analyses from other legislative research groups,[222] a law review article,[223] and statements and file materials of the bill's author.[224] The court did not find in the materials pertaining to the bill, as *actually passed*, a clear legislative statement disavowing the ruling in *Halbert's*.[225] This finding is sound, given that the Legislature has no difficulty writing bills with specific language to explicitly overrule disputed court decisions.[226]

In looking for a clear statement of intent, the court responded to a variety of textualist concerns.[227] By demanding a clear statement of legislative intent to overrule the court, the court minimizes the danger of projecting its intuitions upon the

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May 25, 1993) (describing purpose of bill to overturn *Halbert's*); ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF S.B.934 AS AMENDED JUNE 7, 1993 2, 6 (Hearing Date: August 18, 1993) (noting that bill attempts to "modify" *Halbert's* and that bill goes too far). The bill was further amended subsequent to the Assembly Committee analysis.

[221] *See* Letter from Edward Levy, Senior Vice President and Legislative Counsel, California League of Savings Institutions, to Members of Assembly Judiciary Committee (Aug. 9, 1993) (on file with author) (requesting "no" vote in absence of amendments); Letter from Philip Vermeulen, Executive Director, California Association of Sheet Metal and Air Conditioning Contractors National Association, to Members of Assembly Judiciary Committee (July 8, 1993) (on file with author) (requesting support for S.B. 934 as contractors are in "catch 22" situation); Letter from Frank L. Rowley, Attorney at Law, to Quentin L. Kopp, State Senator (Apr. 15, 1993) (suggesting, as attorney sitting on fence, that 1985 law is only now being understood, and that changing law will cause as many problems as it will solve).

[222] *See* SENATE RULES COMMITTEE, OFFICE OF SENATE FLOOR ANALYSES, UNFINISHED BUSINESS ANALYSIS OF SB 934 AS AMENDED AUG. 23, 1993 (Sept. 9, 1993) (describing bill as modifying waiver forms, making no mention of superseding *Halbert's*, and showing that lenders have dropped opposition).

[223] *See generally* Paul D. Gutierrez, *Commencement of Works of Improvement: This Could Be the Start of Something Big*, 17 LINCOLN L. REV. 215 (1987) (describing history of mechanic's liens and failure of Legislature to define the term "commencement").

[224] *See, e.g.*, Kopp Letter to Wilson, *supra* note 212 (arguing that intent of bill was to redress unfair precedent which *Halbert's* established).

[225] *See J.A. Jones*, 33 Cal. Rptr. 2d at 215.

[226] *See, e.g.*, A.B. 3591, Reg. Sess. 1993-94, Chapter 179 of 1994 (stating Legislature's intent in enacting § 1, which was to abrogate incorrect statement of existing law in Part II of *People v. Burgio*, 20 Cal. Rptr. 2d 397, 405-07 (Ct. App. 1993)). The Legislature intended the act to be a declaration of existing law.

[227] *See supra* Part II (presenting criticisms of courts' reliance on extrinsic evidence of legislative history).

legislative history, and potentially encouraging its manipulation.[228] By requiring a clear statement, the court avoids subversion of bicamerality and presentment to the governor.[229] While the majority acknowledges the need for examination of legislative history, the court takes a skeptical view of abstractions of intent, noting that ambiguity can indicate a legislative decision to pass the matter to the courts.[230] In *J.A. Jones*, however, the court had made its ruling and passed the matter back to the Legislature.

J.A. Jones is exemplary of a moderate textualist approach to the second situation of statutory construction, where the text is ambiguous and resort to extrinsic legislative intent history is principled. The dissent in *J.A. Jones* maintained that the *pro tanto* language was clear and that the majority's construction rendered it superfluous.[231] This position is impossible to reconcile with the confusion among the parties and that represented in the legislative materials, which explicitly stretch over a decade.[232]

The court in *J.A. Jones* recognizes the legislative process as complex, adversarial deal making. In refusing to defer to the inconclusive flotsam of this process, it respects the product that the Legislature actually produced, the statute. Furthermore, by requiring a clear statement from the Legislature to overrule its earlier decision in *Halbert's*, the court does not allow its role as interpreter of law to be usurped by a vague author statement. In so doing, the court also formally communicates to the Legislature and the public that clear expression is valued by the courts and is necessary to produce judicial assent. Finally, the court sends a message to practitioners about how they should read legislative history, and that the history will be analyzed critically before it will trump the language of the act.

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[228] *See J.A. Jones*, 33 Cal. Rptr. 2d at 212.

[229] *See id.* at 211.

[230] *See id.* at 211-12 (noting that diverse legislature can never have one legislative intent).

[231] *See id.* at 216 (Crosby, J., dissenting).

[232] *See supra* note 204 and accompanying text (discussing difficulties in interpreting language in lien waiver forms). While the dissent maintains the decision in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 8 Cal. Rptr. 2d 298 (Ct. App. 1992), was unjust, the interests of lenders, builders, and owners in this situation are intertwined. *Id.*

C. Abusing the Absurdity Exception with Vague Intent: California School Employees Association v. Governing Board of the Marin Community College District

Our focus now turns to our third situation, away from language that the court finds ambiguous, to language the court finds plain, but when applied leads to a result the court deems absurd. Despite the confused state of California law regarding statutory construction,[233] courts generally follow their obligation to give words their usual meaning and effect.[234] Within this scheme, courts have a safety valve for avoiding a nonsensical literal interpretation if it would frustrate the manifest purposes of the legislation as a whole or lead to absurd results.[235]

While absurdity may be "in the eye of the beholder,"[236] judicial resort to the absurdity exception is relatively rare, given its anti-majoritarian character.[237] Legislative intent discussions are frequently crucial in absurdity rule cases.[238] Courts purport to

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[233] *See generally supra* notes 1-31 and accompanying text (describing confusing state of statutory construction in California). Does one start with legislative intent, the plain meaning of the words, or fuse the two in a generalized quest?

[234] *See, e.g.*, Mercer v. Department of Motor Vehicles, 809 P.2d 404, 410 (Cal. 1991) (focusing on usual and ordinary meaning of words in statute). The court here acknowledges a general policy to prevent drunk driving and an obligation to advance this policy to the extent permitted under the statute. *See id.* at 409-10. The court gives as its first step in the analysis a resort to plain meaning, and moves directly to Webster's Dictionary. *See id.* at 410. The court concludes that the word "drive" denotes volitional movement of a vehicle, and then conducts an *in pari materia* analysis to conclude the Legislature intended the word have a narrow scope. *Id.* Ultimately the court concludes that the plain meaning of the language demands that the police cannot arrest someone for drunk driving when they find the person drunk in a car, but with no evidence that the car has been driven. *See id.* at 414.

[235] *See, e.g.*, Younger v. Superior Court, 577 P.2d 1014, 1021-22 (Cal. 1978) (ruling that statute for destroying records of minor marijuana convictions applies only to persons who have completed their punishment before seeking relief; otherwise, defendants could escape punishment by destroying records upon which conviction is based); DaFonte v. Up-Right, Inc., 828 P.2d 140, 144 (Cal. 1992) ("The plain meaning of words in a statute may be disregarded only when that meaning is 'repugnant to the general purview of the act,' or for some other compelling reason."); *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (noting court should give alternative meaning to statute when literal interpretation is nonsensical).

[236] Unzueta v. Ocean View Sch. Dist., 8 Cal. Rptr. 2d 614, 619 (Ct. App. 1992).

[237] *See* FLEMING, *supra* note 160, at 116 (explaining absurd result rule devalues written law and legislative authority of popular government).

[238] *See, e.g., Younger*, 577 P.2d at 1021-22 (examining legislative intent where literal meaning produces absurd result).

find a ghostly intent behind the statute, in the attempt to divine a rationale for their decision to reject clear language[239] or reject an absurdity argument.[240]

Courts should examine their use of legislative intent in absurdity arguments with great skepticism.[241] In these instances, the courts have already found that the foremost indicator of legislative intent — the language of the statute — has failed to yield a rational result. A court should follow the clear meaning of the statute unless it can clearly articulate either a definitive moral[242] or legislative purpose that renders the plain meaning absurd.

If other courts have applied the statute in similar situations, without invoking absurdity, and without legislative response, the absurdity exception should not apply. If courts are to require from the Legislature clear intent statements,[243] they should apply that same standard to their own uses of intent in absurdity arguments. The failure to do so significantly compromises the benefits of a strengthened plain meaning standard.[244]

The California Supreme Court recently demonstrated a willingness to manipulate the absurdity exception in the 1994 case of *California School Employees Ass'n v. Governing Board of the Marin Community College District*.[245] This case arose as a consequence of the American victory in the Persian Gulf War, after which President Bush proclaimed Friday through Sunday, April 5-7 as "National Days of Thanksgiving."[246] As part of its description of

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[239] *Id.*

[240] *See* People v. Belleci, 598 P.2d 473, 479 (Cal. 1979) (holding that Attorney General's absurd result argument fails against background of legislative intent which court has defined previously with resort to extrinsic legislative history).

[241] *See* FLEMING, *supra* note 160, at 116 (discussing problems of legislative intent).

[242] *See* Riggs v. Palmer, 22 N.E. 188, 189 (N.Y. 1889) (establishing that court should not apply plain meaning of statute where immoral result renders that meaning absurd).

[243] *See supra* Part III.B and accompanying notes (discussing situation in which legislation is ambiguous and degree of clarity courts should require before resorting to legislative history).

[244] *See* Eskridge, *supra* note 71, at 674 (noting that only ethical judges will produce benefits from harder plain meaning standard).

[245] 878 P.2d 1321 (Cal. 1994).

[246] Proclamation No. 6257, 56 Fed. Reg. 10353 (Mar. 7, 1991). President Bush declared:

> I, GEORGE BUSH, President of the United States of America, do hereby proclaim April 5-7, 1991, as National Days of Thanksgiving. I ask that Americans gather in homes and places of worship to give thanks to Almighty God for the

paid holidays, the California Education Code[247] provided a holiday for classified workers whenever the President "appointed" a "day of thanksgiving."[248] The California School Employees Association (CSEA) asked the Governing Board of the Marin Community College District (Board) to recognize the three days as paid holidays.[249] When the Board denied their request, the CSEA successfully petitioned for a writ of mandate, which the Board then appealed to the First District Court of Appeal.[250]

The Board pressed two basic, related arguments on the appellate court.[251] First, it maintained that presidential proclamations have become so common that they cannot be taken at face value.[252] Second, they contended that appointing a holiday is distinct from a presidential proclamation naming one.[253] The court approached the problem by initially examining the plain meaning of "appoint," a term not defined in the statutes.[254]

> liberation of Kuwait, for the blessings of peace and liberty, for our troops, our families, and our Nation. In addition, I direct that the flag of the United States be flown on all government buildings, I urge all Americans to display the flag, and I ask that bells across the country be set ringing . . . in celebration of the liberation of Kuwait and the end of hostilities in Persian Gulf.

Id.

[247] *See* CAL. EDUC. CODE § 88203 (West Supp. 1996).

[248] *See id.* (listing holiday entitlements of non-academic workers, including days United States President or State Governor appointed for public fast, thanksgiving, or holiday). The California Education Code contains some peculiarities with regard to section 79020, which the appellate court refers to as "something of a statutory fly preserved in the amber of section 88203." *See* California Sch. Employees Ass'n v. Marin Community College Dist., 19 Cal. Rptr. 2d 572, 573 (Ct. App. 1993), *rev'd*, 878 P.2d 1321 (Cal. 1994).

[249] *See California Sch. Employees*, 19 Cal. Rptr. 2d at 573 (setting forth school board's argument that three days should be paid holidays).

[250] *See id.*

[251] *See id.* at 573-74. The Board also maintained that the statute violated constitutional guarantees against establishment of religion, but the court found that the holidays were secular and without "ecclesiastical significance." *See id.* at 575.

[252] The Board complained that state employees would almost never go to work with the myriad of days of thanksgiving Presidents issue. *See id.* at 574. This is either deep ignorance or misrepresentation of how the law has actually worked over the last fifty years. *See* California Sch. Employees Ass'n v. Governing Bd., 878 P.2d 1321, 1335 (Cal. 1994) (stating that four proclamations in last fifty years would qualify as days of thanksgiving under California Education Code § 88203).

[253] *See California Sch. Employees*, 19 Cal. Rptr. 2d at 574 (proposing standard under § 88203 similar to executive order requirement for President to appoint federal holiday). The California Supreme Court later adopted this as a cornerstone of its decision. *See California Sch. Employees*, 878 P.2d at 1328.

[254] *See California Sch. Employees*, 19 Cal. Rptr. 2d at 574.

After turning to the dictionary, the court concluded that appointing means to designate, that a designation may be accomplished by a proclamation, and that the California Supreme Court has already implicitly so held in *Laubisch v. Roberdo*.[255]

The court then did an *in pari materia* analysis of other statutes and discovered another code section expressly referring to a "proclamation appointing or declaring [a] special or limited holiday."[256] Based on this observation, the court ruled that the Gulf War proclamation resulted in a holiday.[257] Potential overuse of the presidential power, incorporated by reference in the Education Code, was simply a policy argument for withdrawing that incorporation.[258] The court stated that this type of argument should be directed to the Legislature.[259] Courts are unable, based on such arguments, to justify not enforcing clearly worded statutes.[260]

Unfortunately, the majority of the California Supreme Court could not muster the same commitment to democratic principles, and reversed.[261] Chief Justice Lucas began the majority opinion by invoking the legislative intent standard, supported by the example of another recent decision which ignored plain meaning, *People v. Pieters*.[262] He paid brief homage to *Halbert's*

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[255] 277 P.2d 9 (Cal. 1954). *Laubisch v. Roberdo* dealt with the effect on the statute of limitations of holidays proclaimed at the end of World War II. *See id.* at 13-14. The facts are complicated, but in essence the court held that a presidential proclamation for a day of mourning on the death of President Roosevelt was a holiday for the purpose of reimbursing wages to employees who did not work that day. *See id.*

[256] *See* CAL. GOV'T CODE § 6705 (West 1995).

[257] *See California Sch. Employees*, 19 Cal. Rptr. 2d at 573-74. The court later notes that Bush's proclamation is consistent with those that followed the War of 1812, the Civil War, and World War I. *See id.* at 575.

[258] *See id.* at 574. This problem parallels that in *Unzueta v. Ocean View Sch. Dist.*, 8 Cal. Rptr. 2d 614 (Ct. App. 1992). *See supra* notes 136-73 and accompanying text (depicting problems of applying plain meaning of statute).

[259] *California Sch. Employees*, 19 Cal. Rptr. 2d at 574.

[260] *See id.*

[261] *See* California Sch. Employees Ass'n v. Governing Bd. of the Marin Community College Dist., 878 P.2d 1321, 1331 (Cal. 1994).

[262] 802 P.2d 420 (Cal. 1991). Like the instant case, the majority in *Pieters*, led by Lucas, disposed of the plain meaning of the language through the absurdity rule. *See id.* at 422. The court was construing the effect of sentence enhancements for possession of large quantities of cocaine or heroin. *See id.* at 422. These statutory provisions conflicted with a more general law which limits sentence enhancements to double the base term for the

and its emphasis on the plain meaning of the statute, that which has survived the legislative process.[263] Finding the language clear and unambiguous, and discounting, as the lower courts had, the difference between "proclaim" and "appoint," the opinion shifted to search for inferences of intent.[264]

The majority's fabrication of legislative intent to mask the lawlessness of its own decision is insidious.[265] Initially, the majority simply projected its views by saying it was "doubtful" the Legislature intended that such a "fine semantic distinction" would trigger a holiday.[266] Three paragraphs later, it notes that it will soon explain how the "legislative purpose" (as yet unevidenced) would not be furthered by a literal interpretation, which would produce an "unintended" result.[267] In an uncharacteristically candid moment two paragraphs later, after reviewing the 140 year codification history, the majority conceded that the legislative history provided no suggestion of purpose.[268] In the next breath, however, it then purported to

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crime. *See id.* at 423. The defendant's base sentence was three years with a five year enhancement, violating the double base term limitation. *See id.* at 422-23. The court of appeal had declined to imply an exception where the Legislature had failed to do so, noting that an exception would intrude upon a legislative function. *See id.* at 424. Justice Lucas complains that this reasoning fails to give effect to the manifest intent of the Legislature, which is a clearly stated desire to punish more heavily serious drug dealers. *See id.* at 424-25. Assuming the reasoning fails to give effect to *part* of the enhancement statute, what about the intent of the double base term limitation?

The dissent maintains that the statute is not susceptible to statutory construction, as it is plain, and that, even assuming some ambiguity, the majority opinion violates a number of rules of statutory construction. *Id.* at 429 (Broussard, J., concurring and dissenting). The violated rules of construction are (1) *expressio unius est exclusio alterius* (where a general rule has specific exceptions, other exceptions are not to be implied); (2) ambiguity in criminal statutes should be resolved in favor of leniency; and (3) every statute is to be read with reference to the entire scheme of law and harmonized with the whole. *Id.* at 427. The majority opinion makes note of subsequent amendments to the base term limitation which exclude drug sentence enhancements from its provisions. *See id.* at 422, 425 n.5. However, this tells us nothing about the intent of the enacting Legislature.

[263] *See* Halbert's Lumber, Inc. v. Lucky Stores, Inc., 8 Cal. Rptr. 2d 298, 300 (Ct. App. 1992). Unfortunately, Justice Lucas's approach is far removed from that of *Halbert's* careful examination of a deeply ambiguous statute. *See supra* note 204 and accompanying text (explaining court's opinion in *Halbert's*).

[264] *California Sch. Employees*, 878 P.2d at 1325-26.

[265] *See California Sch. Employees*, 19 Cal. Rptr. 2d at 574 (noting that general disagreement with clear meaning of statute should be directed at Legislature).

[266] *California Sch. Employees*, 878 P.2d at 1325-26.

[267] *Id.* at 1327.

[268] *See id.* This conclusion is disingenuous as the codification history indicates a

discover a "probable purpose," namely that community college employees join the rest of the nation in a special holiday.[269]

After this softening up, the next paragraph delivered the knock-out blow. It is revealed that a literal reading of the statute, which is triggered by the "capricious" wording of the President's proclamation, leads to a result which the Legislature *could not have intended.*[270] The following paragraph recedes from this presumption, referring to the intent as "probable," and then "narrow."[271]

The purported discovery of this intent is inseparable from what the court characterized as the resulting absurdity.[272] The court cited a number of cases as support for avoiding plain meaning if it would frustrate the intended purpose of the legislation as a whole or cause an absurd result.[273] None of these

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continued desire to keep a relatively clear piece of language on the books, update it periodically, modernize and refine it.

[269] *Id.* The court's discovery will metamorphize into an examination of the President's intent.

[270] *See id.*

[271] *See id.* at 1328.

[272] *See California Sch. Employees*, 878 P.2d at 1334 (Kennard, J., dissenting). There was nothing absurd about such a proclamation at the end of the Vietnam War. *See id.* at 1334-35 & n.4. Perhaps the Gulf War itself was absurd, though one suspects the majority's concern really stemmed from the liberal number of days President Bush designated. As the dissent indicates, the majority's ultimate conclusion results in a standard that *none* of the presidential appointed days of thanksgiving from the last fifty years can meet. *See id.* at 1335.

[273] *See California Sch. Employees*, 878 P.2d 1327. The first case, *People v. Belleci*, 598 P.2d 473, 477-80 (Cal. 1979), does not even invoke the absurdity rule, and has extensive extrinsic legislative history to support its analysis. The next case in accord, *Wells Fargo Bank v. Superior Court*, 811 P.2d. 1025 (Cal. 1991), is a plain meaning case, as the court in *Unzueta* recognized. Unzueta v. Ocean View Sch. Dist., 8 Cal. Rptr. 614, 614 (Ct. App. 1992). Far from supporting the invocation of the absurdity exception, *Wells Fargo* advises against it: "Our function is not to judge the wisdom of statutes. Nor are we empowered to insert what a legislative body has omitted from its enactments." *Wells Fargo*, 811 P.2d at 1035 (citations omitted).

The third case is *People v. Broussard*, 856 P.2d 1134, 1136 (Cal. 1993), which actually does invoke the absurdity rule, but in a very different setting. In *Broussard*, the defendant maintained that victims of his crimes, who had suffered only economic injury, were not eligible for restitution. The defendant argued that the Government Code definition of a victim demanded that they suffer physical injury. *See id.* The California Legislature enacted the restitution legislation in response to Proposition 8 of 1982, which demanded restitution for all victims but did not alter the definition of victim. *See id.* at 281. In the face of significant extrinsic legislative history that the Legislature intended to effectuate the Proposition 8 mandate, the court ruled that the victims should recover. *See id.* at 281-84. Justice Panelli in dissent said the remedy for defective legislation lay with the Legislature,

cases are analogous, and one case does not even invoke the absurdity exception.[274] To make the creation of a holiday appear absurd, which the dissent correctly points out it is not,[275] the majority characterized the literal reading of the statute as a capricious "semantic lottery" in which the winning words "day of thanksgiving" appear.[276] While presidents have not, in fact, been capricious, does it really matter given how the statute reads?[277]

Intoxicated by quasi-legislative fiat, the majority devised a standard nowhere found in the statutes. As a threshold matter, the court found that the President must declare a corresponding federal holiday.[278] Beyond this, the President's language and tone in making the proclamation must demonstrate an intent to declare a national holiday.[279] This is consonant with the majority's analysis to this point. The President's words, and their interaction with the statute, are insignificant compared to an intent which the courts may postulate and then construe.

The dissenting opinion by Justice Kennard rightly took the majority to task for these various presumptions.[280] The majority's solution results in the substitution of a murky inquiry

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and that it was unseemly for the court to reach a desired status by disregarding express statutory language. *See id.* at 284 (Panelli, J., dissenting). The last case the *California School Employees* court invokes in this string is *Younger v. Superior Court*, 577 P.2d 1014 (Cal. 1978). *See supra* note 235 and accompanying text (stating court's holding that statute for destroying minor's records applied only after punishment had been completed because any other interpretation would lead to absurd result).

[274] *See Wells Fargo*, 811 P.2d at 1035.

[275] *California Sch. Employees*, 878 P.2d at 1334-38. In the last fifty years, only four presidential proclamations have designated a total of six days as days of thanksgiving, all days of the highest national character, such as the end of the Vietnam War and the return of the damaged Apollo 13 spacecraft. *See id.* at 1335 & n.4. (One might take issue with the Bicentennial Presidential Inaugural. *See id.*) The majority opinion insults those who served, including over three hundred California classified school employees, when calling their holiday a random and capricious act. *See id.* at 1335. Presidents have carefully avoided using the phrase "day of thanksgiving" for less exalted occasions. *See id.* at 1335.

[276] *Id.* at 1337. The law is full of "magic words," as any first year student studying future interests can attest.

[277] *See supra* note 248 and accompanying text (noting statute's peculiarities).

[278] *See California Sch. Employees*, 878 P.2d at 1328.

[279] *See id.* at 1328-29. Has the court turned into a sort of state-wide hall monitor, evaluating employee vacation passes?

[280] *See id.* at 1331 (Kennard, J., dissenting) (criticizing that majority misapplied statute and fabricated unfounded test for distinguishing between mere ceremonial commemoration day and paid holiday).

into the President's state of mind for the clear, objective criteria of the statute.[281] The outcome is uncertain and thus likely to lead to litigation.[282] Justice Kennard argued that the characterization of the President's proclamation as capricious is neither accurate nor respectful.[283] The designation of days of thanksgiving after the Gulf War was not a "capricious" act resulting from the "fortuitous choice of words" in a "semantic lottery."[284] Rather, it resulted from the President's discretionary act.[285]

The majority, according to Justice Kennard, has violated section 1858 of the Code of Civil Procedure by omitting what is present and inserting what is not.[286] Instead, it has fashioned a test in which no proclamation of a day of thanksgiving over the last fifty years would qualify. While the "mischief" of the decision may be limited because the case concerns only community college workers, the dissent recognized that statutory construction is one of the court's primary tasks.[287] The court, in substituting judgement for the unambiguous statutory language expressed by the Legislature, blurs the limiting principles of statutory construction.[288]

The majority opinion in *California School Employees Ass'n v. Governing Board of the Marin Community College District* abuses the absurdity exception. The decision subverts the clear language that had been applied in a variety of analogous situations and had survived intact for over 140 years. The anti-majoritarian character of the decision is obfuscated by an intentionalist argument which is made of whole cloth, and undercuts confidence in the law generally. The implication of the majority's position is

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[281] *See id.* Besides ignoring plain meaning, the decision cannot be reconciled with the earlier case of *Laubisch v. Roberdo*, 277 P.2d 9 (Cal. 1954).

[282] *See California Sch. Employees*, 878 P.2d at 1331 (Kennard, J., dissenting).

[283] *See id.*

[284] *Id.* at 1334 (Kennard, J., dissenting).

[285] *See id.*

[286] *See id.* at 1336 (Kennard, J., dissenting). As the dissent notes, the operative language in section 88203 of the California Education Code is the same as that used to trigger the annual Thanksgiving Day in section 6700 of the Government Code, and as a result creates two different standards of interpretation for the same language. *California Sch. Employees*, 878 P.2d at 1339. This result is inevitable unless the majority proposes that we no longer recognize Thanksgiving. *See id.* The Thanksgiving proclamations fail the majority test of declaring a federal holiday and calling for more than a ceremonial occasion. *See id.*

[287] *California Sch. Employees*, 878 P.2d at 1339.

[288] *See id.*

that statutory construction is an arbitrary task, and that a hypothesized intent can undermine the clearest of language.

In ignoring the separation of powers upon which our democracy is based, the majority sits as a super-legislature. The underlying message to lawyers and to the public is that the court stands ready to relegislate outcomes with which it does not agree. In contrast, the textual analysis employed by the dissent, and the appellate court prior to review, is analytically sound and principled.

In reading the text and its case law gloss, the dissent recognized that to follow the clear language is not to engage in a semantic lottery, but to act solemnly within our tripartite system of government. While the appellate courts of California are developing a significant body of law which approaches statutory construction from a sound textual basis, a majority of the California Supreme Court is not yet willing to follow suit.

CONCLUSION

Early in this century, many who argued against the plain meaning rule and for the use of extrinsic legislative intent evidence hoped that it would help control anti-majoritarian judicial activism.[289] History makes clear that poorly reasoned use of legislative history implicates many of the same concerns, and getting the genie back into the bottle is difficult.[290] An apologist for legislative history says language "never seems plain enough to forestall the hunt for enlightenment in the legislative context."[291] However, in California courts a practitioner flirts with disaster to presume this attitude.[292] As this Comment

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[289] *See, e.g.*, James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 891 (1930) (stating that statute's legislative history would provide enough to interpret it correctly).

[290] *See* Wald, *Legislative History Use by 1981 Supreme Court*, *supra* note 12, at 214-15 (suggesting that courts are not doing all they can to critically adhere to consistent and uniform rules for statutory construction). Wald asserts that "[i]t helps somewhat to understand how the process really works, and I do wish more law schools taught clerks how to interpret legislative history . . . but barring that millennium, I see no out but doing the same thing we are doing now, but perhaps more critically . . . ." *Id.*

[291] *Id.* at 216.

[292] *But see* Wells Fargo Bank v. Bank of Am., 38 Cal. Rptr. 2d 521, 527 (Ct. App. 1995) (describing legislative history as "murky arena for enlightenment").

demonstrates, the California courts are showing a greater respect for the plain meaning rule and greater critical insight in evaluating extrinsic evidence of legislative history. The "new textualism" — or whatever label one wishes to attach to it — is alive and well in local chambers.

Textualist conceptions of the plain meaning rule are not rooted in a primitive belief in the inherent meaning of words.[293] In statutory construction, the plain meaning rule is a function of basic constitutional principles that define and limit how legislatures may enact laws and how far the judicial branch may go in construing them. These laws govern communication, whether between the branches of government or between the government and the public.

The strength of this formalist concern is matched by the profound epistemological weaknesses of the philosophy that allows uncritical use of extrinsic legislative intent evidence. The difficulties that underlie the idea of intent — already a legal fiction — are compounded when extended to legislative bodies with elaborate rules of interaction. If a philosophy of reasonable cooperation within legislatures and between branches of government previously justified the unreflecting use of extrinsic legislative materials, such a philosophy is unrepresentative of the current epoch.

Furthermore, difficult questions of historical perspective follow every attempt to divine the presumed intent of a statute. While courts routinely address such difficult questions, the danger of primitive and naive beliefs are arguably as present with an uncertain group of legislative documents as with a statute. Finally, pragmatic problems of the cost and availability of legislative history, and the theoretic uncertainty it injects into the law, are very real.

Judge Easterbrook and others would interpret these criticisms to deny any place in the courtroom to extrinsic legislative history.[294] This Comment does not endorse this view, as neither the weaknesses of legislative history nor the strengths of the plain meaning rule are that absolute. As a practical matter, the courts are also far from adopting Judge Easterbrook's position.

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[293] *See supra* Part II (discussing benefits of heightened plain meaning standard).

[294] *See* Eskridge, *supra* note 71, at 646.

The clear trend, however, is towards a moderate brand of textualism, both in federal courts and in California.[295] The courts still routinely consider legislative history, but some are demanding that this material very clearly express an intent before that intent will trump the statutory text.[296] The virtues of textualism, however, will not be realized through merely embracing the rhetoric of the theory. The courts must act consistently with the spirit of textualism. This means that the courts must focus first on the statutory language and apply a clear and explicit analysis to it.

Constitutional principles, as well as an awareness of pragmatic legislative realities, should animate the analysis. When the courts do reach extrinsic evidence of legislative intent, they should read it with sophistication. Finally, courts should invoke the absurdity exception with the greatest of restraint.

The majority's argument in *California School Employees Ass'n v. Governing Board of the Marin Community College District* is seriously flawed in these respects. In ignoring the clear import of the text, its analysis obfuscates the nature of the search for intent. Having no extrinsic legislative history to draw upon, the court plays a verbal shell game to create an intent of its own. This self-created intent is the key justification for the wholesale judicial law-making which follows.

This decision undermines the basic principles of our government. It makes suspect the California Supreme Court's professions of commitment to plain meaning in any case. The Legislature should act to overrule the decision of the court or rewrite the law.

Despite the California Supreme Court's failure to act in a principled manner in this case, practitioners must take textualism seriously. The commitment of many courts to textualist ideas directly affects the kind of arguments attorneys may urge upon the courts. An argument that finds no support in the statutory language, whatever the legislative history may

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[295] *See supra* note 31 and accompanying text (discussing trend in California courts towards modern brand of textualism); *see generally* Eskridge, *supra* note 71 (discussing creation of new textualism and its roots in federal judicial system).

[296] *See* J.A. Jones Construction Co. v. Superior Court, 33 Cal. Rptr. 2d 206, 212 (Ct. App. 1994) (concluding that "wisest course" is to rely on legislative history only when it is unambiguous).

suggest, is likely to meet a deaf ear. Similarly, ambiguous legislative history, even if appropriately consulted, may not count for much.

Generally, textualist philosophy requires practitioners have a heightened awareness of the statute, related statutory provisions, rules of construction, and legislative process. Currently, law schools generally do not provide this awareness. Practitioners must, therefore, develop these skills or seek those who have them if they expect to anticipate, engage, and win the arguments that textualism will engender. Extrinsic evidence of legislative intent is not going to disappear — nor should it — but the rules governing its use are changing. The implications of the "new textualism" are a pragmatic reality for lawyers at all levels of our legal system.

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