Statutory Construction in Florida: In Search of a Principled Approach

Peter D. Webster
Sylvia H. Walbolt
Christine R. Davis

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"Nay, whoever hath an *absolute Authority* to *interpret* any written, or spoken Laws; it is *He*, who is truly the *Lawgiver*, to all Intents and Purposes; and not the Person who first wrote, or spoke them."[1]

I. INTRODUCTION

There is, perhaps, no more contentious task that judges perform than that of construing or, if you will, interpreting a statute.[2] There are also few that are more difficult. This is so for several reasons. Statutes are made up of words. Words are, by their nature, at best imprecise approximations of the ideas they are intended to convey.[3] A word al-

* Judge, Florida First District Court of Appeal, 1991-Present. B.S.F.S. magna cum laude, Georgetown University, 1971; J.D. with distinction, Duke University School of Law, 1974; LL.M., University of Virginia School of Law, 1995.

** Shareholder and Former Chair of the Board of Directors, Carlton Fields, P.A. B.A., University of Florida, 1961; J.D. with honors, University of Florida College of Law, 1963.

*** Associate, Carlton Fields, P.A. B.S., Florida State University, 1999; J.D., Florida State University College of Law, 2002.

1 Benjamin Hoadley, Lord Bishop of Winchester, The Nature of the Kingdom, or Church, of Christ (March 31, 1717), *in* SIXTEEN SERMONS 284, 291 (1754).

2 This is true, as well, of administrative regulations and procedural rules. *See, e.g.*, Rucker v. Wabash R.R. Co., 418 F.2d 146, 149 (7th Cir. 1969) ("Administrative regulations, like statutes, must be construed by courts, and the same rules of interpretation are applicable in both cases." (citing 2 J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4007 (3d ed. 1943))); Brown v. State, 715 So. 2d 241, 243 (Fla. 1998) ("Our courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules." (citing Syndicate Props. v. Hotel Floridian Co., 114 So. 441, 443 (Fla. 1927); Merchs.' Nat'l Bank v. Grunthal, 22 So. 685, 687 (Fla. 1897))).

3 *See, e.g.*, JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 163 (Gaunt Reprint 1999) (1909); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

most always has more than one meaning.[4] Moreover, statutes are often a group product, and the members of the group may not have shared the same understanding regarding the words used.[5] If all of this were not enough, legislative bodies frequently draft statutes using general, rather than specific, language because they cannot agree on the full reach of the statute or, even if they can, they wish to leave room for interpretive growth in order to cover those potential future situations that cannot be clearly foreseen.[6]

Harvard Law School professor John Chipman Gray recognized all of this roughly a century ago. In his Carpenter Lectures on the nature and sources of the law delivered at Columbia University in 1908, Gray said:

> Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.[7]

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[4] *See, e.g.*, Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417 (1899).

[5] *See, e.g.*, Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 522 (1948); *see also* United Steelworkers of Am. v. Weber, 443 U.S. 193, 217 (1979) (Burger, C.J., dissenting) ("Often we have difficulty interpreting statutes either because of imprecise drafting or because legislative compromises have produced genuine ambiguities.").

[6] *See* Levi, *supra* note 5, at 520-22.

[7] GRAY, *supra* note 3, at 172-73.

Gray was fond of quoting the excerpt which appears at the beginning of this article from Bishop Hoadly's 1717 sermon on The Nature of the Kingdom or Church of Christ,[8] because he understood that excerpt perfectly described what occurs when judges are called upon to construe statutes. "[S]tatutes do not interpret themselves; their meaning is declared by the courts, and *it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law*."[9] In other words, he recognized that when they construe statutes, by that very act, courts frequently make, rather than merely interpret, law.[10]

Judge Cardozo also recognized this fact. In his Storrs Lectures on the nature of the judicial process delivered at Yale University in 1921, Judge Cardozo said:

> [C]odes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more.[11]

So too, with Justice Holmes who said, "that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[12]

It is fashionable in some circles today to speak with disdain of judges who make, rather than merely interpret, the law, as if this were some sort of modern phenomenon that is antithetical to the democratic principles on which our nation is built and, therefore, must be stopped.

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[8] *See id.* at 172.

[9] *Id.* at 170 (emphasis added).

[10] *See id.* at 172.

[11] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 14 (1st ed. 1921).

[12] S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

Judicial lawmaking is not, however, a recent phenomenon. In our legal system, judges have been making law for some 500 years. All of our common law—the law of contracts, torts, trusts and estates, and so on—was made by judges.[13]

Of course, this is not to suggest that judges ought simply to substitute their conceptions of fairness and justice for those of the popularly elected Legislature. While the area of legitimate judicial lawmaking may be considerable, it is not unlimited. Although Justice Holmes understood that the gap-filling performed by judges when construing statutes was legitimate, he also insisted that it must be severely constrained. He "steadfastly insisted that the Supreme Court must not sit as a superlegislature and that unelected justices must not substitute their views for the judgments of the people's elected representatives."[14]

Justice Frankfurter was of a similar mind. He said that courts

> are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. . . . [T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it.[15]

So, too, when speaking of statutory construction, Judge Learned Hand said that:

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[13] Two relatively recent examples of this common law judicial lawmaking may be seen in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970), where the Court held that a cause of action for wrongful death ought to be recognized under general maritime law; and *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973), where the court held that comparative negligence ought to replace contributory negligence as a defense in common law negligence cases.

[14] MARY ANN GLENDON, A NATION UNDER LAWYERS 120 (1994).

[15] Frankfurter, *supra* note 3, at 533.

> [T]he judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.[16]

As Judge Hand expressed it:

> [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. Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves. And so, while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties.[17]

In other words, the act of statutory construction is an art.[18] Some judges perform it with more talent than others.

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[16] Learned Hand, How Far Is a Judge Free in Rendering a Decision?, (CBS radio broadcast May 14, 1933), *in* THE SPIRIT OF LIBERTY, PAPERS AND ADDRESSES OF LEARNED HAND 109 (Irving Dillard ed., 1st ed. 1952).

[17] *Id.* at 109-10; *see also* LORD DENNING, THE DISCIPLINE OF LAW 12 (1979) ("A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.").

[18] *See* GRAY, *supra* note 3, at 177-78; Frankfurter, *supra* note 3, at 530.

The true nature of statutory construction was not a matter of great concern as long as it remained a relatively small part of the work that judges did. In 1923, Judge Cardozo was able to say that statutory law made up only the *smaller part* of our law.[19] At that time, as Judge Cardozo explained, "in the everyday transactions of life the average man is governed, not by statute, but by common law, or at most by statute built upon a substratum of common law, modifying, in details only, the common law foundation."[20] During the twentieth-century, however, the courts of America which had, on the whole, been primarily concerned with the common law, were transformed into courts which spent a great deal (and in many cases a majority) of their time construing legislation of one sort or another.[21] Notwithstanding the dramatically increased importance of this task, statutory construction has no generally accepted approach.[22] Instead, a great many approaches exist, and are used by the courts.[23] The inevitable result has been a reduc-

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[19] BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 135-36 (1st ed. 1924). *See id.* at "Introductory Note" (explaining the collected works were originally given as a series of lectures at Yale University Law School in December 1923).

[20] *Id.* at 136.

[21] Thus, in 1947, Justice Frankfurter was able to observe that:

> as late as 1875 more than 40% of the controversies before the [Supreme] Court were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero. It is therefore accurate to say that courts have ceased to be the primary makers of law in the sense in which they "legislated" the common law.

Frankfurter, *supra* note 3, at 527.

[22] Even the members of the United States Supreme Court are unable to agree on an approach to statutory construction. *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16 (Amy Gutmann ed., 1998), with STEVEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85 (2006). The various opinions regarding the proper interpretation of the Federal Impact Aid Act found in *Zuni Public School District No. 89 v. Department of Education*, 127 S. Ct. 1534 (2007), also vividly demonstrate this fact. *Compare* Zuni, 127 S. Ct. at 1541 (Breyer, J.) ("Considerations other than language provide us with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us and that the Secretary's chosen method is a reasonable one.") *with Id.* at 1552, (Scalia, J., dissenting) ("This Court . . . confronts technical language all the time, but we never see fit to pronounce upon what we think Congress *meant* a statute to say, and what we think sound policy would *counsel* it to say, before considering what it *does* say.").

[23] *See* Frankfurter, *supra* note 3, at 529-33 (discussing the approaches different judges take).

tion in outcome predictability in cases that turn on the construction of a statute.

Although the struggle courts engage in when construing a statute has taken on greatly increased importance in the last one hundred years, the problems posed by that exercise have been around for much longer.[24] One of the earliest approaches to statutory construction comes from a sixteenth-century English case, and has come to be known as the "mischief rule."[25] As reported by Lord Coke in *Heydon's Case*:

> [I]t was resolved by [the Barons of the Exchequer], that for the sure and true [ ] interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered: [ ]
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> [ ] 1st. What was the common law before the making of the Act.
>
> [ ] 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
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> [ ] 4th. The true reason of the remedy; and then the office of all the Judges is always to make such [ ] construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.[26]

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[24] *See generally* Heydon's Case, 76 Eng. Rep. 637, 638 (Exch. 1584) (discussing what needs to be considered when interpreting statutes).

[25] *See* Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. CAL. L. REV. 299, 315 (2007) ("We suggest that each policy statement follow the outline of the Mischief Rule set out in Heydon's Case, one of the classic statutory interpretation cases.") (footnote omitted).

[26] 76 Eng. Rep. at 638.

The mischief rule focused on the purpose or intent of Parliament, as the author of the legislation.[27] The present-day approaches to statutory construction generally referred to as "purposivism"[28] and "intentionalism"[29] continue this focus on the purpose or intent of the author (or authors) of the legislation.[30]

Other approaches, however, focus primarily on the text, rather than purpose or intent. One of the first to do so is generally referred to as the "golden rule."[31] Although there are several versions of the golden rule, all emphasize the need "to adhere to the ordinary meaning

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[27] *See generally id.*

[28] *See, e.g.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as a Practical Reasoning*, 42 STAN. L. REV. 321, 332 (1990); see also Frankfurter, *supra* note 3, at 538-39 ("Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate . . . ."); Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 817-19 (1983) (describing his approach to statutory construction "as one of imaginative reconstruction," that "has obvious affinities with the 'attribution of purpose' approach . . . , the antecedents of which go back almost 400 years [to Heydon's Case.]").

[29] *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) (explaining that the duty of courts is to ensure that the legislature's intent is carried out, regardless of whether that intent may appear to be at odds with the literal language of the statute); *see also* Eskridge, *supra* note 28 at 325.

[30] While purposivism and intentionalism have much in common, they are not identical. One commentator has attempted to explain the differences between the two with the following: "[I]n general legal usage the word 'intent' coincides with the particular immediate purpose that the statute is intended to directly express and immediately accomplish, whereas the word 'purpose' refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish." FREDERICK REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 88 (1975). *See also* RUGGERO J. ALDISERT, THE JUDICIAL PROCESS 236 (2d ed. 1996) ("Intentionalism focuses on the individual author or authors' meaning which is given to statutory language; purposivism determines the goals of the statute as they are defined by the factual scenarios in which the statute is applied.").

[31] *See* River Wear Comm'rs v. Adamson, 2 App. Cas. 743, 764-65 (H.L. 1877) ("[The golden rule requires taking] the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification.").

of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance . . . ."[32]

Perhaps the most text-focused approach is that frequently referred to as "literalism."[33] Literalism mandates that a statute be enforced, even if to do so will produce an absurd result.[34] Lord Bramwell expressed the literalist position in the House of Lords in 1884 when he said:

> "I think it infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to alter those words according to one's notion of an absurdity."[35]

A variant of literalism is known as "plain meaning."[36] The United States Supreme Court used this approach (which, in general, shuns recourse to legislative history) in an early case, saying:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing

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[32] Becke v. Smith, 150 Eng. Rep 724, 726 (Ex. 1836); *see also River Wear Comm'rs*, 2 App. Cas. at 764-65.

[33] *See* Cass R. Sunstein, Is Tobacco a Drug? *Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1017 (1998) ("[Literalism] stresses the need to interpret statutory terms in accordance with their ordinary, plain meaning to speakers of English.").

[34] *Id.* at 1017-18 ("[B]y wrenching statutory terms out of their context, [literalism] may well lead to understandings of statutory terms that are quite different from those of the enacting Congress and may, in that sense, produce significant mistakes.").

[35] Hill v. E. & W. India Dock Co., 9 App. Cas. 448, 464-65 (H.L. 1884); *see also* Chung Fook v. White, 264 U.S. 443, 446 (1924) ("The words of the statute being clear, if it unjustly discriminates . . . or is cruel and inhuman in its results, . . . the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional.").

[36] *See* Eskridge, *supra* note 28 at 340 (discussing textualism).

> amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used . . . .[37]

Proponents of the plain meaning approach will, however, resort to legislative history when construction of the words as written would lead to an absurd result.[38] This plain meaning approach lives on in what has today come to be referred to as "textualism."[39] Perhaps the most well-known proponent of this approach is Justice Scalia.[40]

Then there also are the linguistic[41] and substantive[42] canons of construction. Commentators have long criticized these canons as of

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[37] Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).

[38] *See, e.g.,* United States v. Mo. Pac. R.R., 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear, and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended."); *see also* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980))).

[39] *See* Eskridge, *supra* note 28, at 340.

[40] *See, e.g.,* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1559 (2007) (Scalia, J., dissenting) ("The only sure indication of what Congress intended is what Congress enacted . . . . We must interpret the law as Congress has written it, not as we would wish it to be."); Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring in the judgment) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it.").

[41] *See, e.g.,* Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996) ("Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." (citing Bergh v. Stephens, 175 So. 2d 787, 790 (Fla. Dist. Ct. App. 1965), *overruled on other grounds by* Akey v. Murphy, 238 So. 2d 94, 95 (Fla. 1970))).

[42] *See, e.g.,* Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977) ("'Statutes in derogation of the common law are to be construed strictly . . . .'" (quoting 30 Fla. Jur. Statute §130 (1977))).

only limited utility,[43] or worse.[44] Such criticism notwithstanding, the canons of construction continue to enjoy respect in most courts.[45]

Part II of this article will examine whether the Florida Supreme Court is approaching statutory construction in a consistent manner. In Part III, we shall examine whether constitutional separation of powers considerations create a boundary beyond which courts should not venture when construing statutes. Finally, in Part IV, we shall propose what we believe might be a more principled approach to statutory construction, which would result in greater outcome predictability in cases that turn on statutory construction.

II. Statutory Construction by the Florida Supreme Court in the Twenty-First Century

In 1892, Florida's statute books had thirty-four chapters. In 2006, there were 1013 chapters governing virtually every aspect of commercial enterprise and personal conduct in the State of Florida. The

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[43] *See, e.g.,* Frankfurter, *supra* note 3, at 544 ("[While] [s]uch canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, . . . [they] are not in any true sense rules of law. So far as valid, they are what Mr. Justice Holmes called them, axioms of experience." (citing Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928))); 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 (1950) (asserting that the canons of construction are of only limited utility because "there are two opposing canons on almost every point.").

[44] *See, e.g.,* Posner, *supra* note 28, at 806 ("I [ ] think that most of the canons are just plain wrong").

[45] *See, e.g.,* Ayes v. U.S. Dep't of Veterans Affairs, 473 F.3d 104, 108 (4th Cir. 2006) (applying the *ejusdem generis*, or "of the same kind," canon of construction); In re Globe Bldg. Materials, Inc., 463 F.3d 631, 635 (7th Cir. 2006) (applying the *expressio unius est exclusio alterius* canon of construction); Boyle v. Quest Diagnostics, Inc., 441 F. Supp. 2d 665, 670 (D. N.J. 2006) (referring with approval to several canons of construction); Koile v. State, 934 So. 2d 1226, 1231 (Fla. 2006) ("[I]f the statutory intent is unclear from the plain language of the statute, then 'we apply rules of statutory construction and explore legislative history to determine legislative intent.'" (quoting BellSouth Telecomms., Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003))); State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So. 2d 1067, 1073 (Fla. 2006) ("[T]he 'long-recognized principle of statutory construction [is] that where two statutory provisions are in conflict, the specific statute controls over the general statute'" (quoting State v. J.M., 824 So. 2d 105, 112 (Fla. 2002))); *see also* discussion of techniques of statutory construction *infra* Part II.

courts in Florida have been called upon to interpret these statutes in thousands of cases. Since the year 2000 alone, the Florida Supreme Court has rendered more than 250 decisions construing a Florida statute.[46] Many of those decisions arose as a result of a certified question or a conflict in decisions of Florida district courts of appeal. Such lack of certainty among the judiciary as to the proper construction of the statutes at issue, in itself, demonstrates the difficulty of this judicial function.

Indeed, even the supreme court can be split sharply as to the proper reading of a statute. At least sixty-five of its statutory construction decisions rendered this century had dissents. As we shall see later in this article, the dissent often highlights the inconsistency of the court's approach to judicial interpretation of statutes, and especially the inconsistent application of canons of statutory construction.

A. The Polestar of Statutory Construction–Legislative Intent

The most common beginning of supreme court decisions construing Florida statutes is the pronouncement that "legislative intent is the 'polestar' that guides" interpretation.[47] To effectuate the intent of the Legislature, courts are supposed to look first to the "plain meaning" of the statutory language.[48]

Even when the court is convinced the Legislature really meant and intended something not expressed in the statute, the court has declared "it will not deem itself authorized to depart from the plain meaning of the [statutory] language which is free from ambiguity."[49] The dissenting justice in *State v. Ruiz* protested that a plain meaning analysis

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[46] *See generally* LexisNexis, http://www.lexis.com (last visited Mar. 26, 2008) (commercial electronic database requiring registration); Westlaw, http://www.westlaw.com (last visited Mar. 26, 2008) (commercial electronic database requiring registration).

[47] *See, e.g.,* Borden v. East-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006); *see also* Maggio v. Fla. Dep't of Labor & Employee Sec., 899 So. 2d 1074, 1076 (Fla. 2005). The "polestar" guide was referenced by the court more than 35 times between the beginning of the year 2000 and July 1, 2007. *See generally* LexisNexis, *supra* note 46.

[48] Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 5 (Fla. 2004).

[49] State v. Ruiz, 863 So. 2d 1205, 1209 (Fla. 2003).

does not allow the court to "disregard the plain intent of the Legislature in enacting a statute."[50] The court agreed in *Maddox v. State*, over the dissent, declaring that if, when all the terms of a statute are read together, "the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature."[51]

Where the language is unambiguous, the court says it will not resort to canons of statutory construction.[52] Nor, says the court, will it look to legislative history.[53] Yet, as we shall see, the court has done both over the years to justify particular statutory constructions. In short, the rubric of "legislative intent" is in reality nothing more than the starting and ending point for the court's analysis. A host of hoary rules of statutory construction can be used to justify one reading of a statute over a contrary reading, all in the name of faithful obedience to legislative intent.

B. Competing Canons of Statutory Construction

Certain fundamental canons of statutory construction are applied by Florida courts on a frequent basis. For example, a statute should be given a constitutional construction where reasonably possible.[54] "[P]enal statutes must be strictly construed according to their letter. . . . [And] any ambiguity . . . must be resolved in favor of the person charged with an offense."[55]

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[50] *Id.* at 1214 (Wells, J., dissenting).

[51] 923 So. 2d 442, 445-46 (Fla. 2006) (quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992)).

[52] *Id.* at 445; *see also* Blanton v. City of Pinellas Park, 887 So. 2d 1224, 1230 (Fla. 2004).

[53] *Knowles*, 898 So. 2d at 10.

[54] *See* Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 929 (Fla. 2005) ("[I]t is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional."); *see also* State v. Mitchell, 652 So. 2d 473, 476 (Fla. Dist. Ct. App. 1995).

[55] State v. Byars, 823 So. 2d 740, 742 (Fla. 2002) (quoting Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991).

But even fundamental rules can be applied in different ways to reach different results. For example, "a statute enacted in derogation of the common law must be strictly construed . . . ."[56] On the other hand,

> [w]hen a statute is both in derogation of the common law and remedial in nature, the rule of strict construction should not be applied so as to frustrate the legislative intent. . . . [Rather, it] [ ] should be construed liberally . . . [so as to give effect to the legislative intent].[57]

Since almost any statute can be deemed to be remedial—it obviously was enacted to fix some problem the legislature perceived—the exception can swallow the whole, depending on the court's view of the result it needs to reach.

Another exception that has been applied to the elemental rule is that the court must apply a statute's "plain language." The court refuses to do so when that could lead to "an unreasonable or ridiculous" result.[58] But, as the dissent in *Maddox* pointedly observed, this exception can create separation of powers issues if the court is substituting its judgment for what the legislature specifically said was the law.[59] Other rules are more technical, but also can be selected to reach a particular result. Rules such as *noscitur a sociis*[60] and *ejusdem generis*[61] can be applied to derive legislative intent.[62] The dictionary can be used.[63]

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[56] Major League Baseball v. Morsani, 790 So. 2d 1071, 1077-78 (Fla. 2001); *see also* Campbell v. Goldman, 959 So. 2d 223, 227 (Fla. 2007).

[57] Irven v. Dep't of Health & Rehab. Servs., 790 So. 2d 403, 406 (Fla. 2001).

[58] Maddox v. State, 923 So. 2d 442, 446 (Fla. 2006) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)).

[59] *Id.* at 452 (Cantero, J., dissenting).

[60] "It is known by its associates" – a rule of statutory construction explaining that the meaning of an unclear word or phrase can be determined by the surrounding words. BLACK'S LAW DICTIONARY 1087 (8th ed. 2004).

[61] "Of the same kind or class" – a rule of statutory construction that holds that when a general word or phrase follows a list of specific persons or things, the general word or phrase is interpreted to include only persons or things of the same type as included in the specific list. *Id.* at 556.

[62] *See* Nehme v. Smithkline Beecham Clinical Labs., Inc., 863 So. 2d 201, 205 (Fla. 2003).

Grammar can be parsed,[64] as can titles and section headings.[65] In at least one decision, "the Preface to the Florida Statutes explain[ing] the hierarchical numbering system of the Florida Statutes" was used.[66]

The point is, the selection of a particular canon of construction can (and often does) control the result. Very often—as a dissent sometimes forcibly points out—there are competing, equally valid rules of construction that would lead to the completely opposite result. This tension is well seen through the lens of nine split decisions of the court and a unanimous decision disapproving the decisions of three district courts in conflict with a fourth district court.

The cases reviewed in this section reflect the all-encompassing nature of Florida's governing statutes, from a statute defining the crime of burglary to one establishing a bill of rights for nursing home residents, from laws regarding payment provisions of surety bonds on public works contracts, to a law dealing with sexual predators. They also illustrate the clash of competing views and diverse interpretations of statutory language by different justices of the court. They show that judges, while proclaiming allegiance to the same principles of statutory construction, reach conclusions about legislative intent that cannot be reconciled.

1. *Knowles v. Beverly Enterprises—Florida, Inc.*

It took the Florida Supreme Court four years to determine that the statute at issue in *Knowles v. Beverly Enterprises—Florida, Inc.*,[67]

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[63] *Id.*; *see also* Am. Home Assurance Co. v. Plaza Materials Corp., 908 So. 2d 360, 373 (Fla. 2005) (Cantero, J., concurring in part and dissenting in part) (using a dictionary to ascertain meaning).

[64] *See* State v. Huggins, 802 So. 2d 276, 279 (Fla. 2001) (Wells, C.J., dissenting) ("I find that the Legislature intended, by its deliberate use of the word 'or,' to have the [burglary] statute apply both to a dwelling, whether occupied or not, *or* to an occupied structure. Under this statute, 'occupied' modifies 'structure,' not 'dwelling.'").

[65] *See* Aramark Unif. & Career Apparel, Inc., v. Easton, 894 So. 2d 20, 25 (Fla. 2004) ("[I]n determining legislative intent, we must give due weight and effect to the title of the section."); *see also* Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003) (explaining that a statute must be considered as a whole).

[66] *See* Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1232 (Fla. 2006).

[67] 898 So. 2d 1 (Fla. 2004).

was clear and unambiguous. The personal representative of the petitioner's deceased husband's estate sued the defendant nursing home under section 400.023(1) of *Florida's Bill of Rights for Nursing Home Residents*.[68] Section 400.012(1) authorizes personal representatives to bring an action against a state licensed nursing facility for the death of residents, "when the cause of death resulted from the deprivation or infringement of the decedent's rights."[69]

The petitioner conceded that her husband's "death did not result from any of the alleged violations of [his statutory rights]."[70] She advanced a multifaceted argument, however, that the legislative intent was not to limit a personal representative's right to sue under this statute.[71] Four years after the issue was certified to it, the supreme court rejected those arguments and held there was no statutory cause of action where the death was not caused by a statutory violation.[72] The court noted that the personal representative still had a common law negligence action available to her.[73] Query whether the court would have construed the statute in the same nonremedial way had there been no other available remedy?

The court's analysis began with citations to statutory construction rules[74] that we will see throughout this article.

> It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis. . . . In determining that intent, we have explained that "we look first to the statute's plain meaning." . . . Normally, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning."[75]

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[68] *Id.* at 2-3.
[69] *Id.* at 3 (quoting FLA. STAT. § 400.023(1) (1997)) (emphasis omitted).
[70] *Id.*
[71] *Id.* at 7.
[72] *Id.* at 6.
[73] *Id.* at 9.
[74] *See id.* at 5.
[75] *Id.*

The supreme court rejected the petitioner's argument that because the statute was remedial in nature, it should be liberally construed to allow a personal representative to bring an action for violations of the statute, even though the death did not result from such violations.[76] The court concluded, "such an interpretation would alter the . . . unambiguous language of [the statute, because it would add] a different circumstance [under] which suit [could] be brought . . . ."[77] Although the court acknowledged that a remedial statute "should be liberally construed to preserve and promote access to the remedy intended by the Legislature,"[78] it further declared that "[t]he law is well settled that courts in this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or *limit*, its express terms or its *reasonable and obvious implications*.' "[79]

The court also rejected the petitioner's assertion that the construction given to the statute by the lower courts would render the statute meaningless when considered with other related statutes.[80] The petitioner argued that "where it is possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another."[81] The supreme court held, however, that the provisions in the statute relating to deposited funds and other monies were not inconsistent with the provision at issue.[82]

The court further stated that section 400.023(1), a specific statute, did not conflict with Florida's Survival Statute, a general statute.[83] "It is true," said the court, "that courts must presume that the Legislature passes statutes with the knowledge of prior existing statutes and that 'the legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law

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[76] *Id.* at 7.

[77] *Id.*

[78] *Id.* (quoting Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)).

[79] *Id.* (quoting Am. Bankers Life Assurance Co. of Fla. v. Williams, 212 So. 2d 777, 778 (Fla. Dist. Ct. App. 1968)) (emphasis added).

[80] *Id.* at 8.

[81] *Id.* (emphasis added).

[82] *Id.*

[83] *See id.* at 9-10.

without expressing an intention to do so.'"[84] The duty of the court is to "[w]here possible . . . adopt that construction of a statutory provision which harmonizes and reconciles it with *other provisions of the same act*."[85] But, "[t]here must be a hopeless inconsistency before rules of construction are applied to defeat the plain language of one of the statutes."[86]

In the end, the court held that the "Legislature had the authority both to determine the extent of the statutory right and to prescribe or limit the remedies available for a violation of the right."[87] The language of the statute was clear and unambiguous, and "the rules of statutory construction are the means by which courts seek to determine legislative intent only when that intent is not plain and obvious enough to be conclusive."[88]

Three justices joined in Justice Cantero's concurring opinion rebutting the dissent's position that "to justify its conclusion, the majority adds language to the statute."[89] According to the concurring justices:

> [B]ecause the language of the statute is clear and unambiguous, the analysis must end there. While this may seem simplistic, it is nevertheless what is required; we have no prerogative to do otherwise. "[T]he legislature is assumed to have expressed its intent through the words found in a statute. Thus, "[i]f the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." In other words, not only do we not need to resort to legislative history, as the dissent does, to understand this plain meaning; we *cannot* do so.

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[84] *Id.* at 9 (quoting Woodgate Dev. Corp. v. Hamilton Inv. Trust, 351 So. 2d 14, 16 (Fla. 1977)).

[85] *Id.* (quoting Woodgate, 351 So. 2d at 16) (emphasis added).

[86] *Id.* (quoting Agency for Healthcare Admin. v. Estate of Johnson, 743 So. 2d 83, 87 (Fla. Dist. Ct. App. 1999)).

[87] *Id.*

[88] *Id.* at 10.

[89] *Id.* at 11 (Cantero, J., concurring).

. . . .

> The majority is mindful that "[w]e are not at liberty to add words to statutes that were not placed there by the Legislature." To construe the statute to allow a personal representative to sue regardless of whether "the cause of death resulted from the deprivation or infringement of the decedent's rights" would judicially delete the entire limiting phrase from the statute. But "[w]e are compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful. Statutory interpretations that render statutory provisions superfluous are, and should be, disfavored."[90]

The concurring justices also addressed the dissent's assertion "that the case before us represents an 'unintended consequence of the specific language chosen for the amending legislation' and thus we must resort to legislative history."[91] They pointed out that "the Legislature is presumed to know the meaning of the words it chooses. Thus, where statutory language is unambiguous, we cannot use legislative history to contradict it."[92]

In contrast, Justice Lewis' dissent focused on "the historical formation and development" of the statute itself.[93] The dissent charged that "both the majority and concurring views fail to acknowledge, or even consider, that reference to matters extrinsic to the particular words of a statute is *not* limited to only when the language of a statute is itself ambiguous or unclear."[94] Instead, the court previously explained that "[a] law should be construed together with any other law relating to the same purpose such that they are in harmony. Courts should avoid a construction which places in conflict statutes which cover the same general field. The law favors a rational, sensible construction."[95]

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[90] *Id.* at 11-13 (citations omitted) (emphasis added).

[91] *Id.* at 14 (citation omitted).

[92] *Id.*

[93] *Id.* (Lewis, J., dissenting).

[94] *Id.* at 19 (emphasis added).

[95] *Id.*

The dissent pointed to the fact that "multiple appellate panels" had construed the statute differently, requiring "the gathering of all possible information to ascertain the Legislature's original intent . . . ."[96] In the end, the dissent found the court's construction absurd and contrary to the legislative intent.[97]

The issue of reliance on legislative acts passed at subsequent sessions to determine legislative intent in a prior act was revisited by the supreme court in *Dadeland Depot, Inc. v. St. Paul Fire & Marine Insurance Co*.[98] The majority noted that "this tool of statutory construction was called into question somewhat by our opinion in *Knowles* . . . ."[99] The dissent (Justices Wells and Bell, both of whom were in the majority in *Knowles*) retorted that "*Knowles* was very different from the present case because a majority of the Court in *Knowles* concluded that the statutory language was clear and unambiguous, and that legislative intent had to be derived from the words used in the statute itself."[100] Pointing out that the majority did not suggest that the statute in this case was clear and unambiguous, the dissent distinguished *Knowles* and urged the need for construction and consideration of legislative history that was absent in *Knowles*.[101] Stating further that the Legislature "has now clarified" the meaning of the statute, the dissent deemed it "only reasonable to . . . accept this clarification."[102] As Justice Wells put it, "[w]e are dealing with a statutory cause of action, and looking to this timely legislative action is a recognized tool of statutory construction."[103]

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96 *Id.* at 20.

97 *See id.* at 21.

98 945 So. 2d 1216 (Fla. 2006).

99 *Id.* at 1230.

100 *Id.* at 1241 (Wells, J., dissenting).

101 *See id.* at 1241-42.

102 *Id.* at 1242.

103 *Id.* As a pure, but interesting, side note to the issue of reliance on legislative history, Justice Wells, with Justice Quince, previously had dissented from the court's decision to grant a petition for mandamus by directly relying on legislative history on an issue of statutory interpretation. *See* Schmidt v. Crusoe, 878 So. 2d 361, 368 (Fla. 2003) (Wells, J., dissenting) ("Legislative history of a statute is obviously not germane to the enforcement of a clear legal right by mandamus. Resorting to legislative history is a tool of statutory construction.").

2. *Delgado v. State*

It is unusual for dissenting judges to appeal directly to the Legislature when they disagree with the majority's interpretation of a statute,[104] but this four to three decision caused the dissenting judges to do exactly that.[105]

In *Delgado v. State*,[106] the defendant was convicted of first degree murder and armed burglary.[107] The murder was committed during the alleged burglary.[108] Section 810.02(1) of the *Florida Statutes*, provided that burglary "means entering or remaining in a structure . . . with the intent to commit an offense therein, *unless . . . the defendant is licensed or invited to enter or remain*."[109] The defendant contended he had been invited into the victim's house in the first place and that the State accordingly failed to satisfy its burden of proving an essential element of the crime of burglary.[110] Following his convictions of first degree murder and sentences of death, the defendant appealed to the supreme court.[111]

The court reversed by a per curiam, revised opinion, holding that the phrase *remaining in* in Florida's burglary statute "applies only in situations where the remaining in was done surreptitiously."[112] Addressing the Third District's reasoning in *Ray v. State*,[113] that after consent is withdrawn a person can be convicted for burglary,[114] the supreme court in *Delgado* disagreed and abrogated *Ray*.[115] The court explained that, while the Third District's reasoning correctly gave "meaning to the phrase 'remaining in,'" it "effectively wiped out the

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104 In *American Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 370 n.8 (Fla. 2005), the majority itself pointed out the need for legislative clarification of the statute at issue.

105 *See* Delgado v. State, 776 So. 2d 233 (Fla. 2000).

106 *Id.*

107 *Id.* at 234.

108 *Id.* at 235.

109 *Id.* at 236 (quoting FLA. STAT. § 810.02(1) (1989)) (emphasis added).

110 *See id.*

111 *Id.* at 234.

112 *Id.* at 240.

113 Ray v. State, 522 So. 2d 963 (Fla. Dist. Ct. App. 1988).

114 *Delgado*, 776 So. 2d at 238.

115 *See id.* at 240-41.

clause 'unless . . . the defendant [was] licensed or invited to enter.' "[116] The court resolved this dilemma by declaring that "in order to give meaning to the *entire* burglary statute (the 'remaining in' clause and the 'unless' clause), the 'remaining in' clause should be limited to the defendant who surreptitiously remains."[117]

Addressing the Third District's observation that "the word surreptitiously does not appear in the statute and that a court should not inject words into statutes that were not placed there by the Legislature," the court pointed out that a comparable New York burglary statute did not contain this word either but the New York courts nonetheless limited the statute in this way.[118] The court went on to note that, given the differing interpretations by various courts, it should follow that the legislative mandate is to construe the burglary statute "most favorably to the accused."[119] According to the majority, "[t]his interpretation is consistent with the original intention of the burglary statute."[120]

Concluding that "the *Ray* doctrine leads to an absurd result," the court receded from its prior decisions on this issue.[121] The court stated that, despite "the importance of *stare decisis*, this principle must give way to common sense and logic."[122] Although receding from its prior, controlling decisions, the court specifically held that its decision would not "apply retroactively to convictions that have become final."[123]

Dissenting with Justices Lewis and Quince, then Chief Justice Wells declared that Florida law on this point had been settled since 1983 and that "[u]nsettling well-settled legal principles is extremely disruptive in the criminal justice system . . . ."[124] The dissent further stressed that, because the Legislature has not altered the statute in response to the court's prior interpretation, "[t]he Legislature has not evidenced any doubt that these long-standing statutory interpretations are

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116 *Id.* at 240.

117 *Id.* (emphasis added).

118 *Id.*

119 *Id.* (quoting FLA. STAT. § 775.021(1) (2007)).

120 *Id.*

121 *Id.* at 241.

122 *Id.*

123 *Id.*

124 *Id.* at 242 (Wells, C.J., dissenting).

in accord with legislative intent."[125] To the contrary, under the court's own precedents this legislative inaction "indicates that the Legislature approved or accepted the construction placed upon the statute."[126]

The dissent further complained that "[s]ince the majority cannot reach its result through the acceptance of the plain language of the burglary statute, the majority resorts to writing a change in the statute by inserting the word 'surreptitiously' into the statute."[127] In view of the majority's decision, the dissent called upon the Legislature "to immediately review and plainly express whether it accepts the majority's construction of this statute."[128]

The Legislature reviewed, and did not accept, the majority's construction. Instead, the Legislature enacted section 810.015 of the *Florida Statutes*, an amendment to the burglary statute, expressly to nullify the court's decision in *Delgado*, and to legislatively embrace the decisions receded from in *Delgado*.[129] The Legislature, however, specifically provided that the amendment "shall operate retroactively to February 1, 2000."[130]

Thereafter, answering the question certified in two cases as being a "question of great public importance,"[131] the supreme court in *State of Florida v. Ruiz* held that the amendment to Florida's burglary statute did not apply to conduct that occurred prior to February 1, 2000.[132] Based on the legislative history of the amendment, the en banc Third District had held that the statute was intended to apply to cases "in the 'pipeline' at the time *Delgado* was decided . . . ."[133] The court disagreed, holding "that the Third District erred in going beyond the plain meaning of section 810.015(2), which, as the Third District ac-

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125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 FLA. STAT. § 810.015(2) (2007).

130 *Id.*

131 State v. Ruiz, 863 So. 2d 1205, 1206 (Fla. 2003).

132 *Id.* at 1209-10.

133 *Id.* at 1209 (citing Braggs v. State, 815 So. 2d 657, 660 (Fla. Dist. Ct. App. 2002)).

knowledged, by its own terms does not apply to those defendants whose conduct occurred prior to February 1, 2000."[134]

The *Ruiz* majority began its opinion with the incantation that "[t]he plain meaning of statutory language is the first consideration of statutory construction."[135] "Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity."[136] Because the Legislature specified that the statute was to "operate retroactively to February 1, 2000," events occurring before that time "*do not fall within the window established by the Legislature for retroactive application"* of the statute.[137] The court so held, even though it acknowledged the legislative intent to nullify the judicial precedent pursuant to which the convictions at issue had been obtained.[138]

The dissent, on the other hand, agreed with the en banc Third District that "the February 1 date was chosen in an effort to turn back the clock to the interpretation of the burglary statute as it existed two days prior to the original release of the *Delgado* opinion."[139] The dissent declared that the Third District was "indisputably correct in view of the fact that the *Delgado* opinion was issued on February 3, 2000."[140] Asserting that "the majority's analysis in this case is . . . a misreading" of the amendment to the burglary statute, the dissenting justices "would give effect to the plain intent" of the statute and recede from *Delgado* "in recognition that this is the Legislature's will in respect to the construction of this statutory crime . . . ."[141]

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[134] *Id.* (citing Braggs v. State, 815 So. 2d 657, 660 (Fla. Dist. Ct. App. 2002)).
[135] *Id.* (quoting State v. Bradford, 787 So. 2d 811, 817 (Fla. 2001)).
[136] *Id.* (quoting Fla. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 323 (Fla. 2001)).
[137] *Id.* at 1210 (emphasis added).
[138] *See id.*
[139] *Id.* at 1214 (Wells, J., dissenting) (quoting Braggs v. State, 815 So. 2d 657, 660 (Fla. Dist. Ct. App. 2002)).
[140] *Id.*
[141] *Id.* at 1214-15.

3. *Donato v. American Telephone & Telegraph Co.*

Even though the Legislature specifically directed that the statute at issue in *Donato v. American Telephone & Telegraph Co.*[142] *was to be liberally construed to further its general purpose, the justices of the supreme court varied in their approaches to interpreting the statute.*[143] *In Donato*, a former employee sued his employer for marital discrimination, alleging he was wrongfully discharged shortly after his wife, who sued their mutual employer for sex discrimination and retaliation.[144] At issue was whether a spouse had a cause of action for marital discrimination under Florida's Civil Rights Act, where the plaintiff husband alleged he was discriminated against as a result of the actions of his wife.[145]

Florida's Civil Rights Act, expanded in 1977, prohibited many forms of discrimination, including discharging any individual based on his or her marital status.[146] The term *marital status* was not defined in the statute.[147] The Legislature specified, however, that the Act was "to be construed in accord with the fair import of its terms" and was to be "liberally construed to further [its] general purposes . . . ."[148]

The plaintiff argued that the term *marital status* was sufficiently broad to include the general status of marriage, as well as marriage to a particular person.[149] Such an interpretation had, in fact, been adopted by the Florida Commission on Human Relations.[150] The plaintiff also argued that the statute was ambiguous when "considered in conjunction with other provisions within [the Act itself]."[151] The federal district court dismissed the claim and the Eleventh Circuit Court of Appeals

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142 Donato v. Am. Tel. & Tel., 767 So. 2d 1146 (Fla. 2000).

143 *See id.*

144 *Id.* at 1147.

145 *Id.*

146 *Id.* at 1148-49 (quoting FLA. STAT. § 760.10(1)(a) (2007)).

147 *Id.* at 1149.

148 *Id.*

149 *Id.* at 1148.

150 *See id.*

151 *Id.* at 1152.

certified the question to the Florida Supreme Court.[152] The supreme court affirmed the dismissal of the lawsuit.[153]

The supreme court began its consideration of this issue with the familiar observation that "legislative intent is the polestar that guides us in our inquiry."[154] To that end, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning."[155] Moreover, the court noted that it was "precluded from construing an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications."[156]

The court noted there was "little to no documented legislative history on the subject in Florida or elsewhere," stating that it was "also hindered by the lack of judicial treatment of the term 'marital status' in Florida."[157] Consequently, it was "left with the task of interpreting the . . . words utilized in the statute without any instruction or indication from the Legislature . . . ."[158]

In the end, the court seized upon the fact that a number of states had construed the term *marital status* narrowly and it agreed with the reasoning and logic of those decisions.[159] "If we were to give the term a broader definition by requiring courts to consider the specific person to whom someone is married, we would be expanding the term beyond its common, ordinary use and would give meaning to the term that was not intended by the Legislature."[160]

The court acknowledged "the general rule that an interpretation of a statute by the agency 'charged with its enforcement is entitled to great deference and should not be overturned, unless clearly erroneous

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[152] *Id.* at 1148.
[153] *See id.* at 1147.
[154] *Id.* at 1150.
[155] *Id.* (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)).
[156] *Id.* at 1150-51.
[157] *Id.* at 1149-50.
[158] *Id.* at 1150.
[159] *Id.* at 1149.
[160] *Id.* at 1154.

or in conflict with the legislative intent of the statute.' "[161] Because the court concluded that the term was not ambiguous, however, it was "less constrained to accept the Commission's interpretation of the statute."[162]

Finally, the court held there was no conflict with the section of the statute that excluded nepotism policies from the Act.[163] The plaintiff argued there would be no need for the Legislature to exclude nepotism policies from the Civil Rights Act if the term *marital status* encompassed only the state of being married or unmarried in general.[164] The court rejected that argument, stating there was nothing in the legislative history or the language of the statute suggesting that the identity or actions of an individual's spouse were to be considered in determining marital status.[165]

On the other hand, the two dissenting justices—Justices Pariente and Quince, the two women on the court—asserted that the statutory provision "should be liberally construed in favor of granting access to the remedy."[166] They would construe the provision consistently with the enforcing agency's broad interpretation.[167] Reading all the provisions together, the dissent believed that by expressly excluding employment decisions taken in accordance with company anti-nepotism policies the Legislature intended "to embrace the broad meaning of marital status adopted" by the agency.[168]

4. *B.C. v. Florida Department of Children & Families*

The Legislature's mandate that the statute be construed liberally was similarly ineffective to cause the supreme court to agree in *B.C. v. Florida Department of Children & Families*[169] on how that statute should be interpreted. In this case, the court was called on to construe a

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161 *Id.* at 1153.

162 *Id.*

163 *See id.* at 1154.

164 *See id.*

165 *See id.*

166 *Id.* at 1155 (Pariente, J., dissenting, Quince, J., concurring in the dissent).

167 *See id.* at 1156.

168 *Id.* at 1156.

169 887 So. 2d 1046 (Fla. 2004).

statute pertaining to the termination of parental rights.[170] The petitioner began serving a ninety-one month prison term when his daughter was one-year old.[171] When he had approximately four years remaining on his sentence, the state petitioned to terminate his parental rights.[172] It relied on section 39.806(1)(d)(1), which authorized a termination petition when a parent is incarcerated and "[t]he period of time for which [a] parent *is expected* to be incarcerated *will constitute* a substantial portion of the period of time before the child *will attain* the age of 18 years."[173]

The circuit court dismissed the petition, but the Fourth District reversed.[174] It held that the petitioner's entire sentence should be used in determining whether the incarceration constituted a substantial period of time before the daughter turned eighteen.[175] Noting conflict with other districts, the Fourth District certified the question whether the statute required consideration of "the entire period of incarceration, or only the period to be served after the petition for termination is filed."[176] The supreme court reversed, holding that the appropriate standard was the remaining period of incarceration.[177]

The court held that the statutory references to "is expected," "will constitute," and "will attain" make the statute entirely forward-looking.[178] It agreed with the Second District that:

> [T]he statutory language requires the court to evaluate whether the time for which a parent is expected to be incarcerated *in the future* constitutes a substantial portion of the time before the child reaches eighteen, not whether the time the parent *has been incarcerated* [in the past] is a substantial portion of the child's life to date. . . . We are not at liberty to construe this unambiguous language

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170 *See id.* at 1048-49.

171 *Id.* at 1048.

172 *Id.*

173 FLA. STAT. § 39.806(1)(d)(1) (2006) (emphasis added).

174 *B.C.*, 887 So. 2d at 1048.

175 *Id.*

176 *Id.* at 1047 (internal quotation marks omitted).

177 *Id.*

178 *Id.* at 1052.

> differently . . . [Moreover, the] Court will not deem . . . itself authorized to depart from the plain meaning of the language which is free from ambiguity[.] . . . Nor are we permitted to add to a statute words that were not placed there by the Legislature. . . . [In addition, since termination of parental rights involves fundamental liberty interests of parents, the principle that] constitutional rights must be narrowly limited in their application according to the statutory language [was invoked].[179]

Justice Wells dissented, joined by Justices Bell and Cantero.[180] They complained that "[t]he majority gives to the statute too cramped a reading," and "the district court's decision is a more reasonable construction of the statute."[181] Justice Bell, in a dissent joined by Justices Wells and Cantero, asserted that the "majority's plain meaning analysis . . . ignores the statutory context and gives the section a strict construction in contravention of the Legislature's express mandate to interpret the statute liberally."[182]

5. *Malu v. Security National Insurance Company*

In this case as well, the fact that a statute was to be construed liberally to affect the Legislature's remedial intent did not preclude different interpretations of the statute by different justices. In *Malu v. National Security Insurance Co.*,[183] the supreme court addressed the question whether expenses for the use of a personal automobile in seeking medical treatment were required to be reimbursed by the insurer under the Personal Injury Protection (PIP) provisions in Florida's Motor Vehicle No-Fault Law.[184] The applicable section of this statute authorizes reimbursement for "[e]ighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including . . . ambulance . . . services."[185] The use of a per-

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[179] *Id.* (internal quotation marks omitted) (emphasis added).

[180] *Id.* at 1055.

[181] *Id.* at 1057 (Wells, J., dissenting).

[182] *Id.* at 1057, 1063 (Bell, J., dissenting) (internal quotation marks omitted).

[183] 898 So. 2d 69 (Fla. 2005).

[184] *Id.* at 71.

[185] FLA. STAT. § 627.736(1)(a) (2006).

sonal automobile is not specifically enumerated as one of the reimbursable expenses.[186]

Agreeing with the decision of the Third District in *Padilla v. Liberty Mutual Insurance Co.*,[187] the Fourth District held that the failure by the Legislature to list the expense of the use of a personal vehicle among those entitled to reimbursement under the PIP statute meant that such expenses were not reimbursable.[188] Both courts certified conflict with *Hunter v. Allstate Insurance Co.,*[189] an earlier Fifth District Court of Appeal decision.[190] The supreme court agreed with *Hunter* and concluded that expenses for the use of a personal automobile were authorized under the statute.[191]

The court stated that the statute's wording called for reimbursement of "*all* reasonable expenses" and that "its stated purpose to provide insurance benefits covering a broad range of medically necessary services" suggested that transportation expenses beyond just ambulances should be reimbursed.[192] The court stressed that "the language of the PIP statute should be interpreted liberally to effectuate the legislative purpose of providing broad PIP coverage for Florida motorists."[193]

Additionally, the court noted that the same question had been addressed by the Fifth District in applying a prior version of section 627.736(1)(a).[194] In *Hunter*, the Fifth District concluded "that medical transportation expenses were reimbursable under the statute."[195] *Hunter* had been decided seventeen years earlier, and the Legislature had reenacted the statute with minor changes after *Hunter* was decided.[196] Stating that "the Legislature is presumed to be acquainted with judicial construction of a statute when it subsequently reenacts the

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186 *See id.*

187 870 So. 2d 827 (Fla. Dist. Ct. App. 2003).

188 *See Malu*, 898 So. 2d at 71.

189 498 So. 2d 514 (Fla. Dist. Ct. App. 1986).

190 *Malu*, 898 So. 2d at 70-71.

191 *Id.* at 76.

192 *Id.* at 74 (internal quotation marks omitted) (emphasis added).

193 *Id.*

194 *Id.*

195 *Id.* at 74-75.

196 *See id.* at 75.

statute," the court presumed that the Legislature's decision not to amend the statute to overturn *Hunter* was a legislative approval of that decision.[197]

Justices Bell and Cantero dissented, stating that a plain reading of the statute did not require reimbursement of the transportation expenses.[198] The dissent complained that the majority opinion "necessarily reads the statute to require payment of any other reasonable expenses incurred to obtain services expressly covered under the statute."[199] Consequently, payment of "other incidental expenses," such as child care, would also be required.[200]

Justice Lewis wrote an opinion concurring with the majority's opinion in order to express his belief that the dissent's reading of the statute "is contrary to a logical, common sense interpretation of Florida's PIP statute."[201] The dissent's interpretation would encourage persons to use reimbursable, but more costly, methods of transportation with "increased costs to the system."[202]

Justice Lewis also noted that to avoid constitutional issues, the PIP statute must be construed to provide "an adequate alternative remedy as a substitute for the loss of the underlying fundamental right in Florida of access to courts for redress of injuries."[203] To reduce medical benefits available under a common law recovery would "push the no-fault concept even further toward invalidity."[204] Justice Lewis closed by emphasizing that there was nothing in the court's decision that would allow reimbursement for "extraneous items not directly related to medical care, as suggested by the dissent, which have not been recognized as recoverable elements of damages for injuries."[205]

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197 *Id.* at 75-76.

198 *Id.* at 77 (Bell, J., dissenting).

199 *Id.*

200 *Id.*

201 *Id.* at 76 (Lewis, J., concurring).

202 *Id.*

203 *Id.* at 77.

204 *Id.*

205 *Id.*

The dissenting justices agreed with Justice Lewis that "*common sense* dictates that the transportation costs at issue *should be* reimbursable under the no-fault scheme."[206] But, they "simply [could not] find in the plain and unambiguous language of the *statute* that these costs *must be* reimbursed."[207] They rejected out of hand Justice Lewis' suggestion that persons otherwise would use ambulances rather than their own vehicles, stating that only "medically necessary ambulance services" are reimbursable.[208]

6. *State v. Goode*

Does *shall* mean *may*? The justices could not agree on the answer to this question in *State v. Goode*.[209] The supreme court addressed a provision of the Jimmy Ryce Act[210] requiring that "[w]ithin 30 days after the determination of probable cause, the court shall conduct a trial to determine whether the person is a sexually violent predator."[211] Resolving the conflict in district court decisions, the court held that "by its plain terms, the thirty-day provision is mandatory but not jurisdictional."[212] According to five justices, *shall* means *shall*, at least for purposes of this statute.[213]

The court began its analysis with the legislative history of the Jimmy Ryce Act, noting that it appeared "to have been largely based on Kansas's similar [statute]."[214] The court concluded that, like the Kansas Legislature, the Florida Legislature was "concerned about the patent constitutional issues implicit in any scheme of involuntary and indefinite detention to be imposed in addition to specific criminal penalties

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206 *Id.* (Bell, J., dissenting) (emphasis added).

207 *Id.* (Bell, J., dissenting) (emphasis added).

208 *Id.* at 77-78 (internal quotations omitted).

209 830 So. 2d 817 (Fla. 2002).

210 "The Ryce Act sets out a scheme for the continued detention of persons who have been convicted and imprisoned in Florida for certain sexual offenses. Sections 394.918-.930 of the Ryce Act provide for the civil commitment of 'sexually violent predators' after their criminal sentences have expired." *Id.* at 820.

211 FLA. STAT. § 394.916(1) (2006).

212 *Goode*, 830 So. 2d at 821.

213 *See id.*

214 *Id.*

imposed for the same underlying conduct . . . ."[215] To "temper the drastic effects of the indefinite detention scheme," the Legislature imposed "rigid time constraints set out in explicit language in the act[ ]."[216]

The court went on to reiterate its statements in prior decisions that "[a]lthough there is no fixed construction of the word 'shall,' it is normally meant to be mandatory in nature."[217] At the same time, its interpretation "depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute."[218] Because of the "significant and substantial liberty interests involved with the involuntary and indefinite detentions provided for under the Ryce Act," the court concluded that "the Legislature used the word 'shall' to convey that the thirty-day time limit was mandatory, although not jurisdictional."[219]

In the court's view, the "absence of explicit language detailing a 'consequence'" of a failure to comply with the thirty-day time requirement, a point stressed by the dissent, "does not allow us to ignore the plain mandatory language the Legislature has provided based upon similar provisions in the Kansas act."[220] The court also relied on the "principle that the word 'shall' should ordinarily be construed as mandatory according to its plain meaning, especially when it refers to an action preceding the denial of a substantive right."[221] To view the time period as merely directory would render other parts of the statute meaningless, which the court should not do.[222]

The court also noted that "a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless."[223] If *shall* meant *may*, the thirty-day time period could

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215 *Id.* at 822.

216 *Id.*

217 *Id.* at 823 (quoting S.R. v. State, 346 So. 2d 1018, 1019 (Fla. 1977)) (internal quotation marks omitted).

218 *Id.* (quoting S.R., 346 So. 2d at 1019) (internal quotation marks omitted).

219 *Id.*

220 *Id.* at 824.

221 *Id.*

222 *See id.*

223 *Id.*

be routinely ignored without consequences, thus making the limitations on continuances essentially meaningless.[224] Finally, "if the word 'shall' is not construed as mandatory, a serious question would arise as to whether the Ryce Act itself provides the proper constitutional protections to detainees, particularly as it has been applied to the respondent in the instant case."[225]

Senior Justice Harding and Justice Wells dissented, finding "the thirty-day time period . . . to be directory rather than mandatory."[226] The dissent focused on the absence of any "specified consequences for non-compliance" with the time period.[227] The dissent ended on a public policy note, warning that the majority's opinion "will have the very effect that the California court warned against: dangerous people will be released into the community due to an inconsequential violation of a time requirement."[228]

7. *American Home Assurance Co. v. Plaza Materials Corp.*

What rules of statutory construction apply when the court concludes two provisions in the same statute are irreconcilable? In *American Home Assurance Co. v. Plaza Materials Corp.*,[229] the supreme court was required to resolve that dilemma in order to answer "the following question, which [had been] certified to be of great public importance:

> If a statutory payment bond does not contain reference to the notice and time limitation provisions of Section 255.05(6), are those notice and time limitations nevertheless enforceable by the surety, or is the claimant entitled to rely upon the notice and time limitations applicable under the common law?[230]

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224 *See id.*

225 *Id.* at 826.

226 *Id.* at 830 (Harding, S.J., dissenting,Wells, J., concurring in dissent).

227 *Id.*

228 *Id.* at 831.

229 908 So. 2d 360 (Fla. 2005).

230 *Id.* at 361-62.

Viewing the statutory provisions within section 255.05 as conflicting, the court declared it would "attempt to respect the provisions by affording each provision a field of operation rather than elevating any provision over another."[231]

The court explained that, in 1980, the Legislature added two provisions to section 255.05.[232] Subsection four specifically provided "that [t]he payment provisions of all bonds furnished for public work contracts described in subsection (1) shall, *regardless of form*, be construed and deemed statutory bond provisions, subject to all requirements of subsection (2)."[233] Subsection six, on the other hand, required that all bonds contain explicit reference to the notice and time limitations of subsection two.[234] Under the facts of the case, the court concluded an "unavoidable internal conflict between subsections (4) and (6) of section 255.05 exists."[235]

The court began its statutory construction analysis by refusing to "engage in a narrow, limited reading of an individual subsection of section 255.05 as the dissent urges, which would render another coequal provision of the statute entirely nugatory."[236] The court emphasized that first, it must give effect to every part of a statute if possible; second, "words in a statute should not be construed as mere surplusage;" and third, it should avoid a reading "that would render part of a statute meaningless."[237] "Therefore, it is our duty to read the provisions of a statute as consistent with one another . . . and to give effect and meaning to the entirety of the legislative enactment at issue."[238]

The court expressly declined "to render either subsection (4) or (6) completely without operation by selecting either one for singular primacy in the instant case. To do so, as the dissent argues we should,

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231 *Id.* at 363.

232 *Id.* at 364.

233 *Id.* (quoting FLA. STAT. § 255.05(4) (1995)) (internal quotation marks omitted) (emphasis added).

234 *Id.*

235 *Id.* at 365.

236 *Id.* at 366.

237 *Id.* (internal quotations omitted).

238 *Id.* (citation omitted).

would be to disregard basic tenets of statutory construction that are elements of mainstream Florida law."[239]

The court turned to decisions of different district courts that previously had addressed the same factual scenario,[240] but resolved it in opposite ways.[241] Two district courts had held that "noncompliance with subsection (6) trumped any effect of section 255.05(4) and mandated that the payment provisions of the bonds in question be treated as common law bonds."[242] The supreme court held that result was "impermissible because it entirely negates subsection (4)."[243]

In the view of the majority, "a decision which results in one of these two subsections 'trumping' the other would run entirely counter to this Court's well-settled principles of statutory construction."[244] In order "to give effect and meaning to all of the provisions of section 255.05 . . . compliance or non-compliance must have some consequence."[245] The court's "refusal to read either subsection (4) or (6) to the exclusion of the other is supported by the legislative history of the enactment—an important source of the legislative intent in a case, such as this, where the plain text of the statute is in inescapable conflict."[246] Pointing to the fact that the Legislature had added these subsections to the statute in the same bill, the court said, "[i]t would defy logic to

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239 *Id.*

240 *Id.*

241 *See id.* at 366-67. In fact, different panels of the Fifth District also had arrived at different results on this issue in different cases. *Compare* Martin Paving Co. v. United Pac. Ins. Co., 646 So. 2d 268, 271 (Fla. Dist. Ct. App. 1994) (holding that subsection (4) does not require compliance with subsection (2) unless subsection (1) is complied with), *with* Fla. Crushed Stone Co. v. Am. Home Assurance Co., 815 So. 2d 715, 716 (Fla. Dist. Ct. App. 2002) (holding that all bonds on public works projects "shall be construed as statutory bond provisions subject to the requirements of section 255.05(2)").

242 Am. Home Assurance Co. v. Plaza Materials Corp., 908 So. 2d at 366-67 (Fla. 2005) (citing Martin Paving, 646 So. 2d at 271; Am. Home Assurance Co. v. Plaza Materials Corp., 826 So. 2d 358, 361 (Fla. Dist. Ct. App. 2002)).

243 *Id.* at 367.

244 *Id.*

245 *Id.* at 368.

246 *Id.*

conclude that the Legislature intended two contemporaneous amendments to negate one another."[247]

The court specifically looked to staff analyses of those amendments, rejecting the dissent's criticism of such consideration, declaring that it had on "numerous occasions looked to legislative history and staff analysis to discern legislative intent."[248] In the majority's view, "the dissent's position with regard to the use of legislative history and staff analysis is beyond the mainstream of Florida jurisprudence and totally contrary to well-established Florida precedent."[249]

"In light of the legislative intent manifest in the statutory text as well as the accompanying legislative history, which contrary to the dissent's assertion is a basic and invaluable tool of statutory construction,"[250] the court adopted what it viewed "as the most viable method of effectuating the entirety of section 255.05, while preserving principles of fairness and equity."[251] As the court put it:

> The approach adopted today gives all possible effect and consequences to both subsection (4) and subsection (6) as may be available within the judicial system, and applies a field of operation to all provisions in a situation in which both parties clearly failed to comply with statutory requirements while justifiably relying upon portions of the statute.[252]

The court specifically urged the parties to present the issue of the internal conflict within section 255.05 to the Legislature.[253]

The court reiterated its view that "[t]he dissent attempts to ascribe a label of relative 'importance,' without any recognized authority, to the statutory requirements and through this 'importance' analysis

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247 *Id.*

248 *Id.* at 368-69.

249 *Id.* at 369.

250 *Id.*

251 *Id.*

252 *Id.* at 370.

253 *Id.* at 370 n.8. As of this writing, the legislature has not amended the subsections at issue.

simply eliminate a clear statutory provision."[254] The court rejected the dissent's "new and unique approach," finding it

> contrary to the well-established body of law that we are required to read and apply all provisions of a statute to be consistent with one another and that we give meaning and effect to the entirety of the statute, not simply erase a statutory provision through an analysis of a judicial doctrine of relative "importance" as the dissent urges in this conflict.[255]

Finally, the court rejected the dissent's reliance on the absence of penalties within the statutory scheme, stating that impermissibly rendered "a significant statutory provision totally without meaning."[256]

Justice Cantero began his dissent and concurrence by fundamentally disagreeing that the statute contained conflicting provisions.[257] In his view, the problem was not that the two provisions were in conflict, but rather "that neither party complied with [the statute]."[258] "In that event, the statute itself determines who prevails: the deadlines imposed on claimants in subsection (2) apply *regardless* of the form of the bond . . . ."[259] "*Regardless of* means without taking into account."[260] "Thus, the phrase emphasizes the absolute and all-inclusive reach of the subsection."[261] The majority's interpretation "emasculates the unambiguous language in subsection (4) (providing that the deadlines apply anyway), thwarts the Legislature's intent, and rewards ignorance."[262]

Justice Cantero also pointed out "that the absence of a sanction for noncompliance with a statutory provision" has been held to evidence "a legislative choice about the primacy of that provision vis-a-vis other,

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254 *Id.* at 370.

255 *Id.*

256 *Id.*

257 *Id.* at 371 (Cantero, J., concurring in part and dissenting in part).

258 *Id.*

259 *Id.*

260 *Id.* at 373 (quoting MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 981 (10th ed. 1993)) (internal quotation marks omitted) (emphasis added).

261 *Id.*

262 *Id.* at 371.

conflicting provisions."[263] "Had the Legislature intended to punish the omission of the information subsection (6) requires, it could have so provided."[264] Based upon his analysis of the statutory language, Justice Cantero concluded:

> [A]lthough the legislature apparently found it important to require that bonds refer to the deadlines of subsection (2), the language of subsection (4)–providing that, regardless of form, all bonds remain subject to the requirements of subsection (2)–demonstrates that it did not grant the requirement of notice of the deadlines coequal status with the deadlines themselves.[265]

Quoting a concurring opinion of Justice Scalia, Justice Cantero complained that the majority's examination of the legislative staff analyses to determine legislative intent was "neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes . . . nor conducive to a genuine effectuation of [legislative] intent."[266] He acknowledged the Florida Supreme Court's statement "that legislative staff analyses are not determinative of legislative intent, but are only 'one touchstone of the collective legislative will.'"[267] However, he went on to state that "where the language is clear, courts need no other aids for determining legislative intent."[268] In his view, "legislative staff analyses add nothing to an investigation of legislative intent" because they are written by staff, not legislators themselves.[269] Apart from his belief that the staff analyses should not be used at all to ascertain legislative intent, he found them unhelpful in

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263 *Id.* at 374.

264 *Id.*

265 *Id.* at 375.

266 *Id.* (quoting Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted). Justice Wells joined "in Justice Cantero's concurring and dissenting opinion except for that part of his opinion discussing the use of legislative staff analysis in statutory construction." Am. Home Assurance Co., 908 So. 2d at 371 (Wells, J., concurring in part and dissenting in part).

267 *Id.* at 375 (Cantero, J., concurring in part and dissenting in part) (quoting White v. State, 714 So. 2d 440, 443 n.5 (Fla. 1998)).

268 *Id.* at 376.

269 *Id.*

this case, declaring that "[t]he purported lamp of legislative history sheds no light on this issue."[270]

Justice Cantero then turned to his fundamental disagreement with the majority's analysis, which he characterized as "blatantly extra-statutory":[271]

> Although neither party in this case complied with the statute, nothing in the statute even hints at the resolution reached by the majority. To the contrary, the "regardless of form" language in subsection (4) dictates the opposite. Had the legislature intended use of such a prejudice analysis, it certainly could have included one–as it did when it added subsection (8) in 1998.[272]

Because the Legislature did not do so, this "illustrates even more clearly that when the Legislature stated in subsection (4) that *all* public work bonds *regardless of form* are subject to the time and notice limitations of subsection (2), it meant what it said."[273]

8. *State v. Paul*

In *State v. Paul*, the supreme court confronted the issue of the extent to which a Florida statute limited a trial judge's discretion to deny an application for bail in a criminal proceeding.[274] The defendant, while free on bond for attempted murder, was arrested on new charges.[275] The "State moved to revoke [his] bond on the original charge and detain him without bond" on the new charges, relying on section 907.041, Florida's pretrial detention statute.[276] This statute sets forth detailed and specific criteria for determining the conditions under which a defendant can be detained prior to trial.[277]

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[270] *Id.* at 376-77.

[271] *Id.* at 377.

[272] *Id.*

[273] *Id.*

[274] State v. Paul, 783 So. 2d 1042, 1042 (Fla. 2001).

[275] *Id.* at 1043.

[276] *Id.* at 1043-44.

[277] *See id.* at 1044.

One of the criteria permitting pretrial detention was the conviction of a dangerous crime within ten years preceding the date of the "arrest for the crime presently charged."[278] Although the defendant had been convicted for burglary of a dwelling within the ten-year period, he was a juvenile at the time of that conviction, and the pretrial detention statute did not include the consideration of juvenile adjudications.[279] Nonetheless, the State argued that the defendant had violated a condition of his bond for attempted murder and that the trial judge had inherent discretion in such circumstances to deny the defendant's application for bail.[280] The trial judge agreed and the defendant's bail was revoked.[281]

On appeal, the Fourth District concluded, as the First District had previously,

> that the Legislature's failure to include juvenile adjudications in section 907.041(4)(b)4.b. precluded the State from using a delinquency adjudication to . . . [prove] a prior conviction for a dangerous crime under that section . . . . [A]lthough a trial court has the power to order the arrest and commitment of a defendant for a violation of a bond condition, the trial court's decision whether to deny a subsequent bond application must be based on the criteria for pretrial detention set forth in section 907.041(4)(b).[282]

In contrast, the Third District concluded that "once a defendant violates a bond condition, the question as to whether to grant pretrial release is addressed to the discretion of the trial court without regard to the pretrial detention criteria in section 907.041."[283] The Fourth District certified conflict with the Third District as to

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[278] *Id.*

[279] *See id.*

[280] *See id.* at 1043-44.

[281] *Id.* at 1044.

[282] *Id.* at 1044-45.

[283] *Id.* at 1045 (referring to the Third District's decision in Houser v. Manning, 719 So. 2d 307, 309 (Fla. Dist. Ct. App. 1998)).

> whether the trial courts have the inherent authority to deny a subsequent application for bail after a defendant breaches a bond condition, or whether the trial courts' discretion to deny a subsequent application for bail is circumscribed by the parameters established by the Legislature in section 907.041, Florida Statutes (1997).[284]

For a number of reasons, including its view "that section 907.041 expressly addresses the circumstances of a defendant who breaches a bond condition or commits a new crime," the supreme court held "that a trial court's discretion to deny subsequent application for bail is circumscribed by statute."[285] Although the court acknowledged that the Legislature had amended the statutes relating to pretrial release after oral argument in the case, the court stated the amendments neither applied to nor mooted this case: "the amendments do not address the broader issue that is before us as to whether a court possesses inherent authority to deny bail where a bond condition has been breached."[286]

The supreme court began its analysis of the conflict in the decisions by considering "the broader backdrop of the constitutional right to bail and the presumption of innocence that exists before a defendant is adjudicated guilty of a crime."[287] The court then turned to the 1983 amendments to the Florida Constitution,[288] enacted to "provide[ ] a comprehensive statutory scheme setting forth the circumstances when a trial court may deny bond to a person charged with a crime."[289] The court addressed the "detailed and specific criteria," which the Legislature enacted "for determining when a person may be detained prior to trial . . . ."[290]

The court concluded that, in providing "comprehensive guidelines for when an original application for bail may be denied" the Legislature "also addressed the question of when a defendant violates the

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284 *Id.* at 1042.

285 *Id.* at 1042-43.

286 *Id.* at 1043; *Id.* at 1043 n.1.

287 *Id.* at 1045.

288 *See id.* (discussing FLA. CONST. art. I, § 14 (amended 1983)).

289 *Id.* at 1046.

290 *Id.* (discussing Fla. Stat. § 907.041(4)(b)1 (1997)).

conditions of bond, which is the precise issue now before us."[291] Section 907.041(4)(b)(1) provides that a trial court may grant pretrial detention if "no further conditions of release are reasonably likely to assure the defendant's appearance at subsequent proceedings . . . ."[292] According to the majority, the plain language of that section does not limit the trial court and "is clearly applicable to allow a trial court to consider ordering pretrial detention where the defendant has subsequently violated conditions of release."[293]

Continuing, the court observed that "[i]n addition to establishing comprehensive criteria to determine if pretrial release is warranted, the Legislature also has enacted a comprehensive set of procedures for pretrial detention, which provide a panoply of protections."[294] Further, it noted that: "[l]ikewise, this Court has adopted rules of criminal procedure that are consistent with and complementary to this legislative scheme."[295] The court's "rule strongly suggests that it applies not just to release determinations upon initial arrest, but also to bond decisions following rearrests and renewed bail applications."[296]

The court then turned to the Third District's reliance upon an earlier Fifth District decision, which suggested in dicta "that when a condition of bond is violated, the trial court has the discretion to deny bond . . . ."[297] The supreme court observed, however, that before the Third District's reliance on that dicta, no other appellate court had "concluded that trial courts are vested with inherent authority, without regard to article I, section 14 or section 907.041, to deny bail once there has been a breach of the bond conditions."[298] To the contrary, "several Fourth District cases have held that the trial court's decision to deny bond is circumscribed by the pretrial detention statute."[299] The supreme

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[291] *Id.* at 1047.

[292] FLA. STAT. § 907.041(4)(b)1 (1997).

[293] *Paul*, 783 So. 2d at 1047.

[294] *Id.* at 1048.

[295] *Id.*

[296] *Id.* at 1049 (quoting Paul v. Jenne, 728 So. 2d 1167, 1171 (Fla. Dist. Ct. App. 1999)) (internal quotation marks omitted).

[297] *Id.* at 1049-50; *Id.* at 1049 n.12.

[298] *Id.* at 1050.

[299] *Id.*

court agreed with the Fourth District that in accordance with the constitutional guaranty of the right to bail:

> [T]he Legislature has created a comprehensive and carefully crafted scheme for setting forth the circumstances under which a defendant may be held in pretrial detention. Accordingly, although the breach of a bond condition provides the basis for revocation of the original bond, the trial court's discretion to deny a subsequent application for a new bond is limited by the terms of the statute. Further, there is nothing that prevents the State from seeking pretrial detention for the newly charged offense if the State can establish the necessary criteria pursuant to section 907.041(4)(b).[300]

The court, once again, turned to the 2000 amendments to the pretrial release statutes, noting that those amendments did not apply in this case and that their interpretation and constitutionality were not before the court.[301] At the same time, the court observed that the "amendments continue[d] to evince a comprehensive legislative scheme regarding bond and pretrial release, even to the extent that the amendments repeal Florida Rules of Criminal Procedure 3.131 and 3.132 'to the extent that the rules are inconsistent with this act.'"[302] Because "[t]he amendments expanded the power of the trial courts to revoke existing bonds and order pretrial detention," they supported the court's holding that this section "applies to revocation of an existing bond."[303]

The court then quoted the Fourth District's statement that it had "no difficulty divining the legislative intent to curtail the court's power to deny bail, except in certain instances, in light of the constitutionally guaranteed right to bail."[304] The supreme court's adoption of this reasoning was "influenced by [the] concern that adopting the Third District's view would leave the judiciary, the State, and defendants without

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[300] *Id.* at 1051 (footnote omitted).

[301] *Id.* at 1051 n.14.

[302] *Id.* (quoting 2000 Fla. Laws 1470).

[303] *Id.* (quoting Barns v. State, 768 So. 2d 529, 531 (Fla. Dist. Ct. App. 2000)) (internal quotation marks omitted).

[304] *Id.* at 1051 (quoting Paul v. Jenne, 728 So. 2d 1167, 1171 (Fla. Dist. Ct. App. 1999)) (internal quotation marks omitted).

ascertainable criteria, precise standards, and procedural protections presently existing in the comprehensive statutory scheme and rules, and thus potentially run afoul of a defendant's constitutional rights."[305] If a trial court has discretion to grant pretrial release, then "appellate review would consist only of a broad abuse of discretion standard."[306]

The court ended by "emphasiz[ing] that the trial court was not without recourse to address a defendant's willful violation of bond conditions."[307] The court concluded that the legislative scheme "under which trial courts may act to deny bail and order pretrial detention . . . fully comports with the Florida Constitution and has long been the standard by which trial courts have been guided in determining whether to deny bail."[308] In the court's view,

> [t]he statute and the rules enacted pursuant to the statute incorporate the considerations required to balance the court's need to enforce its orders, the need for society to be protected from those posing a danger to the community, and the defendant's constitutional rights to bail based on the time-honored presumption of innocence.[309]

Although understanding the viewpoint of the Third District, the supreme court found "that the reasoning of the Fourth District majority opinion in *Paul* . . . represent[s] the better approach for the reasons explained in this opinion."[310]

Justices Harding and Quince concurred in the dissent of then Chief Justice Wells, declaring that the Third District's decision and the reasoning in the earlier Fifth District decision "simply make sense."[311] Stating that "[a] judge who has set a condition of bail clearly must have the discretion to deny further bail to persons who break the condition[,]"[312] the dissent agreed with the Third District's conclusion, that

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305 *Id.*

306 *Id.*

307 *Id.* at 1052.

308 *Id.*

309 *Id.*

310 *Id.* at 1052.

311 *Id.* at 1053 (Wells, C.J., dissenting).

312 *Id.*

"the very idea of a defendant's release being conditioned is meaningless without the power to rescind the release when the conditions are violated."[313]

The dissent further reasoned that the Legislature never "intended to limit the necessary authority of the trial court to enforce the conditions the trial court has set."[314] The dissent urged that the subsequent amendment of the statute "should be accepted as a clarification of legislative intent."[315] In fact, the staff analysis of the bill specifically referenced the district courts' conflicting decisions "suggesting that a primary motivation behind the statute was to legislatively overrule the result" in the Fourth District decision.[316]

9. *Sarkis v. Allstate Insurance Co.*

In *Sarkis v. Allstate Insurance Co.*,[317] the supreme court was called upon to determine whether section 768.79 of the *Florida Statutes*, which makes no reference to a contingency risk multiplier in computing attorneys' fees,[318] nonetheless permitted such a multiplier to be awarded.[319] After the insurer refused an offer of judgment made in plaintiff's action to recover underinsured motorist benefits, the plaintiff ultimately was awarded a recovery twenty-five percent greater than the offer of judgment.[320] The trial judge then used a contingency risk multiplier to determine the attorney fees to be awarded the plaintiff under Florida's offer of judgment statute and rule.[321] The en banc Fifth District reversed, declining to follow conflicting decisions in the Second and Fourth Districts.[322]

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313 *Id.* (quoting Houser v. Manning, 719 So. 2d 307, 308 (Fla. Dist. Ct. App. 1998)) (internal quotation marks omitted).

314 *Id.* at 1053.

315 *Id.*

316 *Id.*

317 863 So. 2d 210 (Fla. 2003).

318 *See id.* at 223 (discussing FLA. STAT. § 768.79 (1997)).

319 *See id.* at 212-13.

320 *Id.* at 211.

321 *See id.* at 212.

322 *See id.* at 211-12.

Accepting conflict jurisdiction,[323] the supreme court affirmed the decision of the Fifth District which held as a matter of law that a contingency risk multiplier is not to be used to compute attorneys' fees awarded under Florida's offer of judgment statute.[324] After reviewing the reasoning of the various district courts in reaching different conclusions on this issue, the supreme court stood by its precedent, strictly construing the offer of judgment statute's authorization of attorneys' fees as a sanction "for unnecessarily continuing the litigation."[325]

Reiterating "that the use of a multiplier must be consistent with the purpose of the fee-authorizing statute,"[326] the court explained that "[t]he reason for an award of attorneys' fees authorized as a sanction for the rejection of an offer to settle is very different from the reason that [it] authorized the use of a multiplier in [its prior precedent] . . . ."[327] The multiplier was authorized "to promote access to courts by encouraging lawyers to undertake representation at the inception of certain cases."[328] Since attorneys' fees assessed as a sanction under the offer of judgment statute "are awarded after an attorney has already been obtained and agreed to undertake the case, . . . the use of a multiplier is not consistent with the purpose of [this] . . . statute."[329] As a sanction, the "statute imposing a penalty must be strictly construed in favor of the one against whom the penalty is imposed and is never extended by construction."[330]

In a solitary dissent, Justice Pariente expressed her view "that allowing the trial court to *consider* the contingent nature of the representation in calculating an award of a reasonable attorney's fees award is consistent with the language of the offer of judgment statute and not inconsistent with its underlying policy of promoting settlements."[331] Pointing to the plain language of "*all other relevant criteria*" in the statute, she complained that "the [c]ourt has adopted a forced, rather

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[323] *See id.* at 211.
[324] *Id.* at 212, 218.
[325] *Id.* at 222.
[326] *Id.*
[327] *Id.*
[328] *Id.*
[329] *Id.* at 222-23.
[330] *Id.* at 223.
[331] *Id.* at 230 (Pariente, J., dissenting) (empasis added).

than a strict, construction of an unambiguous statute in rejecting the contingent nature of the representation as one of the 'relevant criteria' in determining the reasonableness of a fee award under section 768.79(7)(b)."[332] She referred to "the practical realities of the role that the multiplier plays in the initial decision to undertake representation in a case,"[333] and deemed this to be a relevant criterion for assessment of a fee: "Although the term 'all other relevant criteria' is intentionally open-ended and nonspecific, it is not ambiguous in the sense of being susceptible to two opposing constructions. One need not resort to implication in order to construe 'all other relevant criteria' to include the contingency fee multiplier."[334]

In a concurring opinion expressing disagreement with the dissent's analysis, Justices Wells and Bell focused on the nature of the fee award as a sanction under a statute that had "to be strictly construed as written and not extended by implication."[335] Since the statute does not authorize a "multiplier, an authorization for the use of a multiplier would have to be by implication in violation of both long-standing and very recent precedent of this Court."[336]

10. *Horowitz v. Plantation General Hospital Limited Partnership*

In contrast to the split decisions we have considered above, the supreme court was unanimous in *Horowitz v. Plantation General Hospital Limited Partnership*.[337] At the same time, it disapproved decisions of the Second, Third, and Fifth Districts.[338]

The issue the court addressed was "whether section 458.320, Florida Statutes (2006), which outlines the financial responsibility re-

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[332] *Id.* at 228 (citing FLA. STAT. § 768.79(7)(b) (1997)) (emphasis added).

[333] *Id.* at 226-27.

[334] *Id.* at 228-29 (citation omitted).

[335] *Id.* at 224 (Wells, J., concurring).

[336] *Id.* (referring to FLA. STAT. § 768.79 (1997).

[337] 959 So. 2d 176 (Fla. 2007).

[338] *See id.* at 178 (disapproving of Mercy Hosp. Inc. v. Baumgardner, 870 So. 2d 130 (Fla. Dist. Ct. App. 2003); Baker v. Tenet Healthsystem Hosps., Inc., 780 So. 2d 170 (Fla. Dist. Ct. App. 2001); and Robert v. Paschall, 767 So. 2d 1227 (Fla. Dist. Ct. App. 2000)).

quirements for physicians practicing in Florida, imposes civil liability on the hospital [where physicians on its staff fail to comply with those requirements]."[339] Three district courts had held there was an implied, private cause of action under this statute based on the "obvious intent of the legislature . . . to make sure that a person injured by the medical malpractice of a doctor with staff privileges would be able to ultimately recover at least $250,000 of compensable damages."[340] The Fourth District disagreed, concluding there was no indication of legislative intent to impose civil liability on hospitals in the statutory scheme.[341] The supreme court agreed with the Fourth District.[342]

The court began by observing that hospitals have no duty under the common law to ensure the financial responsibility of "staff-privileged physicians, who are independent contractors."[343] Thus, "[i]f such a duty and cause of action exist, they do so by virtue of [the statute]."[344] The court emphasized that "to construe an unambiguous statute in a way which would" grant a cause of action not expressly provided or obviously implied in the statute "would be an abrogation of legislative power."[345] To determine whether the Legislature intended to impose civil liability, the primary guide for the court's analysis, "as in all cases of statutory construction, [is] the 'actual language used in the statute,'"[346] including "the context in which the language lies."[347]

Section 458.320 is located in chapter 458, which "primarily regulates the practice of physicians and medical practitioners, not hospi-

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339 *Id.* at 177.

340 *Id.* at 179 (quoting Robert v. Paschall, 767 So. 2d 1227, 1228 (Fla. Dist. Ct. App. 2000), and also referring to Mercy Hosp. Inc. v. Baumgardner, 870 So. 2d 130, 131 (Fla. Dist. Ct. App. 2003) and Baker v. Tenet Healthsystem Hosps., Inc., 780 So. 2d 170, 171 (Fla. Dist. Ct. App. 2001)) (internal quotation marks omitted).

341 Plantation Gen. Hosp. Ltd. P'ship. v. Horowitz, 895 So. 2d 484, 488 (Fla. Dist. Ct. App. 2005).

342 *Horowitz*, 959 So. 2d at 178.

343 *Id.* at 180.

344 *Id.* at 181.

345 *Id.* at 182 (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)) (internal quotation marks omitted).

346 *Id.* (quoting Borden v. East-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006)).

347 *Id.* at 182 (quoting Miele v. Prudential-Bache Sec., Inc., 656 So. 2d 470, 472 (Fla. 1995)) (internal quotation marks omitted).

tals."[348] The court looked to the substance of the chapter as well as its title.[349] Although section 458.320(2) requires physicians with staff privileges to establish financial responsibility "as a continuing condition of hospital staff privileges,"[350] the court concluded that this "single statement of legislative intent [did not suggest the] intent to impose civil liability on hospitals."[351] This was confirmed by looking at "other subsections of section 458.320 . . . the greater context of chapter 458," and other statutory provisions imposing hospital responsibilities.[352]

The court noted that the statute allows physicians to opt out of the statutory financial responsibility requirements.[353] "Clearly, the Legislature could not have intended to require the hospital to guarantee the future financial responsibility of a physician who makes an election [to opt out] under section 458.320(5)(g)."[354]

The court also emphasized that "the statutory enforcement mechanisms for noncompliance indicate that the Legislature did not intend to hold a hospital liable for a physician's failure to comply with the requirements of section 458.320."[355] Not only is no duty placed on hospitals with respect to a physician's noncompliance with financial responsibility requirements, the only "provision in chapter 458 that affirmatively imposes duties on hospitals does not address physician financial responsibility."[356] The "failure to impose additional duties [in this regard] on hospitals in chapter 458 . . . further indicates that the Legislature did not intend to impose civil liability on hospitals in section 458.320."[357]

The court lastly noted that two other provisions in the chapter "expressly impose civil liability," indicating a lack of intent to impose

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348 *Id.*

349 *Id.*

350 FLA. STAT. § 458.320(2) (2004).

351 *Horowitz*, 959 So.2d at 183.

352 *Id.*

353 *Id.* at 184 (citing FLA. STAT. § 458.320(5)(g)).

354 *Id.*

355 *Id.* (citing § 458.320 (2004)).

356 *Id.* at 185 (citing FLA. STAT. § 458.337 (2006)).

357 *Id.*

civil liability for matters not specifically addressed.[358] The court's examination of related provisions in chapters 395 and 766 supported that conclusion.[359] Chapter 395 regulates hospital practice, and nothing therein addresses physician compliance with financial responsibility requirements.[360] "If the Legislature intended to impose an affirmative duty on a hospital to 'condition' the grant of staff privileges on a physician's establishing financial responsibility, it would have included this requirement in the sections governing a hospital's grant of staff privileges."[361]

Similarly, in section 766.110, there is no "mention of civil liability for a hospital's failure to ensure the financial competence of its staff-privileged physicians."[362] Yet, that section "expressly imposes a duty on and creates a cause of action against hospitals for a breach of" [the requirements of section 766.110(1) and] "provides a strong indication that the Legislature did not intend to impose civil liability on hospitals in section 458.320."[363] "Had the Legislature intended to hold hospitals liable for failing to ensure physician financial responsibility, it would have either included such a duty and cause of action within section 766.110 or used parallel language to impose civil liability in section 458.320."[364]

The court concluded "it is outside this Court's purview to imply a statutory cause of action against hospitals where none was intended by the Legislature."[365] Yet, three different district courts found that precise legislative intent in this statutory scheme.

C. Whose Rule of Statutory Construction is the Best Rule?

We begin this section with a caveat. Many years ago, Judge Cardozo observed that because "precedents which are merely static" greatly outnumber precedents that are dynamic, "a . . . sketch of the

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358 *Id.*
359 *Id.*
360 *Id.*
361 *Id.* at 186.
362 *Id.*
363 *Id.*
364 *Id.*
365 *Id.*

judicial process which concerns itself almost exclusively with the creative or dynamic element is likely to give a false impression, or an overcolored picture, of uncertainty in the law and of free discretion in the judge."[366] He made the point that a majority of the cases in his court "could not, with semblance of reason, be decided in any way but one, [because] [t]he law and its application alike are plain."[367] In others, "the rule of law is certain, and the application alone doubtful."[368]

In a small percentage of cases, however, "a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law."[369] In his view, it is these cases "where the creative element in the judicial process finds its opportunity and power."[370] In these cases: "[R]easons plausible and fairly persuasive might be found for one conclusion as for another. Here comes into play that balancing of judgment, that testing and sorting of consideration of analogy and logic and utility and fairness . . . ."[371]

This observation is fully applicable to our selective analysis of split decisions. One readily, honestly, and persuasively could take each of the dissenting opinions in those dynamic cases and turn them into a majority decision of the court. In some instances, the Legislature itself effectively does that by declaring that the court's decision misapprehended the Legislature's intent and therafter enacting a new statute nullifying the decision.[372] At the same time, consistent with Judge Cardozo's characterization of the different categories of cases, it must be remembered that most decisions are not split decisions.

Simply put, the unanimous decisions are the easy cases. It is the difficult cases that are hard to resolve and predict. Notwithstanding the

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366 CARDOZO, *supra* note 11, at 163-64.

367 *Id.* at 164.

368 *Id.*

369 *Id.* at 165.

370 *Id.*

371 *Id.* at 165-66.

372 *See* State v. Ruiz, 863 So.2d 1205, 1207 & n.3 (Fla. 2003) (illustrating the Florida Legislature's nullification of a burglary case decision and subsequent enactment of new burglary definition).

rubric of following the polestar of legislative intent,[373] there is no consistency in approach; no coherent process for reaching the ultimate construction of the statute in difficult cases. Rather, different justices appear to use diverse rules of construction in order to reach a desired result. It is almost as if they predetermine the case's outcome and then select the particular rules that support their result.

A comparison of *Knowles v. Beverly Enterprises—Florida, Inc.*[374] with *Maddox v. State*[375] illustrates the point. In *Knowles*, the court refused to adopt a construction it viewed as altering unambiguous statutory language, even though the statute was remedial and required a liberal interpretation.[376] The court's concurring justices rejected the dissent's view that the majority's construction reached an absurd result in contravention of the Legislature's remedial intent.[377] On the other hand, in *Maddox*, the court did exactly the opposite. It acknowledged that a "strict meaning of the words" required the construction given by the First District, but nonetheless refused to adopt that construction because "it would lead to absurd results."[378] In turn, the dissent here maintained that an unambiguous statute "must be applied as written," as a matter of separation of powers.[379]

Absurdity appears to be in the eye of the beholder, and a handy tool to achieve what is deemed to be the right result. But, if there are some judges who do not view the construction required by the Legislature's own use of words to be absurd, how can it be said that this was not, in fact, the Legislature's intent? If Justice Cantero is correct that the absurdity canon of construction can, as a matter of separation of powers, be resorted to only "where applying the plain meaning would border on irrationality,"[380] it would appear logical that this statutory

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373 *See generally* Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 5 (Fla. 2004) ("[L]egislative intent is the polestar that guides a court's statutory construction analysis").

374 *Id.*

375 Maddox v. State, 923 So. 2d 442 (Fla. 2006).

376 *Knowles*, 898 So. 2d at 7.

377 *See id.* at 13 (Cantero, J., concurring).

378 *See Maddox*, 923 So. 2d at 448.

379 *Id.* at 448 (Cantero, J., dissenting).

380 *Id.* at 452.

construction rule should and would be applied only by a unanimous court.

The old saying is that hard cases make bad law. In *Maddox*, a person who forged another's signature on a traffic ticket would have escaped a conviction for forgery, based on a statute aimed at keeping actual traffic citations out of evidence in automobile accident cases.[381] In *Delgado v. State*,[382] the defendant committed murder during a burglary and would have escaped conviction because he entered the house with the victim's permission, though obviously not with authorization to then burglarize it.[383] Is that an absurd result, not in keeping with legislative intent? Or, was that the required result, albeit perhaps an unintended result, under the actual statutory language as other judges believed?[384]

Even beyond the absurdity rule[385] itself, the court's professed adherence to legislative intent as the polestar[386] sometimes flounders on the concomitant rule requiring courts to apply the plain meaning of unambiguous statutory language,[387] even where a court is convinced that the Legislature intended otherwise.[388] That is what the court did in *State v. Ruiz*,[389] where the legislative intent—to override a prior decision of the court and legislatively impose the rule applied in prior decisions of the court—could hardly have been more clear. The dissent stressed that viewpoint, urging that the court improperly failed to give effect to "the Legislature's will in respect to the construction of this statutory crime . . . ."[390]

In fact, the role of legislative history in statutory construction is far from settled. In *Knowles*, the majority refused to look to legislative

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381 *See id.* at 445-46.

382 Delgado v. State, 776 So. 2d 233 (Fla. 2000).

383 *See id.* at 236.

384 *See id.* at 242 (Wells, C.J., dissenting).

385 *See Maddox*, 923 So. 2d at 452 (Cantero, J., dissenting) (discussing the absurdity doctrine).

386 *See* Knowles v. Beverly Enters.-Fla., 898 So.2d 1, 5 (Fla. 2004).

387 *See id.* (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)).

388 *See* State v. Ruiz, 863 So. 2d 1205,1209 (Fla. 2003).

389 *Id.* at 1207.

390 *Id.* at 1215 (Wells, J., dissenting).

history at all to understand the meaning of the statute,[391] whereas three justices focused directly on the statute's history.[392] In contrast, in *American Home Assurance Co. v. Plaza Materials Corp.*,[393] the majority directly relied on a legislative staff analysis as supporting its construction,[394] with Justice Cantero sharply disagreeing that this reliance on legislative history was appropriate, given what he viewed as the clear statutory phrase regardless of its form.[395]

Although no rule is more widely cited than the rule that courts cannot alter the provisions the Legislature enacted, that is exactly what the court did in *Delgado*,[396] when it added the requirement of surreptitious entry into the burglary statute and in *Malu v. Security National Insurance Co.*,[397] when it added transportation expenses to the category of reimbursable expenses that are specified by the Legislature. In *American Home Assurance*, on the other hand, the court disregarded certain statutory language and relied on "basic tenets of statutory construction that are elements of mainstream Florida law"[398]—to wit, giving meaning to every part of a statute whenever possible, refusing to read any statutory language as mere surplusage, and avoiding making any part of the statute meaningless. As Justice Cantero complained in his dissent, the court made "the 'regardless of form' language" meaningless by its construction of other statutory language.[399] There was a similar split of views in *Maddox* where the majority looked to other provisions of the statute to derive the intent of the provision at issue,[400] but the dissenting justices declared that an unambiguous statute must be enforced in accordance with its plain language.[401]

The court has used legislative history in other cases to support a construction of language described by the majority as clear and unam-

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391 *See Knowles*, 898 So. 2d at 11.

392 *See id.* at 14 (Lewis, J., dissenting).

393 Am. Home Assurance Co. v. Plaza Materials Corp., 908 So. 2d 360 (Fla. 2005).

394 *See id.* at 368-69.

395 *See id.* at 371 (Cantero, J., concurring in part and dissenting in part).

396 *See Delgado*, 776 So.2d at 240-42.

397 *See* Malu v. Sec. Nat'l. Ins. Co., 898 So. 2d 69, 76 (Fla. 2005).

398 *Am. Home Assurance Co.*, 908 So. 2d at 366.

399 *Id.* at 377 (Cantero, J., concurring in part and dissenting in part).

400 *See* Maddox v. State, 923 So. 2d 442, 446-48 (Fla. 2006).

401 *See id.* at 448 (Cantero, J., dissenting).

biguous.[402] It lamented in *Donato v. American Telephone & Telegraph Co.* that it was hindered in construing the term *marital status* by the fact "there is little to no documented legislative history on the subject in Florida or elsewhere."[403] Yet it has announced in other cases that the court should not look to legislative history or use canons of construction—including the rule precluding a construction that leads to an absurd result—where the statutory language itself is unambiguous.[404] Indeed, in *State v. Paul*,[405] the majority concluded that it was constrained by the limited language in the statute itself, even though the Legislature had specifically sought to override the district court decision the court approved.[406]

As in the case of the determination of what is an absurd result, the terms *clear*, *unambiguous*, and *plain meaning* appear on their face to be easy rules of construction to apply across-the-board. These terms do not suggest uncertainty. *Plain* means obvious, and determining what is the *plain meaning* would appear to be as simple as "what you see is what you get." One would expect, then, that seven judges would agree whether a statutory meaning is clear. As we have seen, however, what is obvious to one judge may be murky to another, and what one judge sees as clear, another may not. Having the supreme court declare the plain meaning of a statute by a four to three vote shows four judges believe the statute is clear and three judges believe it is not. That seems akin to a four to three vote that a person has integrity. Plainly, this rule of construction is, once again, in the eye of the beholder.

Although legislative intent is the avowed polestar to be followed by the court, it does not always articulate the statutory purpose as part of its reasoning in reaching a particular statutory construction. Sometimes it does so,[407] but other times it is only the dissent that does so.[408]

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[402] *See, e.g.,* Aramark Unif. & Career Apparel, Inc. v. Easton, 894 So. 2d 20, 22-24 (Fla. 2004); Donato v. AT&T Co., 767 So. 2d 1146, 1152-53 (Fla. 2000).

[403] *Donato*, 767 So. 2d at 1149-50.

[404] *See, e.g., Maddox*, 923 So. 2d at 448; Delgado v. State, 776 So. 2d 233, 240-41 (Fla. 2000).

[405] State v. Paul, 783 So. 2d 1042 (Fla. 2001).

[406] *See id.* at 1046, 1051-52.

[407] *See, e.g.,* Malu v. Sec. Nat'l. Ins. Co., 898 So. 2d 69, 73-75 (Fla. 2005).

[408] *See, e.g.,* State v. Huggins, 802 So. 2d 276, 281 (Fla. 2001) (Lewis, J., dissenting) ("[T]he stated goals of public safety and protection are not [ ] furthered if application

Sometimes the court considers legislative inaction after a judicial construction of a statute,[409] and sometimes it does not.[410] At times the court considers legislative changes to a statute at issue,[411] and sometimes it does not.[412] Although the polestar is supposed to be the intent of the Florida Legislature, sometimes the court refuses to consider how courts in other states construe similar statutes.[413] On occasion the court looks to the absence of consequences for a failure to comply with a statute,[414] but disregards that in other cases.[415]

Despite these variances in application, the use of different canons of construction cannot be dismissed as simply whimsical. Cases have different nuances, requiring different application of the canons of construction. In *Malu*,[416] the court relied on legislative inaction in the face of a particular precedent construing the PIP statute; whereas, in *Paul*,[417] the court construed the bail bond statute differently from prior precedent, despite legislative inaction. *Malu* was a civil case,[418] whereas *Paul* implicated important constitutional rights to bail and the presumption of innocence.[419]

These differences in application do not necessarily appear to be result-driven. Surely no judge thought it was a good result that a defendant who forged another's signature on a traffic citation should escape

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of the [Prison Releasee Re-Offender Act] turns upon the serendipitous absence of persons from a target of criminal activity specifically designed for human habitation.").

409 *See, e.g., Malu*, 898 So. 2d at 75-76.

410 *See, e.g.,* State v. Paul, 783 So. 2d 1042, 1045-52 (Fla. 2001).

411 *See, e.g.,* Am. Home Assurance Co. v. Plaza Materials Corp., 908 So. 2d 360, 364-65 (Fla. 2005).

412 *See, e.g.,* Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 5-10 (Fla. 2004).

413 *See, e.g.,* State v. J.P., 907 So. 2d 1101, 1107-09 (Fla. 2004).

414 *See* Horowitz v. Plantation Gen. Hosp. Ltd. P'ship, 959 So.2d 176, 186 (Fla. 2007) (noting the statute at issue did not impose civil liability on hospitals for non-compliance).

415 *See* State v. Goode, 830 So. 2d 817, 824 (Fla. 2002) (noting that the absence of consequences for non-compliance did not give the court cause to disregard the "plain mandatory language" of the act).

416 *See* Malu v. Sec. Nat'l. Ins. Co., 898 So. 2d 69, 75-76 (Fla. 2005).

417 *See* State v. Paul, 783 So. 2d 1042, 1052 (Fla. 2001).

418 *See generally Malu*, 808 So. 2d 69.

419 *See generally Paul*, 783 So. 2d 1042.

conviction for that forgery.[420] On the other hand, would the court have held as it did on the construction of the Nursing Home Act if that had been the only remedy for the allegedly wrongful conduct at issue? It hardly can be doubted that the court's application of the absurdity exception to the construction of literal statutory terms rests on the court's view of the right result for the case. We, accordingly, turn now to the import of this on the settled requirement of separation of powers.

III. Statutory Construction and the Doctrine of Separation of Powers

Before we can discuss meaningfully what role the doctrine of separation of powers ought to play in statutory construction, we must first understand what we mean by the phrase *separation of powers*. The concept of a separation of powers in government is generally attributed to Montesquieu.[421] The phrase is generally understood as referring to a division of the principal functions of government among three coordinate branches-the legislative, the executive, and the judicial-no one of which is to be superior to the others.[422] The intent is to prevent too much power from being reposed in any one body and, thereby, to prevent tyranny.[423]

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420 *See* Maddox v. State, 923 So. 2d 442, 444 (Fla. 2006).

421 *S*ee The Federalist No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) (stating that "[t]he oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind."); Warren E. Burger, The Doctrine of Judicial Review: Mr. Marshall, Mr. Jefferson, and Mr. Marbury, in Judges on Judging 7, 17 n. 3 (David M. O'Brien ed., 1997) ("[T]he great rationalist Montesquieu contributed the notion of a separation of powers within the government itself, in order that each branch might act as a sort of brake upon the others").

422 *See* The Federalist No. 47, *supra* note 421, at 323-24 ("[T]he political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct"); Hugo L. Black, The Bill of Rights, in Judges on Judging, *supra* note 421, at 247.

423 *See* Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 263 (Fla. 1991) ("The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty."); In re Advisory Opinion to the Governor, 276 So. 2d 25, 30 (Fla. 1973) ("The preservation of the inherent powers of the three branches of government, free of encroachment or infringement by one upon the other, is essential

In our Federal Constitution, this concept is manifest in the provisions that "[a]ll legislative Powers . . . shall be vested in a Congress of the United States,"[424] "[t]he executive Power shall be vested in a President of the United States,"[425] and "[t]he judicial Power of the United States[ ] shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[426] Referring to this division of powers, Justice Brandeis said:

> The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[427]

Florida's Constitution contains similar provisions which state that "[t]he legislative power of the state shall be vested in a legislature of the State of Florida,"[428] "[t]he supreme executive power shall be vested in a governor,"[429] and "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts."[430] However, the Florida Constitution contains an additional provision which has no counterpart in the Federal Constitution:

> Branches of government—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.[431]

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to the effective operation of our constitutional system of government."); THE FEDERALIST NO. 47, *supra* note 421, at 325-26.

424 U.S. CONST. art. I, § 1.

425 U.S. CONST. art. II, § 1.

426 U.S. CONST. art. III, § 1.

427 Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

428 FLA. CONST. art. III, § 1.

429 FLA. CONST. art. IV, § 1.

430 FLA. CONST. art. V, § 1.

431 FLA. CONST. art. II, § 3.

The concept of separation of powers incorporated into our Federal Constitution was never intended to imply the existence of branches of government, each of which was completely separate in its powers and responsibilities from the others.[432] Rather, it was intended that, while each branch would be largely separate from the others, each would also be subject to checks and balances that might be exercised by the others, thereby creating a system of interdependence.[433] The natural tension created by such a system is intended to prevent overreaching by any one branch.[434]

Relying on the language of article II, section 3, of the Florida Constitution, Florida's courts have said repeatedly that "[u]nlike the United States Constitution and the constitutions of some other states, the Florida Constitution contains a 'strict' separation of powers provision."[435] However, Florida's courts also have said repeatedly that, because, as a practical matter, it would be impossible to do so, "[s]eparation of powers does not mean that every governmental activity be classified as belonging exclusively to a single branch of govern-

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[432] See THE FEDERALIST NO. 47, *supra* note 421, at 325-26 ("[Montesquieu] did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other"); THE FEDERALIST NO. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961) ("[Separation of powers] does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other [rather, unless the] . . . departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained").

[433] *See* Myers v. United States, 272 U.S. 52, 291-92 (1926) (Brandeis, J., dissenting) ("The separation of the powers of government did not make each branch completely autonomous. It left each in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial."); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

[434] *See* THE FEDERALIST NO. 48, *supra* note 432, at 332 ("[None of the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers").

[435] Woods v. State, 740 So. 2d 20, 24 (Fla. Dist. Ct. App. 1999), *approved sub nom.* State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000); *see also* Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004); B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994).

ment."[436] Thus, while the doctrine as set out in the Florida Constitution "encompasses two fundamental prohibitions:" first, "that no branch may encroach upon the powers of another," and second, "that no branch may delegate to another branch its constitutionally assigned power;"[437] these prohibitions are "directed only at those powers which belong exclusively to a single branch of government."[438] Moreover, the Florida Supreme Court has said that "[t]he true meaning of the separation doctrine is that the whole power should not be exercised by the same hands which possess the whole power of either of the other departments."[439]

Accordingly, while there may be some circumstances in which application of the separation of powers doctrine, as expressed in Florida's Constitution, will produce a different result than will application of the doctrine as found in our Federal Constitution,[440] for our purposes, it does not appear that application of one or the other will result in a significantly different outcome.

A. The Need for Restraint

Justice Frankfurter advised that:

> [T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in

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436 State v. Johnson, 345 So. 2d 1069, 1071 (Fla. 1977) (quoting extensively from State v. Atl. Coast Line R. Co., 47 So. 969, 975 (Fla. 1908), where the court said, "[p]erhaps there can be no absolute and complete separation of all the powers of a practical government").

437 Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264 (Fla. 1991).

438 Simms v. State Dep't of Health & Rehab. Servs., 641 So. 2d 957, 960 (Fla. Dist. Ct. App. 1994) (citing *Atl. Coast Line R. Co.*, 47 So. at 974).

439 Canney v. Bd. of Pub. Instruction of Alachua County, 278 So. 2d 260, 262 (Fla. 1973).

440 One such circumstance is with regard to the prohibition against delegation of legislative power to executive branch agencies, generally known as the "nondelegation doctrine." *See, e.g., Schiavo*, 885 So. 2d at 332; Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).

> observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it.[441]

Although implicit, Justice Frankfurter's message is quite clear—when judges stray beyond the realm of construing statutes and into that of rewriting them, they are exercising powers granted to the legislative branch of government and, thereby, violating the separation of powers doctrine. While much of the time the border is clearly defined, in many cases it is vague and ill-defined. How, then, is a judge to go about determining in any given case the point where proper exercise of the judicial function ends and usurpation of the legislative law-making prerogative begins?

Difficulties in statutory construction frequently arise in two situations: first, when the language of the statute itself is unclear as applied to the given facts;[442] or second, when it is clear from the language that the Legislature intended to deal with a subject generally and equally clear that the precise factual scenario presented did not occur to the Legislature at the time the statute was enacted.[443] It is appropriate for courts to attempt to determine the statute's meaning in such cases. As Justice Holmes said:

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: [w]e see what you are driving at, but you have not said it, and therefore we shall go on as before.[444]

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[441] Frankfurter, *supra* note 3, at 533.

[442] *See, e.g.,* United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989); Hawkins v. Ford Motor Co., 748 So. 2d 993, 1002 (Fla. 1999).

[443] *See, e.g.,* Diamond v. Chakrabarty, 447 U.S. 303, 315-16 (1980); Barr v. United States, 324 U.S. 83, 90 (1945).

[444] Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J., sitting as Circuit Justice).

While Justice Holmes recognized that judges may legitimately perform what is in essence legislative gap-filling when construing statutes in such situations, he insisted that this role must be limited.[445] So too, with Judge Learned Hand, who said that a judge "must try as best he can to put into concrete form" what the common will, as expressed by the Legislature, is;[446] yet, "the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop . . . ."[447] It is when judges fail to heed Judge Hand's admonition and, instead, continue on undeterred, acting on the assumption that the Legislature must have meant what the judges believe would produce the most rational result, that judges exceed the proper scope of their power and poach prerogatives that belong exclusively to the legislative branch of government.

B. Church of the Holy Trinity v. United States—*A Court Run Amok?*

Interestingly, however, the more extreme examples of judicial overreaching when it comes to statutory construction may occur when a court is called upon to apply statutory language that appears to be clear and unambiguous. Perhaps the most famous (or infamous, depending on one's point of view) in this regard is *Church of the Holy Trinity v. United States*.[448]

> Congress had passed legislation in 1885[449] making it
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> > unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or

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445 *See* GLENDON, *supra* note 14; *see supra* text accompanying note 15.

446 Hand, *supra* note 16, at 109.

447 *Id.*

448 143 U.S. 457 (1892).

449 *See* United States v. Church of the Holy Trinity, 36 F. 303, 303 (S.D.N.Y. 1888) ("This suit [was] brought to recover a penalty of $1,000 imposed by the act of [C]ongress of February 26, 1885.").

> special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia.[450]

Another section of the same legislation expressly exempted from the statute "professional actors, artists, lecturers, singers, and domestic servants."[451] The United States brought suit against the Church of the Holy Trinity, an Episcopal parish incorporated under the laws of New York as a religious society,[452] seeking to recover the one-thousand-dollar penalty prescribed by the legislation for violation of its provisions.[453] The pertinent facts were undisputed.[454]

In 1887, the church had entered into a contract with an alien who resided in England, pursuant to which the alien immigrated to New York to become rector and pastor of the church.[455] The sole issue raised by the Church's demurrer to the complaint was

> whether [C]ongress intended to prohibit the migration [to America] of an alien who comes pursuant to a contract with a religious society to perform the functions of a minister of the gospel, and to subject to the penalty the religious society making the contract and encouraging the migration of the alien minister.[456]

The trial court opined that the primary purpose of the act had undoubtedly been "to prohibit the introduction of assisted immigrants, brought [to the United States] under contracts previously made by corporations and capitalists to prepay their passage and obtain their services at low wages for limited periods of time."[457] It noted that the legislation had been "introduced and advocated by the trades union and

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450 *Church of the Holy Trinity*, 143 U.S. at 458.
451 *Id.* at 458-59.
452 *Id.* at 457.
453 *Church of the Holy Trinity*, 36 F. at 303.
454 *See id.* at 304.
455 *Church of the Holy Trinity*, 143 U.S. at 458.
456 *See Church of the Holy Trinity*, 36 F. at 304.
457 *Id.*

labor associations . . . to shield the interests represented by such organizations from the effects of the competition in the labor market of foreigners brought [to the United States] under contracts having a tendency to stimulate immigration and reduce the rates of wages."[458] The court also thought it was unlikely that Congress, when it passed the statute, intended the legislation to apply to cases such as the one before the court.[459]

The trial court noted further, however, that it would have been difficult to draft a statute that was more comprehensive in its reach.[460] The words used clearly conveyed an intent to be all-inclusive and, if that were not enough, by a separate section Congress exempted several classes of persons from the proscriptions of the legislation, but clergy were not among those exempted.[461]

The trial court concluded that, as unlikely as it thought it was that Congress had intended to include clergy in the classes of persons subject to the proscription, given the language used, the court had no option but to hold that the facts with which it was faced were covered by the statute.[462] Accordingly, it overruled the demurrer and entered judgment in favor of the Government.[463] In doing so, it noted that the language used by Congress had been ample and unequivocal,[464] and that

> where the terms of a statute are plain, unambiguous, and explicit, the courts are not at liberty to go outside of the language to search for a meaning which it does not reasonably bear in the effort to ascertain and give effect to what may be imagined to have been or not to have been the intention of [C]ongress.[465]

The Church sought review in the United States Supreme Court, and the Court

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458 *Id.*
459 *See id.*
460 *Id.* at 305.
461 *See id.*
462 *See id.* at 304.
463 *Id.* at 306.
464 *Id.* at 304.
465 *Id.*

> conceded that the act of the [Church] [wa]s within the letter of [the statute], for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words "labor" and "service" both used, but also, as it were to guard against any narrow interpretation and emphasize the breadth of meaning, to them is added "of any kind;" and, further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached . . . .[466]

While the Court found "great force" in the trial court's reasoning,[467] it concluded that Congress could not have intended for the act to apply in such a case, stating that "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."[468] Accordingly, a unanimous Court reversed, insisting that:

> This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.[469]

As justification for its decision, the Court first cited numerous cases holding that reason and common sense should prevail over literal application of the words used if such literal application would lead to a

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466 *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 458-59 (1892).

467 *Id.* at 459.

468 *Id.*

469 *Id.*

truly absurd result.[470] Next, the Court looked to the title of the statute, which it said "may be considered in determining the intent of the legislature . . . ."[471] The title "is [a]n act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia."[472] According to the Court, "it is to be assumed that words and phrases are used in their ordinary meaning,"[473] and "[t]he common understanding of the terms 'labor' and 'laborers' does not include preaching and preachers . . . ."[474] The Court thought that "[n]o one reading such a title would suppose that [C]ongress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain."[475]

According to the Court, "another guide to the meaning of a statute is found in the evil which it is designed to remedy."[476] It quoted the court in *United States v. Craig*[477] as accurately characterizing the evil the legislation intended to remedy.

> The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to [C]ongress for relief by the passage of the act in question, the design of which was to raise the standard of

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[470] *Id.* at 459-62.
[471] *Id.* at 462.
[472] *Id.* at 463 (internal quotation marks omitted).
[473] *Id.*
[474] *Id.*
[475] *Id.*
[476] *Id.*
[477] 28 F. 795 (E.D. Mich. 1886).

> foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.[478]

Looking to legislative history for further evidence of the evil which Congress sought to remedy, the Court said:

> It appears, also, from the petitions, and in the testimony presented before the committees of [C]ongress, that it was this cheap, unskilled labor which was making the trouble, and the influx of which [C]ongress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition.[479]

Finally, the Court stated that it found it inconceivable that Congress could have "intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation" because ours is a Christian nation.[480]

The Court concluded its opinion with the following:

> [This] is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under these circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.[481]

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[478] *See Church of the Holy Trinity*, 143 U.S. at 463-64 (quoting Craig, 28 F. at 798) (internal quotation marks omitted).

[479] *Id.* at 464.

[480] *Id.* at 471.

[481] *Id.* at 472.

Church of the Holy Trinity has become synonymous with what has come to be known as the absurdity doctrine or rule. This rule constitutes an exception to the general rule that, where the language of a statute is clear and unambiguous, courts are bound to apply the statute as written, and there is no room for interpretation.[482] According to the absurdity rule, "[w]here the plain language of the statute would lead to 'patently absurd consequences,' that 'Congress could not *possibly* have intended' . . . [courts] need not apply the language in such a fashion."[483]

More recently, Justice Kennedy has said that:

> When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way.[484]

However, he also has warned that:

> This exception remains a legitimate tool of the Judiciary . . . only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . .and where the

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[482] *See, e.g.,* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (referring to this rule as the "one, cardinal canon before all others"); A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931) ("When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction . . . .").

[483] Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment) (internal citations omitted) (emphasis added); *see also* Maddox v. State, 923 So. 2d 442, 452-53 (Fla. 2006) (Cantero, J., dissenting) ("Unless we can say with absolute confidence that no reasonable legislature would have intended for the statute to carry its plain meaning, we should 'presume that [our] legislature says in a statute what it means and means in a statute what it says there. The exception to the plain meaning rule should not be used to avoid an unintended result, only an absurd or patently unreasonable one.") (citations omitted).

[484] Pub. Citizen, 491 U.S. at 470 (Kennedy, J., concurring in the judgment).

> alleged absurdity is so clear as to be obvious to most anyone.[485]

Referring to the decision in *Church of the Holy Trinity*, Justice Kennedy has said, "I should think the potential of this doctrine to allow judges to substitute their personal predelections [sic] for the will of the Congress is so self-evident from the case which spawned it as to require no further discussion of its susceptibility to abuse."[486]

Others go considerably further in their criticism of *Church of the Holy Trinity*. Justice Scalia criticized the Court's statement in *Church of the Holy Trinity* "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers,"[487] calling it "a judge-empowering proposition if there ever was one."[488] According to Justice Scalia:

> [O]nce one departs from "strict interpretation of the text" . . . fidelity to the intent of Congress is a chancy thing . . . . Legislative history can never produce a "pellucidly clear" picture . . . of what a law was "intended" to mean, for the simple reason that it is never voted upon—or ordinarily even seen or heard—by the "intending" lawgiving entity, which consists of both Houses of Congress and the President. . . . Thus, what judges believe Congress "meant" (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, *i.e.*, *should* have meant. In *Church of the Holy Trinity*, every Justice on this Court disregarded the plain language of a statute that forbade the hiring of a clergyman from abroad because, after all (they thought), "this is a Christian nation," so Congress could not have meant what it said.[489]

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485 *Id.* at 470-71 (citations omitted).

486 *Id.* at 474.

487 *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

488 Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1551 (2007) (Scalia, J., dissenting).

489 *Id.* at 1556 (citation omitted).

C. Recent Developments—The Absurdity Doctrine Marches On

As Justice Scalia's comments suggest, a healthy respect for the doctrine of separation of powers would seem to dictate that, at least when the language is clear, courts give effect to the words chosen by the Legislature, even if they harbor serious doubt, leaving it to the drafters to correct any error. Yet, courts continue to venture undeterred into this area, holding that words chosen by the Legislature do not mean what they clearly say.

In a relatively recent decision,[490] a panel of the United States Court of Appeals for the Ninth Circuit was called on to construe a subsection of the Class Action Fairness Act of 2005.[491] The relevant subsection reads in its entirety:

> Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not *less* than 7 days after entry of the order.[492]

The issue the panel was asked to resolve was whether the italicized word *less* meant *less*, or whether it actually meant *more*.[493]

Although the language used appears perfectly clear, because the panel thought the use of the word less was illogical,[494] it looked to legislative history, which the panel concluded clearly expressed an intention contrary to that expressed by the words used—i.e., that the intent was "to create a time *limit* for appeal, specifically to require that the party seeking to appeal do so not *more* than seven days after the district

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490 See Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140 (9th Cir. 2006).

491 Class Action Fairness Act of 2005, 28 U.S.C. § 1453(c)(1) (2000 & Supp. V 2005).

492 *Id.* (emphasis added).

493 *See Amalgamated Transit Union*, 435 F.3d at 1146.

494 *See id.*

court's order."[495] Accordingly, agreeing with an earlier decision by the Tenth Circuit,[496] the panel held that the word *less* had actually been intended by Congress to be *more*,[497] essentially rewriting the statute.

A judge on the court requested a vote on whether *Amalgamated Transit Union* should be reheard en banc.[498] Although a majority of the court rejected the en banc call,[499] the original panel wrote a brief order explaining that the duty of the court when construing legislation "is always to discern the intent of Congress."[500] It noted, further, that the court "will resort to legislative history, even where the plain language is unambiguous, where the legislative history clearly indicates that Congress meant something other than what it said."[501]

Six members of the court dissented from the denial of the en banc request.[502] Speaking for the dissent, Judge Bybee said, "[w]e are a court—charged with interpretation, not legislation—and I know of no 'illogicality' doctrine that permits us to change the words in a statute when we think there is a more logical way that Congress could have written [them]."[503] He also said that "the courts' role is to give effect to statutes as Congress enacts them; it is not the courts' role to assess whether a statute is wise or logical."[504] He noted that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances,"[505] Judge Bybee pointed out that the legislative history upon which the panel had relied

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495 *Id.* (emphasis added).

496 *See* Pritchett v. Office Depot, Inc., 420 F.3d 1090 (10th Cir. 2005).

497 See Amalgamated Transit Union, 435 F.3d at 1146.

498 Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1093 (9th Cir. 2006).

499 *Id.* at 1094.

500 *Id.* at 1093 (quoting the panel opinion, Amalgamated Transit Union, 435 F.3d at 1146) (internal quotation marks omitted).

501 *Id.* at 1094 (quoting Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 877 (9th Cir. 2001) (en banc)) (internal quotation marks omitted).

502 *Id.*

503 *Id.* at 1097 (Bybee, J., dissenting).

504 *Id.* at 1096.

505 *Id.* (quoting Am. Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982)) (internal quotation marks omitted).

> was not submitted until eighteen days after the Senate had passed the bill, eleven days after the House had passed the bill, and ten days after the President signed the bill into law. . . . Accordingly, the panel read a statute to mean the exact opposite of what it says based on a Senate report that no senator–much less members of the House or the President–ever saw.[506]

Judge Bybee also stated that, although the panel had not said so, it was apparent that they were relying on the absurdity doctrine to reach their decision.[507] He concluded that, because there was nothing patently absurd about subsection 1453(c)(1) as written, the absurdity doctrine did not apply.[508]

Finally, Judge Bybee said:

> There are real consequences to a court's well-intentioned decision to fix Congress's mistakes. First, if courts are going to correct whatever they perceive to be Congress's mistakes, Congress should lose all confidence that courts will enforce statutes as written. The panel has construed Congress's admittedly clear language to mean the precise opposite of what it says. In so doing, the panel has ignored the deference we must give to the supremacy of the legislature. . . .
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> Furthermore, "rescuing" Congress from what the panel assumes was a mistake forces both the legislative and judicial branches to deviate from their respective constitutional roles. . . .
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> Second, the panel's decision strips citizens of the ability to rely on the laws as written. . . . Such a ruling . . . prevents even the most prudent citizen from ever being confident that his conduct comports with the legislature's laws . . . . The panel's decision is a trap for

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506 *Id.*

507 *See id.* at 1099.

508 *Id.* at 1098.

> citizens (and their lawyers) who can no longer trust the statute as written to mean what it plainly says . . . .
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> Third, and perhaps most importantly, the panel's decision undermines our credibility. . . . If words are so malleable, might we routinely read our own precedents as saying the opposite of what they clearly say? May one panel simply rewrite another panel's opinion when it thinks the prior opinion is "illogical?" And where might our creativity lead us with provisions of the Constitution that don't make as much sense as we would like?[509]

In another relatively recent case,[510] the Florida Supreme Court was called on to construe that portion of section 316.650(9) which states "[traffic] citations shall not be admissible evidence in *any* trial . . . ."[511] In *Maddox v. State*,[512] the defendant had been "charged with two counts of forgery for signing the citations issued in the name of [his brother] and two counts of uttering a forged instrument."[513] At his trial, the traffic citations were admitted in evidence.[514]

Maddox was convicted and, relying on a prior First District decision holding that section 316.650(9) prohibited the use of traffic citations as evidence in such a prosecution,[515] appealed to the Second District.[516] The Second District affirmed, concluding that "whether th[e] issue [of the admissibility of the traffic citations] was preserved for appeal [wa]s questionable"[517] but, even if the issue had been preserved, section 316.650(9) did not apply.[518]

Despite the fact that the bases for the Second District's decision did not "expressly and directly conflict with a decision of another dis-

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509 *Id.* at 1099-1100.

510 *See* Maddox v. State, 923 So. 2d 442 (Fla. 2006).

511 Fla. Stat. § 316.650(9) (2007) (emphasis added).

512 923 So. 2d 442 (Fla. 2006).

513 *See* Maddox v. State, 862 So. 2d 783, 784 (Fla. Dist. Ct. App. 2003).

514 *See id.* at 784.

515 *See* Dixon v. State, 812 So. 2d 595, 595 (Fla. Dist. Ct. App. 2002).

516 *See Maddox*, 862 So.2d at 784.

517 *Id.* at 784.

518 *Id.*

trict court of appeal or of the supreme court on the same question of law,"[519] the Second District, nevertheless, certified such a conflict with the prior First District decision.[520] Although the State pointed out that no express and direct conflict existed between the Second District's decision and the prior First District decision,[521] the supreme court accepted jurisdiction and reached the merits of the issue.[522]

In a four to three decision, the majority of the supreme court concluded that the phrase "any trial" was not intended by the Legislature "to be construed so literally to exclude the use of traffic citations in all judicial proceedings."[523] Instead, it concluded that the statute meant that traffic citations were inadmissible only in trials "directly associated" with traffic infractions,[524] i.e., trials "in which the manner or method of the operation, maintenance or use of a vehicle is the issue in controversy."[525]

In reaching its conclusion, the majority relied on several canons of statutory construction, both linguistic and substantive. The majority acknowledged "that [i]t is a fundamental principle of statutory construction that where a statute is plain and unambiguous there is no occasion for judicial interpretation,"[526] and conceded that "the strict meaning of the words in the abstract employed by the Legislature when it drafted section 316.650(9) may admittedly support the outcome of the First District's opinion . . . ."[527] Nevertheless, it concluded that the literal meaning of the words used was not the meaning intended by the Legislature.[528]

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519 Fla. R. App. P. 9.030(a)(2)(A)(iv) (giving the supreme court discretionary jurisdiction in such cases).

520 *See Maddox*, 862 So. 2d at 784-85.

521 See Maddox v. State, 923 So. 2d 442, 443 n.1 (Fla. 2006).

522 *See id.* at 443 n.1 (explaining that even though the State's argument might be accurate, the court, nevertheless, had jurisdiction because "[t]he heart of the conflict revolves around the differences in the district courts' interpretations of the scope of section 316.650(9) . . . .").

523 *Id.* at 448.

524 *Id.* at 446.

525 *Id.* at 447.

526 *Maddox*, 923 So. 2d at 445 (quoting Golf Channel v. Jenkins, 752 So. 2d 561, 564 (Fla. 2000)) (internal quotation marks omitted).

527 *Id.* at 448.

528 *See id.*

The majority, relying on the canon that requires provisions to be read together with related provisions to divine legislative intent,[529] concluded that, when read in context with the other provisions of chapter 316 of the *Florida Statutes* (which cover some ninety-three pages), it was apparent that the language in question had not been intended to be read literally.[530] The majority also found telling the fact that section 316.066(4), a part of the same chapter, added the modifying phrase, "civil or criminal" to the words "any trial," concluding that, had the Legislature intended section 316.650(9) to apply to all civil and criminal trials, it would have said so, as it had in section 316.066(4).[531] Finally, the majority relied on the absurdity doctrine,[532] concluding that "a sterile literal interpretation should not be adhered to [because] it would lead to absurd results."[533]

Speaking for the dissent, Justice Cantero begins his opinion with the statement: "I would apply the plain meaning of the statute, which prohibits the introduction of traffic citations 'in any trial.' "[534]

He then points out that it is well established that "[t]he first step in interpreting [a] statute is to scrutinize its text,"[535] noting that the plain meaning "rule respects the statutory text as the most reliable and authoritative expression of legislative intent,"[536] and that "[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity."[537] And, as he further points out, "[s]ection 316.650(9) is as clear, definite, and unambiguous as statutory language gets."[538]

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529 *See id.* at 445-46.

530 *See id.* at 446.

531 *See id.* at 446-47.

532 *See id.* at 447.

533 *Id.* at 448.

534 *Id.* (Cantero, J., dissenting).

535 *Id.* at 449.

536 *Id.*

537 *Id.* (quoting St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982)) (internal quotation marks omitted).

538 *Id.* at 450.

Next, Justice Cantero addresses the majority's reliance on the canon that requires provisions to be read together with related provisions to divine legislative intent.[539] He points out that this tool is of little use because chapter 316 contains provisions that support a literal reading of the language of section 316.650(9), as well as the reading chosen by the majority.[540]

Finally, Justice Cantero turns to the majority's reliance on the absurdity doctrine.[541] While he acknowledges its validity,[542] he insists that "to prevent the appearance that we are merely substituting our own judgment for the Legislature's, we must invoke the exception only when absolutely necessary–that is, when otherwise the result truly would be absurd or patently unreasonable."[543] He points out that "the absurdity exception to the plain meaning rule is intended to be narrow"[544] because, "[i]f expanded . . . the absurdity exception would threaten to undermine the separation of powers by allowing judges to substitute their own views of wise public policy for the compromises struck by legislators."[545]

According to Justice Cantero, "[u]nless we can say with absolute confidence that no reasonable legislature would have intended for the statute to carry its plain meaning, we should 'presume that [our] legislature says in a statute what it means and means in a statute what it says there,' "[546] "[t]he exception to the plain meaning rule should not be used to avoid an unintended result, only an absurd or patently unreasonable one."[547] Justice Cantero then explains at some length why he finds nothing "absurd" or "patently unreasonable" about reading section 316.650(9) as written.[548]

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539 *See id.*

540 *See id.* at 451-52.

541 *See id.* at 452.

542 *See id.*

543 *Id.*

544 *Id.*

545 *Id.*

546 *Id.* (quoting BedRoc, Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) (plurality opinion)).

547 *Id.* at 452-53.

548 *Id.* at 453-55.

The preceding discussion demonstrates graphically the difficulties courts face when called on to construe a statute in a "hard case." Particularly when a judge is convinced that the Legislature could not possibly have intended the result that the words used require, the desire to reach what the judge perceives to be a "just" result, given the facts of the case, makes it very tempting to "fix" the legislature's mistake, out of only the purest of motives. However, words do not always convey the same meaning to all people. What seems clearly an absurd result to one person may seem perfectly reasonable to another. How else may one explain the fact that, in *Maddox v. State*, four justices concluded that the legislature could not possibly have meant what it said, while the remaining three justices reached the opposite conclusion?[549]

Moreover, succumbing to the temptation to "fix" such mistakes has serious consequences. For one thing, it reduces the ability of individuals and businesses and their lawyers to predict how statutes will be applied in the real world. Even more importantly, however, it inevitably does damage, however silently, to the separation of powers, which is the very foundation of our system of government.

In this part, we have examined the interplay between the separation of powers doctrine and the process of statutory construction. In the next (and final) Part, we shall discuss how we perceive judges ought to employ the doctrine as a limitation on the process.

IV. A Modest Proposal

The lack of a single, consistent, generally accepted approach to statutory construction has resulted in reduced predictability of outcome in cases that turn on construction of a statute. This is bad for society and for the rule of law. In the absence of a relatively high degree of predictability, it is not possible for people to anticipate what the consequences of their actions are likely to be.[550] Judge Cardozo recognized

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[549] *See id.* at 448.

[550] Blackstone understood the importance of this concept when, speaking of what he referred to as "municipal law," he explained that people can be expected to obey a law only if they know its extent. *See* 1 William Blackstone, Commentaries *35. So, too, with Justice Holmes, who insisted that, because people want to know what the legal consequences of their actions are likely to be, lawyers should be concerned primarily with "the prediction of the incidence of the public force through the

as much when he said "[w]e must not throw to the winds the advantages of consistency and uniformity to do justice in the instance."[551] He also said, "[o]ne of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness."[552]

Moreover, perceptions sometimes are as important as reality. It is not enough that the law is being fairly administered unless society also perceives that such is the case. If people are not able to predict with some degree of accuracy how courts will approach the process of deciding what a statute means, respect for our system of justice, and for the rule of law, will be diminished. Accordingly, in this part, we shall propose an approach to statutory construction that we think will, if it is followed consistently, result in greater predictability and a more principled consideration of this most vexing area of the law.

A. Always Start with the Words

There are many compelling reasons why a judge attempting to determine what a legislature had in mind when it passed a particular piece of legislation *always* should begin with the language of the statute. In the first place, the words used are the means by which the legislature has chosen to express itself. Therefore, a healthy respect for the doctrine of separation of powers commands deference to the words chosen by the legislature as correctly conveying the meaning intended by that branch.[553] As Justice Scalia has said: "[t]he only sure indication of what Congress intended is what Congress enacted . . . ."[554]

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instrumentality of the courts." Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 991 (1897).

551 CARDOZO, *supra* note 11, at 103.

552 *Id.* at 112.

553 *See, e.g.,* Lamie v. U.S. Trustee, 540 U.S. 526, 538 (2004); United States v. Locke, 471 U.S. 84, 95 (1985); Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1099-00 (9th Cir. 2006) (on motion for rehearing en banc) (Bybee, J., dissenting); Maddox, 923 So. 2d at 449-50 (Cantero, J., dissenting); State v. Egan, 287 So. 2d 1, 4 (Fla. 1973) (quoting Van Pelt v. Hilliard, 78 So. 693, 694-95 (Fla. 1918)).

554 Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1559 (2007) (Scalia, J., dissenting).

In addition, attributing to statutes the ordinary meaning of the words used enhances fairness, reliability, and predictability. "Unless the meaning of statutes can be readily ascertained by a reading of the statutory language, the ability of citizens to comply with statutory standards is diminished, and the administration of such standards may be unmanageable or even erratic."[555] As a general rule, our society must be able to rely on statutes as written.

Accordingly, if the words used are free of ambiguity (either on the face of the statute or lurking in the background), the inquiry should end and the words should be given their effect as written.[556] Even if convinced that the legislature actually meant something other than the meaning conveyed by the words used, in the absence of any ambiguity in the statutory language itself, a court should not disregard that meaning.[557] If, in fact, the legislature intended something else, it made the mistake, and it should correct it.[558]

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[555] Peoples Drug Stores, Inc. v. District of Columbia, 470 A.2d 751, 755 (D.C. 1983) (en banc).

[556] *See, e.g.,* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise . . . ."); *see also* Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." (internal quotations omitted) (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931))).

[557] *See, e.g.,* United States v. Locke, 471 U.S. 84, 95 (1985) ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."); St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982) ("[Even if] a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.")(internal quotations omitted) (quoting Van Pelt v. Hilliard, 78 So. 693, 694 (1918))).

[558] *See, e.g., Lamie*, 540 U.S. at 542 ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."); Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."); *Van Pelt*, 78 So. at 694-95 ("If a legislative enactment . . . has been passed improvidently the responsibility is with the Legislature and not the courts.").

As have others,[559] we acknowledge (albeit with some reluctance) the necessity of the absurdity doctrine exception to the plain meaning rule. However, we also agree that the doctrine's application must be carefully limited and employed only when it is clear to virtually everybody that applying the statute as written will produce a truly absurd result, not merely an unreasonable one. That is, it must be a result so absurd "that no reasonable legislature would have intended that."[560] As already discussed at some length,[561] the dangers inherent in a less restrained use of the doctrine are simply too great.

It is, however, when the words chosen by the legislature are not free of ambiguity—when, in the words of Judge Cardozo, "the colors do not match"[562]—that the real work of statutory construction begins. Our proposal is directed to those cases.

B. Assume a Reasonable Legislature

When construing a truly ambiguous statute, we suggest that judges assume that the legislature was acting reasonably when it passed the legislation. We are not the first to suggest such an approach.[563]

In fact, this approach has been criticized as ignoring the way the legislative process actually works, disregarding such considerations as

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559 *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992); *see* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 470 (1989); *see supra* text accompanying note 483; *see supra* text accompanying note 484.

560 *See* Maddox v. State, 923 So. 2d 442, 452 (Fla. 2006) (Cantero, J., dissenting); *see* Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992); *see* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 470 (1989); *see supra* text accompanying note 483; *see supra* text accompanying note 484.

561 *See supra* notes 483-540 and accompanying text.

562 CARDOZO, *supra* note 11, at 21.

563 Perhaps the most well-known statement of this approach comes from Professors Henry Hart and Albert Sacks. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("[A court] should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably [and] . . . should presume conclusively that these persons, whether or not entertaining concepts of reasonableness shared by the court, were trying responsibly and in good faith to discharge their constitutional powers and duties.").

legislative compromises, intentional vagueness, and interest group pressure.[564] We readily acknowledge this. Nonetheless, it seems to us that this approach carries with it a benefit of sufficient worth to merit its use—it affords due deference to a coequal branch of government. That institutional gain overrides the criticism of this approach.

C. Search for the Legislative Purpose

Applying the presumption that the legislature was acting reasonably when it passed the legislation under review, courts should attempt to determine the *purpose* of the legislation—i.e., what the legislature hoped to accomplish by the legislation. Today sometimes referred to as "purposivism," this approach has a long and distinguished lineage.[565]

The roots of purposivism are generally traced to the sixteenth-century *Heydon's Case*,[566] where what has come to be known as the "mischief rule" was set out by Lord Coke.[567] Other proponents have included Justice Felix Frankfurter,[568] Professor Karl Llewllyn,[569] Professors Henry Hart and Albert Sacks,[570] Judge Learned Hand[571] and, to a certain extent, Judge Richard Posner.[572] As expressed by Justice Frankfurter, the concept is based on the principle that

> "[l]egislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of pol-

564 *See, e.g.,* Posner, *supra* note 28, at 819.

565 *See id.* (noting the antecedents of Hart and Sacks' approach go back approximately four hundred years).

566 76 Eng. Rep. 637 (Ex. 1584).

567 *See supra* note 24; Heydon's Case, 76 Eng. Rep. 637, 638 (Exch. 1584); *see supra* text accompanying note 24; *see supra* text accompanying note 25.

568 *See* Frankfurter, *supra* note 3, at 538-39.

569 *See* Llewellyn, *supra* note 43, at 400 ("If a statute is to make sense, it must be read in the light of some assumed purpose.").

570 See HART & SACKS, *supra* note 563, at 1374, 1377-80.

571 *See* Cabell v. Markham, 148 F.2d 737, 739 (2d Cir 1945) ("[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.").

572 *See* Posner, *supra* note 28, at 817, 819 (admitting his approach is similar to Hart and Sacks' approach).

> icy, to formulate a plan of government. That aim, that policy is not drawn . . . out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose."[573]

How, then, does one go about determining the purpose of legislation? One should look to anything that, in the words of Justice Frankfurter, "is logically relevant"[574] to the endeavor. Chief Justice Marshall was of a similar view. He said, "[w]here the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ."[575] One must keep in mind, however, that this search is an *objective* one, not *subjective*—it has nothing to do with attempting to psychoanalyze the draftsmen[576] in an effort to divine what was in their minds.[577] Moreover, in conducting this analysis, it is important that judges refrain from substituting their ideas regarding what the legislature's purpose ought to have been for the purpose that is manifested by the available evidence.

D. Shun Substantive Canons of Construction

Use of the substantive (as opposed to linguistic) canons of construction is problematic for several reasons. In the first place, as Professor Llewellyn pointed out, "there are two opposing canons on almost every point."[578] Thus, for instance, "[s]tatutes in derogation of the common law will not be extended by construction," but "[s]uch acts will be liberally construed if their nature is remedial."[579] Judge Posner made

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573 Frankfurter, *supra* note 3, at 538-39.

574 Frankfurter, *supra* note 3, at 541.

575 United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

576 *See, e.g.,* Chisom v. Roemer, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting) ("When we adopt a method that psychoanalyzes Congress rather than reads its laws, . . . we do great harm."); United States v. Pub. Utils. Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) ("I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress.").

577 *See* Frankfurter, *supra* note 3, at 539.

578 Llewellyn, *supra* note 43, at 401.

579 *Id.* (citing Devers v. Scranton, 161 A. 540 (Pa. 1932); Becker v. Brown, 91 N.W. 178 (Neb. 1902)). Indeed, in *Campbell v. Goldman*, 959 So. 2d 223, 225-26 (Fla. 2007), the Florida Supreme Court applied the "derogation" canon in holding that even technical violations of the fee-shifting provisions of the offer of judgment statute and

the same observation, stating that canons "often pull[ ] in opposite directions";[580] "that often one finds canons tugging both ways in the same case";[581] and that canons have a "tendency to trip over each other . . . ."[582]

Justice Frankfurter has said that, while "[s]uch canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment . . . [they] are not in any true sense rules of law. So far as valid, they are what Mr. Justice Holmes called them, axioms of experience."[583] Judge Posner is of the same mind. He has said that the canons are "at best of modest utility. They are things to bear in mind . . . . [T]he canons are the collective folk wisdom of statutory interpretation and they no more enable difficult questions of interpretation to be answered than the maxims of everyday life enable the difficult problems of everyday living to be solved."[584]

Perhaps of more concern, however, is the fact that many canons are simply ill-reasoned, especially in our modern, complex society governed so extensively by statutes.[585] Why, for instance, should statutes in

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rule required denial of attorneys' fees. Justice Pariente observed in her concurring opinion that the Court's decision, although required by the plain language of the statute and rule, did not "'vindicate[ ] the primary goal of the statute and rule, which is to 'encourage settlements in order to eliminate trials if possible.'" *Id.* at 227 (Pariente, J., specially concurring) (quoting Unicare Health Facilities, Inc. v. Mort, 553 So. 2d 159, 161 (Fla. 1989)). Justice Bell, in his concurring opinion, declared that "because the statute and the rule are clear and unambiguous, I do not believe it is appropriate to invoke the questionable derogation canon." *Id.* at 228 (Bell, J., concurring in result only) (citing Goldman v. Campbell, 920 So. 2d 1264, 1273 (Fla. Dist. Ct. App. 2006)).

580 RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 280 (1990) (citing KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960)).

581 *Id.* at 282.

582 *Id.* at 282 n.28. Justice Bell made this point in his concurring opinion in Campbell v. Goldman, declaring that the standard of construction in Florida Rule of Civil Procedure 1.010 (requiring rules to be construed to secure a "speedy" and "inexpensive" determination of cases) should apply to resolve any ambiguity, "not the derogation canon." *Campbell*, 920 So. 2d at 228 (Bell, J., concurring in result only).

583 Frankfurter, *supra* note 3, at 544 (citing Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928)).

584 POSNER, *supra* note 580, at 279-80.

585 *See* Posner, *supra* note 28, at 806 (stating that "most of the canons are just plain wrong").

derogation of the common law be strictly construed? Is this canon really anything more than a weapon developed by the courts at some time in the past to express their displeasure over legislatures' perceived increasing encroachment onto what had historically been the former's common law-making turf? Can it fairly be said that such a canon affords due deference to the powers of a coequal branch of government? As Judge Posner remarked, many of the substantive canons are nothing more than "political principles used to decide cases when interpretation fails, they are an acknowledgment of the impossibility of resolving all statutory questions interpretatively."[586]

What is possibly the greatest concern regarding the use of substantive canons is their proclivity to be outcome determinative. Because "there are two opposing canons, [however,] on almost every point"[587] that tend to "pull[ ] in opposite directions,"[588] the choice of one or another of those two competing canons will determine the outcome of the case. And we hasten to say that we do not mean to suggest some conscious decision-making process by which a judge deliberately chooses one or the other of two competing canons to get to the result he or she believes is more desirable. Nevertheless, the result ultimately is the same—the outcome turns on an implicitly political, rather than interpretative, consideration. We believe that, if one will follow our proposed approach, resort to substantive canons will prove unnecessary.

E. Respect the Legislature's Coequal Status

The final component of our proposed approach is one we have stressed repeatedly throughout this article—respect for the legislature's position as a coequal branch of government. We do not mean to suggest that courts intentionally disregard the importance of the separation of powers doctrine. Rather, we mean that, because courts frequently must address difficult questions of statutory construction in the context of a specific fact situation involving a live controversy between or among litigants, in the course of that effort, courts sometimes lose sight of the implications of their decision for interbranch relations.

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586 POSNER, *supra* note 580, at 280.
587 Llewellyn, *supra* note 43, at 401.
588 POSNER, *supra* note 580, at 280.

This aspect of our proposed approach is really quite simple and straightforward. We urge courts, when grappling with the "hard cases," not to lose sight of the importance of due deference to the legislative branch as that charged constitutionally with the power to enact laws, and, as Justice Frankfurter said, to exercise "discipline in observing the limitations"[589] inherent in the separation of powers doctrine; and, in the words of Judge Learned Hand, to "remember that [a judge] should go no further than he is sure the government would have gone . . . . If he is in doubt, he must stop . . . ."[590]

V. CONCLUSION

Judges today operate in a very different arena than did judges of years past. Because our society is now driven by legislatively enacted laws, the role and responsibilities of our judges have changed significantly; indeed, judges are confronted on a regular basis with new laws, and new questions about applicability that they must resolve. Statutory interpretation has taken on a life of its own.

Our intent in writing this article has been to illustrate the difficulty that judges face when confronted with the seemingly straightforward task of construing a statute. Indeed, an examination of only ten Florida Supreme Court cases since the turn of this century proves just that. Canons of statutory construction, which were intended as useful tools to guide judges in determining the meaning of legislative enactments, have proven often to cause more harm than good. Judges of differing backgrounds and beliefs confronted with the exact same statutory language may choose different canons and, thereby, reach exactly opposite results, thus leading to the unavoidable consequence of inconsistent decisions that appear on their face to be result-driven. This, in turn, has led to attacks on the judiciary, thereby threatening its independence—a vital feature in our system of government that must be protected. Because of their potential to be outcome determinative, the substantive canons of statutory construction should not be used.

Courts have yet to agree on a consistent approach to statutory construction. This point is easily illustrated by the number of statutory

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589 Frankfurter, *supra* note 3, at 533.

590 Learned Hand, *supra* note 16, at 109.

interpretation cases decided over strong, compelling dissents in only the past seven years. This interpretative inconsistency dramatically increases the difficulty of the tasks of legal practitioners attempting correctly to advise their clients concerning their legal rights and responsibilities, and of lay people attempting to determine what the law requires of them in a given situation. We believe it is time for a uniform approach, one that will be more likely to lead to consistent results and predictability in the outcome of cases.

Of course, while the need for a consistent approach to statutory interpretation is of increasing importance given the level of statutory regulation in the modern world, the judiciary must at all times remain cognizant that it is but one coequal branch in our system of government. When asked to fulfill its duty to interpret the law, it must do so with the utmost restraint; otherwise, it risks silencing the will of the people, as voiced through their elected representatives in the legislature. In the words of Judge Learned Hand: a judge "is not to substitute even his juster will for [the legislature's]; otherwise it would not be the common will which prevails, and to that extent the people would not govern."[591]

With this in mind, we propose the following, modest approach to achieving consistent, predictable, and principled decisions when construing statutes:

- First, always start with the words.
- Second, assume a reasonable legislature.
- Third, search for the legislative purpose.
- Fourth, shun substantive canons of statutory construction.
- Fifth, respect the legislature's coequal status.

There can be no doubt that, as long as there are statutes to interpret, there will be differences in their interpretation, and we would not presume to believe that our proposal could ever eliminate every instance of conflicting interpretations. Our goal, instead, is a much humbler one: a system of statutory construction that returns consistent, uniform, and impartial results based on what the law actually says.

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[591] Learned Hand, *supra* note 16, at 109.