11-1-1995

Strict Textualism

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This Article considers the approach to statutory interpretation known as strict textualism—or sometimes as the "plain meaning" rule—which holds that in interpreting a statute a court should confine itself to a literal—or "straightforward"—reading of the relevant canonical text, unless the text is ambiguous on its face or such a reading would lead to an "absurd" or "bizarre" result. Subject to those two qualifications and the use of a dictionary and grammar, all elements outside the relevant canonical text—for example, the historical condition, that gave rise to the statute, and propositions of policy, morality, and experience that provide the social context of the statute or otherwise bear on its subject matter—are inadmissible. The judge can therefore retire into that lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes.

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2. I leave open here what constitutes the relevant canonical text under strict textualism. See infra part III.

3. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 428-29 (1898).

It is important to draw a distinction between strict textualism and narrow interpretation. Courts sometimes interpret a statute narrowly to avoid a result the courts believe the legislature did not intend or perhaps even should not have intended, or to avoid declaring a statute unconstitutional. Putting aside whether this is a good or bad
I will address this approach to interpretation in the context of a recent Supreme Court decision, *Central Bank v. First Interstate Bank*, in which a five-member majority held that aiding and abetting a violation of rule 10b-5 under the Securities Exchange Act of 1934 does not itself violate rule 10b-5, using strict textualism to justify that result. Strict textualism does not begin with the *Central Bank* opinion. However, *Central Bank* is a convenient vehicle for examining this approach to statutes, in part because the underlying substantive issue was hardly momentous, so that the interpretive approach can be considered in a relatively uncluttered way.

I will first show that strict textualism is intellectually incoherent. I will then show that even if strict textualism were coherent, taken on its own terms it would be institutionally impermissible, because judges have an obligation to be faithful servants of the legislature, and the use of strict textualism violates this obligation.

The objective of this Article is very limited. I do not propose to establish or even to discuss what the theory of statutory interpretation should be. Rather, I propose only to show that strict textualism is not an acceptable theory. This showing carries only limited implications for how statutes should be interpreted. For example, a rejection of strict textualism is compatible with, among other things, aggressive and conservative theories of interpretation, objective and subjective theories, theories centered on original intent, theories centered on dynamic growth, and the admissibility or inadmissibility of various sources that might be deemed relevant to the interpretation of statutes.

Methodology, it is not strict textualism. Indeed, narrow interpretation is the polar opposite of strict textualism, because narrow interpretation is not based on the text of the statute, but on policy, moral, or institutional considerations outside the statutory text, and is usually applied precisely to avoid the apparent meaning of a text.


II. THE CENTRAL BANK CASE

In the mid-1980s, a limited partnership called AmWest L.P. planned a development in Colorado Springs to be known as Stetson Hills. The sole general partner of AmWest L.P. was AmWest Development Corporation (AmWest). As part of the development process, the developers caused the Colorado Springs-Stetson Hills Public Building Authority to be created. In 1986, the Authority issued $15 million in bonds to reimburse the developer for the cost of public improvements in Stetson Hills. The Authority, although nominally public—presumably to get a tax break on development bonds—in fact was a creature of AmWest, and all of its directors were AmWest officers.

In 1988, the Authority proposed to issue another $11 million in bonds with a new lead underwriter. The 1986 and 1988 bonds were similar. Bondholders were to be repaid either from assessments paid by commercial builders or from a reserve fund. The bonds were secured by liens on the land for the amount of the assessments. Under the bond covenants, the land subject to the liens had to be worth at least 160 percent of the bonds’ outstanding principal and interest.

Central Bank of Denver served as the indenture trustee for both bond issues. (An indenture trustee administers, on behalf of the holders of publicly held bonds, a bond indenture—the basic agreement between the bondholders and the bond issuer that governs the issuer’s obligations and the bondholders’ rights). A few months


7. Id.
8. Id.
9. Id.
10. Id.
11. Id. at 894 n.6.
12. Id. at 893.
13. Id.
14. Id.
15. Id.
16. Id. at 894.
before the 1988 bonds were to be issued, the Bank received an appraisal of the land that secured the 1986 bonds and was to secure the 1988 bonds.\textsuperscript{18} Joseph Hastings, who performed the appraisal for the 1986 bonds, also performed the 1988 appraisal.\textsuperscript{19} Hastings's 1988 appraisal showed land values essentially unchanged from the 1986 appraisal.\textsuperscript{20}

Thereafter, the Bank became aware of serious concerns about the accuracy of the 1988 appraisal and the adequacy of the security for the 1986 bonds.\textsuperscript{21} The lead underwriter of the 1986 bonds wrote to the Bank expressing concern that the 160\% test was not being met.\textsuperscript{22} The underwriter's letter also expressed concern that property values in Colorado Springs were declining and that the Authority was operating on a stale appraisal.\textsuperscript{23} The letter suggested that the Authority may have given false or misleading certifications of compliance with the bond covenants.\textsuperscript{24} Subsequently, the 1986 underwriter wrote a second letter to the Bank expressing serious concerns that the 1988 appraisal used outdated real estate values.\textsuperscript{25}

The Bank began to investigate and found some information that contradicted the 1986 underwriter's concerns.\textsuperscript{26} The Bank then asked its own in-house appraiser to review Hastings's 1988 appraisal.\textsuperscript{27} He did so and expressed concerns about Hastings's methodology and about the age of the comparable sales that Hastings relied upon.\textsuperscript{28} The Bank's appraiser suggested that there be an independent review of the Hastings appraisal.\textsuperscript{29} A trust officer of the Bank calculated that even under the Hastings appraisal, the value of the collateral did not meet the 160\% test.\textsuperscript{30}

In light of all this, the Bank, as trustee for the 1986 bonds, wrote a letter to the Authority requiring an independent review of the

\begin{itemize}
  \item[18.] \textit{First Interstate Bank}, 969 F.2d at 894.
  \item[19.] \textit{Id}.
  \item[20.] \textit{Id}.
  \item[21.] \textit{Id}.
  \item[22.] \textit{Id}.
  \item[23.] \textit{Id}.
  \item[24.] \textit{Id}.
  \item[25.] \textit{Id}.
  \item[26.] \textit{Id}.
  \item[27.] \textit{Id}.
  \item[28.] \textit{Id}.
  \item[29.] \textit{Id}.
  \item[30.] \textit{Id}.
\end{itemize}
appraisal by a different appraiser.\textsuperscript{31} The Bank’s letter stated three reasons for requiring an independent review: (1) The comparable sales data in the appraisal were outdated. (2) The methodology of the appraisal did not consider land values in a bulk sale in a forced-liquidation context—which of course would be just the context in which the land values would be significant. (3) The values assigned in the appraisal appeared unjustifiably optimistic, considering the local real estate market.\textsuperscript{32}

A flurry of meetings then took place.\textsuperscript{33} AmWest’s president, Gregory Timm, who was also a director of the Authority, objected to Central Bank’s requirement of an independent review of the Hastings appraisal.\textsuperscript{34} Timm offered instead to have a different appraiser perform a new appraisal at the end of calendar year 1988—well after the planned issuance of the 1988 bonds, which were scheduled to, and did, close in mid-June.\textsuperscript{35} Timm also indicated a willingness to add approximately $2 million in property to the 1986 assessment lien to bring the 1986 bonds into compliance with the 160% test.\textsuperscript{36}

The Bank’s trust committee met and accepted Timm’s proposal, including the delay of an independent review of the Hastings appraisal until half a year after the closing of the 1988 bond issue.\textsuperscript{37} The 1988 bonds were sold in June of that year.\textsuperscript{38}

The promised December 1988 appraisal was begun, but the Authority refused to complete it.\textsuperscript{39} The 1988 bonds went into default.\textsuperscript{40} The plaintiffs, who had purchased 1988 bonds, brought suit against the Authority and the 1988 underwriters on the ground that the prospectus was materially misleading, and against the Bank as an aider and abettor.\textsuperscript{41} The Authority, not surprisingly, defaulted.\textsuperscript{42} The underwriters settled.\textsuperscript{43} The Bank moved for summary

\textsuperscript{31} Id.
\textsuperscript{32} Id. at 894-95.
\textsuperscript{33} Id. at 895.
\textsuperscript{34} Id. at 895 n.7.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 895.
\textsuperscript{38} Id. at 895 n.7.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 893.
\textsuperscript{42} Id. at 893 n.1.
\textsuperscript{43} Id.
The motion was granted by the district court, and the plaintiffs appealed to the Tenth Circuit Court of Appeals, which reversed.

At the time of the Tenth Circuit’s decision, it seemed a cut-and-dried issue that aiding and abetting a violation of rule 10b-5 was itself a violation of rule 10b-5. All circuit courts of appeals that had considered the question had recognized a private right of action against aiders and abettors under rule 10b-5. Additionally, district courts and the Securities and Exchange Commission (SEC) in hundreds of judicial and administrative proceedings in every circuit in the federal system recognized the same right. As the Tenth Circuit pointed out, to establish aiding-and-abetting liability under rule 10b-5 a plaintiff had to prove “(1) the existence of a primary violation of the securities laws by another; (2) knowledge of the primary violation by the alleged aider-and-abettor; and (3) substantial assistance by the alleged aider-and-abettor in achieving the primary violation.”

Although the three elements seem to be universally accepted, some circuits state the second and third elements as a general awareness by the alleged aider-and-abettor that his or her role was part of an overall activity that was improper; and the alleged aider-and-abettor knowingly and substantially assisted the primary violation.

Given this well-settled law, the Tenth Circuit took for granted that a knowing aider and abettor would be liable under rule 10b-5, and focused on a much more limited issue: When an alleged aider and abettor who owes no independent duty to those who are injured by a rule 10b-5 violation takes affirmative action that assists the primary violation, does recklessness satisfy the scienter requirement for aiding-and-abetting liability? For these purposes, the Tenth Circuit said, “[R]eckless behavior is conduct that is ‘an extreme departure from the standards of ordinary care, and which presents a

44. Id. at 893.
45. Id. at 904-05.
47. First Interstate Bank, 969 F.2d at 898.
48. Id.
49. Id. at 898 n.13.
50. Id. at 902.
danger . . . that is either known to the defendant or is so obvious that
the actor must have been aware of it.”51

The Tenth Circuit concluded that recklessness, as defined, sufficed.52 It reversed the trial court’s grant of summary judgment in favor of the Bank, because there was evidence that would have supported a finding that the Bank provided substantial assistance to the primary violation and that its conduct constituted an extreme departure from the standards of ordinary care.53

The Bank petitioned for certiorari. Because aiding-and-abetting liability under rule 10b-5 was so well settled, the Bank, in its petition, assumed the existence of such liability and sought review of only two subsidiary questions: (1) Could an indenture trustee be found liable as an aider and abettor absent a breach of the indenture agreement or other duty under state law? (2) Could the Bank be liable as an aider and abettor based only on a showing of recklessness?54 Unlike the general issue whether there could be aiding-and-abetting liability under rule 10b-5, these subsidiary questions had engendered genuine disagreement in the lower federal courts.55

Instead of addressing the questions presented by the petition, however, the Supreme Court directed the parties to address a question that even the Bank thought was settled—whether any kind of aiding and abetting could violate rule 10b-5.56 The Supreme Court then reversed the Tenth Circuit, 5-4, on the ground that the answer to that question was “no.”57

A plausible opinion could have been written that there should be no aiding-and-abetting liability in private actions under rule 10b-5. Essentially, the argument of such an opinion would be as follows:

(1) Private plaintiffs who bring suit under rule 10b-5 tend to indiscriminately join secondary actors, such as lawyers, accountants, and banks, as defendants, because it is cheap to do so and adds to the settlement value of the complaint.

(2) These secondary actors tend to settle even when they have done nothing wrong, because it is cheaper to settle than to litigate.

51. Id. at 903 (quoting Hackbart v. Holmes, 675 F.2d 1114, 1118 (10th Cir. 1982)).
52. Id.
53. Id. at 904-05.
54. Central Bank, 114 S. Ct. at 1457 (Stevens, J., dissenting).
55. Id. at 1444.
57. Central Bank, 114 S. Ct. at 1455.
(3) Given these two tendencies, lawyers, accountants, and banks will raise their fees in securities transactions to cover the expected expense of settling frivolous cases that will be brought against them as alleged aiders and abettors.

(4) These increased fees are a deadweight loss on the securities market.

(5) The securities acts were adopted to promote efficiency in that market.

(6) Therefore, precluding aiding-and-abetting liability in private actions under rule 10b-5 will further the policies of those acts, and rule 10b-5 should be interpreted accordingly.

Although I would disagree with such an opinion, because its factual premises are unsupported by reliable evidence and its predictions seem unlikely, my disagreement would be a matter of empirical and prudential judgment in an area in which reasonable persons can differ. However, the majority in Central Bank—Justices Kennedy, O’Connor, Scalia, and Thomas, and Chief Justice Rehnquist—did not write such an opinion. Instead, the majority claimed the issue of liability under rule 10b-5 for aiding and abetting could be, and had to be, resolved solely on the basis of a literal reading of the text.59 “With respect . . . [to] the scope of conduct prohibited by § 10(b),” the majority said, “the text of the statute controls our decision.”60 It was “uncontroversial . . . that the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation,” and “that conclusion resolves the case.”61 Policy considerations were irrelevant, except insofar as the absence of policy justifications for a literal interpretation might show that such an interpretation would be “so bizarre” that Congress could not have intended it.62 “To be sure, aiding and abetting a wrongdoer ought to be actionable in certain instances . . . . The issue, however, is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute.”63

The majority did refer to policy issues near the very end of its opinion, in Part IV.C.64 Three policy arguments were adduced in

58. Id. at 1442.
59. Id. at 1446-48.
60. Id. at 1446.
61. Id. at 1448 (emphasis added).
62. Id. at 1454.
63. Id. at 1448.
64. Id. at 1453-54.
this Part. The first of these arguments was that "the rules for determining aiding and abetting liability are unclear, in 'an area that demands certainty and predictability.'"65

[This] leads to the undesirable result of decisions "made on an ad hoc basis, offering little predictive value" to those who provide services to participants in the securities business. . . . "[S]uch a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of rule 10b-5" is not a "satisfactory basis for a rule of liability imposed on the conduct of business transactions."

. . . Because of the uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial.66

The second policy argument adduced by the majority was that "'litigation under rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.'"67 "Litigation under 10b-5 thus requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements."68

The third policy argument adduced by the majority was that the uncertainty and excessive litigation premised in the first two arguments can have ripple effects:

For example, newer and smaller companies may find it difficult to obtain advice from professionals. A professional may fear that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others. In addition, the increased costs incurred by professionals because of the litigation and settlement costs under 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute.69

65. Id. at 1454 (quoting Pinter v. Dahl, 486 U.S. 622, 652 (1988)).
66. Id. (citations omitted).
67. Id. (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975)).
68. Id.
69. Id.
The three policy arguments adduced by the majority were not very different from the policy arguments that I said earlier might plausibly justify a conclusion that aiding-and-abetting liability should not be imposed under rule 10b-5. The majority, however, claimed that its decision did not rest on the three policy arguments it adduced in Part IV.C. Instead, the majority stated that the policy arguments were adduced only to illustrate that its strict-textualist approach did not reach a result "so bizarre" that Congress could not have intended it. This explicit statement about the meager relevance of policy was implicitly reinforced by the placement of Part IV.C near the very end of the opinion and by the brevity of the Part—one printed page out of a fifteen-printed-page opinion.

III. IDENTIFYING A CANONICAL TEXT

With this background, I turn directly to the strict-textualist approach on which the majority claimed to rest its decision. A strict textualist must, of course, begin by identifying a canonical text. For reasons that will become apparent, strict textualists do not necessarily confine the canonical text to the statutory provision directly at issue. Typically, however, strict textualists do not address in any meaningful way the underlying problem of defining exactly what constitutes the relevant canonical text.

Begin with a relatively straightforward problem. Suppose the statutory provision directly at issue is part of a larger statute. Is the relevant text then only the statutory provision or the entire statute? Interpreting one provision of a statute without regard to the entire statute would be foolish, and under a so-called "structural" analysis modern strict textualists treat a statute in which the provision directly at issue is embedded as part of the relevant text.

Suppose now that the provision directly at issue is in a statute that is one of a group of related statutes. Just as it would be foolish to exclude as irrelevant the balance of a statute in which a provision is embedded, so too would it be foolish to treat related statutes as irrelevant, and modern strict textualists also treat such statutes as part of the relevant text.

Going one step further, it would be equally foolish to treat as irrelevant the text of any statute adopted by the legislature that

70. Id. at 1453-54.
71. Id. at 1454.
adopted the provision at issue. Indeed, even if this were not so in theory, it would follow as a practical matter from the principle that related statutes should be deemed relevant. It can seldom if ever be determined from the texts themselves which statutes are “related” and which are not, because various statutes are related in various ways. Statutes that concern securities law are related; so are statutes that concern regulatory agencies; so are statutes that concern finance; so are statutes that concern commerce. The list goes on.

Going one step further still, it would also be foolish to treat as irrelevant, in a “structural” analysis, the text of any part of existing law, statutory or nonstatutory, state or federal. Therefore, for purposes of strict textualism the relevant text must be the whole text of the law.

In short, as modern strict textualists recognize, strict textualism cannot sensibly restrict the relevant text to the statutory provision directly at issue. Once that fateful line is crossed, however, there is no logical stopping point until the limit of the text of all law is reached.

The need to account for a text beyond the provision directly at issue raises two dilemmas for strict textualism. To begin with, the wider the relevant text, the easier it is for a strict-textualist judge to massage the text by emphasizing a verbal fit with the structure of some parts of the text and de-emphasizing the lack of verbal fit with other parts. The easier it is for a judge to massage the text, the harder it is to predict results, so that strict textualism actually becomes an instrument of uncertainty.

More fundamentally, if the relevant text is the text of all law, and if the purpose of strict textualism is to determine legislative intent as objectively manifested in the relevant statutory text, then strict textualism rests on a false factual predicate—that the legislature had the text of all law in mind when it enacted the provision directly at issue. Even if the relevant text were something less than the text of all law—even if, for example, the relevant text were only the text of all related statutes, or the text of all statutes adopted by the relevant legislature—the proposition that the legislature would have had that text in mind when it adopted the provision at issue would still be false. All this has been admitted by a leading strict textualist, Justice Scalia, who accurately characterizes as a fiction the proposition that a legislature, in adopting a statute, has in mind the surrounding body
of law into which the statute must be integrated. Justice Scalia calls this a "benign" fiction, but a fiction is no truer because benign, and in any event this fiction, like any other false statement, is benign only for those who find it congenial to their system of thought. Because the proposition that the wider text tells us about legislative intent is false, the strict textualists' inclusion of the wider text as part of the relevant text means that the purpose of strict textualism is not to determine legislative intent as objectively manifested in the statutory text. But if strict textualism is not even that, what is it?

Furthermore, strict textualism faces insuperable problems in the identification of a canonical text, even apart from the dilemmas that arise when the relevant text is widened to include the whole text of the law or even the text of all statutes adopted by the relevant legislature.

First, suppose a statutory provision has been interpreted by one or more precedents. Does the relevant text then include the precedents? If it does not, the precedents would have no effect, and no strict textualist makes that claim. But if the precedents are part of the relevant text, then the relevant text is not canonical, that is, not all the words of the relevant text are binding, because only the holding, not the language, of a precedent is binding.

Second, suppose that a court normally employs certain canons of construction. Is the relevant text then only the statute, or the statute as interpreted under the canons? If the relevant text is only the statute, then under strict textualism the canons should not be applied unless the text is deemed ambiguous on its face. This would mean that the canons should never be applied in a strict-textualist reading of a statute, in the absence of a prior determination of ambiguity. Again, no strict textualist takes that position. But if the relevant text is the statute interpreted under the canons, then again there is no canonical text, because the canons of construction are not themselves canonical, and indeed are typically ambiguous, not to say conflicting. And, as in the case of treating as relevant the text of laws beyond the provision directly at issue and the statute in which that provision is embedded, no one who uses precedents and canons in statutory

73. See Eskridge, supra note 5, at 680.
interpretation can seriously claim to be limiting the inquiry to the legislative intent as objectively manifested in the statutory text.\textsuperscript{74}

The bottom line is that the problem of identifying a canonical text under strict textualism is essentially insoluble. Because strict textualism is meaningless unless it can be applied to a defined canonical text, the problem of text identification in itself renders strict textualism intellectually incoherent.

All these issues concerning the identification of a canonical text were raised by the facts in \textit{Central Bank}, although for the most part ignored by the majority.\textsuperscript{75} The majority also ignored another, more specialized issue of text identification. The claim against the Bank was that it violated rule 10b-5. However, the majority stated that the relevant text was not rule 10b-5, but section 10(b) of the Securities Exchange Act of 1934, which rule 10b-5 implements.\textsuperscript{76} Section 10(b) provides, in pertinent part:

\begin{quote}
It shall be unlawful for any person, directly or indirectly . . .

(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.\textsuperscript{77}
\end{quote}

Rule 10b-5, in turn, provides:

\begin{quote}
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud [or]
\end{quote}

\begin{quote}
\ldots 
\ldots
\end{quote}

\textsuperscript{74.} \textit{Cf.}\ Eskridge, \textit{supra} note 5, at 679 ("Everyone knows that [the assumptions that Congress is aware of judicial interpretations of provisions that a statute borrows or reenacts and of the canons of construction] have virtually no basis in reality."); Abner J. Mikva, \textit{Reading and Writing Statutes}, 48 U. Pitt. L. Rev. 627, 629 (1987) ("[W]hen I was in Congress, the only 'canons' we talked about were the ones the Pentagon bought that could not shoot straight.").


\textsuperscript{76.} \textit{Id.} at 1445-46.

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.\textsuperscript{78}

Having asserted that aiding-and-abetting liability could not be imposed under rule 10b-5 unless it can be imposed under section 10(b), the majority then asserted that aiding-and-abetting liability could not be imposed under rule 10b-5 because under a literal reading of section 10(b) it was "uncontroversial . . . that the text of [that section] does not itself reach those who aid and abet a § 10(b) violation."\textsuperscript{79} There is a substantial issue, however, whether the majority was right in claiming that section 10(b), and not rule 10b-5, was the relevant text. The majority's assertion that if aiding and abetting does not violate section 10(b), it does not violate rule 10b-5, is somewhat incomplete. No conduct violates section 10(b) as such. Recall that section 10(b) provides, in pertinent part:

It shall be unlawful for any person, directly or indirectly . . .

(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.\textsuperscript{80}

Accordingly, the textual question was not whether aiding and abetting is a primary violation of section 10(b) in and of itself. Rather, there were two textual questions: (1) Does aiding and abetting a primary violation of rule 10b-5 violate rule 10b-5? (2) If so, was the SEC authorized under section 10(b) to prescribe as necessary or appropriate in the public interest for the protection of investors a rule under which aiding and abetting the use or employment of a manipulative or deceptive device or contrivance in the purchase or sale of securities would itself constitute a manipulative or deceptive device or contrivance?\textsuperscript{81}

\textsuperscript{78} 17 C.F.R. § 240.10b-5 (1995).
\textsuperscript{79} \textit{Central Bank}, 114 S. Ct. at 1448 (emphasis added).
\textsuperscript{80} 15 U.S.C. § 78j (emphasis added).
\textsuperscript{81} Under the landmark decision of \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837 (1984), when Congress has delegated its legislative function to an administrative agency, as it did in section 10(b), and when the statute is "silent or ambiguous with respect to the specific issue," the only question for a court is "whether the agency's answer is based on a permissible construction of the statute." \textit{Id.}
Because I do not deal in this Article with the result in *Central Bank*, I do not claim that an analysis of the issue in these terms would necessarily have changed that result. Rather, I point out this issue as a further instance of the problems involved in identifying a canonical text—a problem that has special implications that I will discuss below, in the context of examining whether the relevant text in *Central Bank* was ambiguous. At this point, I simply note that the majority's disregard of this aspect of the text-identification problem presents a mechanical problem of exposition in examining strict textualism in the context of *Central Bank*. In discussing the majority's premise that nothing but a literal reading of the text counts in the *Central Bank* context, should the focus be on whether aiding and abetting violates the text of rule 10b-5 or on whether it violates the text of section 10(b)? For reasons I will develop, this question affects the analysis a little, but not a lot. Accordingly, in the balance of this Article I will usually, although not invariably, treat the texts of section 10(b) and rule 10b-5 together.

**IV. THE BIZARRE-RESULT EXCEPTION**

Judges who invoke strict textualism usually recognize a predicate and an exception to the literal-reading approach. The predicate is that extratextual elements will be inadmissible only if the text is unambiguous on its face—that is, unambiguous without taking into account, and indeed in deliberate ignorance of, anything outside the relevant canonical text. The exception is that extratextual elements will be admissible if a literal reading of the text produces a bizarre or

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82. See infra text accompanying notes 90-111.

83. See infra text accompanying notes 106-08.
absurd result.\textsuperscript{84} The necessity of these qualifications is clear. If a literal reading would produce a bizarre result, then it is extremely unlikely that the legislature intended the result under any widely supported conception of statutory interpretation. If a text is ambiguous on its face, then it cannot be coherently claimed that the text can be interpreted without going outside the text. Both qualifications, however, raise insoluble difficulties. I will deal with the bizarre-result exception in this Part, and with the lack-of-ambiguity predicate in Part V.

Judges who apply a strict-textualist approach seldom, if ever, state what metrics are to be used to determine whether a result would be bizarre. It is clear, however, both from the way the cases discuss the bizarre-result exception and from the nature of the exception that at least one metric, if not the metric, is the consistency between a possible result under the statute, on the one hand, and social propositions—that is, propositions of policy, morality, and experience—on the other. In \textit{Central Bank}, for example, the majority purported to demonstrate that the result it reached was not bizarre by adducing three policy propositions that would support the result.\textsuperscript{85}

The problem is that the bizarre-result exception is fundamentally inconsistent with the concept of strict textualism: Once the bizarre-result worm has gotten into the strict-textualism apple, there is no escape from the conclusion that a literal reading of the text is not, after all, dispositive. A text itself can never determine whether a result under the text is bizarre. Therefore, under the exception, every case requires the strict-textualist judge to take account of extratextual considerations as a basis for a prudential judgment whether the result reached is bizarre.

Moreover, the bizarre-result exception is not containable. Judges who follow a strict-textualist approach distinguish between results that would be bizarre or absurd and results that would merely be not sensible or unreasonable.\textsuperscript{86} However, this distinction is inconsistent


\textsuperscript{86} See, e.g., \textit{Public Citizen}, 491 U.S. at 469-73. Here Justice Kennedy, together with Justice O'Connor and Chief Justice Rehnquist, concurred in the majority's judgment on separation-of-powers grounds but rejected the majority's interpretation of the statute, partly on the ground that while that interpretation was "quite sensible," a literal interpretation was not patently absurd. \textit{Id.} at 470.
with the justification of the exception. The justification is that the legislature is unlikely to have intended a bizarre result. But given that justification, an unreasonable-result exception is required for the same reason. And if an unreasonable result is to be treated the same way as a bizarre result, what is left of the concept that propositions outside the text are irrelevant to its interpretation?

Many legal doctrines have inconsistent exceptions, and the presence of such exceptions is always evidence that the doctrine is bad. Inconsistent exceptions are made to bad doctrines because a bad doctrine plus an inconsistent exception will produce a good result. However, the bizarre-result exception to strict textualism is not simply just one more inconsistent exception in the law. Because the exception is not only inconsistent with but necessary to strict textualism, the exception underscores the incoherence of strict textualism itself.

V. THE LACK-OF-AMBIGUITY PREDICATE

The lack-of-ambiguity predicate to the strict-textualism approach is also deeply flawed. To begin with, even taken on its own terms the lack-of-ambiguity predicate is almost never established. Judges who apply strict textualism, although sometimes clever at pedantic and arid word play, are typically insensitive to the principles of real, living English and find a text to be unambiguous on its face when anyone with any sensitivity to those principles would conclude that the text is ambiguous on its face, often deeply so.

The majority opinion in Central Bank illustrates this point. To show this, I will posit, for present purposes only, the following interpretation of section 10(b) and rule 10b-5. A defendant is liable for aiding and abetting a primary violation of rule 10b-5 if, but only if, he knowingly and substantially furthered the primary violation with the intent to do so. Under this interpretation, for example, there would be no aiding-and-abetting liability under section 10(b) and rule 10b-5 for conduct that was only reckless. I will call this the “intent-to-

87. Id. at 470 (stating that the absurd-result exception “demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way”).
89. Id. at 71.
abet" interpretation. I do not posit this interpretation to show that it is correct, but only to examine whether, given the relevant canonical text, the interpretation was possible so that the text was ambiguous on its face, or was uncontroversially impossible.

An intent-to-abet interpretation of section 10(b) and rule 10b-5 would be supported by a number of contextual circumstances.

(1) **Congruence with law.** To begin with, such an interpretation would make section 10(b) and rule 10b-5 congruent with state tort law, state fiduciary-obligations law, and other federal statutory law.

Under state tort law, as set out in the Restatement (Second) of Torts section 876, “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance . . . to the other so to conduct himself . . .”

Similarly, under state fiduciary-obligations law—which would often apply to conduct that violates section 10(b) and rule 10b-5—one who knowingly aids and abets in a breach of fiduciary duty is liable to the beneficiaries of the fiduciary relationship. For example, in *Penn Mart Realty Co. v. Becker*, Glen Alden sold 92,700 shares of Schenley Industries to the Investors Diversified Services group (IDS)

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93. RESTATEMENT (SECOND) OF TORTS § 876 (1977); see also id. § 874 cmt. c (“A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused.”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 323 (5th ed. 1984) (“All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation . . . are equally liable.”).

The majority in *Central Bank* rejected the relevance of state tort law on the ground that aiding and abetting in the law of torts “has been at best uncertain in application.” *Central Bank*, 114 S. Ct. at 1450. To support this statement, the majority quoted from four cases. These quotations completely distorted the meaning of the cases because the quotations were either wrenched out of context or contained serious omissions. For example, the majority quoted *In re Asbestos School Litigation*, No. 83-0268, 1991 WL 137128, at *3 (E.D. Pa. July 18, 1991), for the proposition that a cause of action under Restatement (Second) of Torts § 876 (1979) “has not yet been applied as a basis for liability” by Pennsylvania courts. *Central Bank*, 114 S. Ct. at 1450. The full quote is that “[a] cause of action for concerted activity under Restatement (Second) of Torts § 876 has been recognized recently by the Pennsylvania courts . . . However it has not yet been applied as a basis for liability.” *In re Asbestos*, 1991 WL 137128, at *3 (emphasis added) (citation omitted). Similarly, the majority quoted *Sloan v. Fauque*, 784 P.2d 895, 896 (Mont. 1989), for the proposition that aiding and abetting tort liability is an issue “of first impression in Montana.” *Central Bank*, 114 S. Ct. at 1450. The majority failed to disclose that having said this, the Montana court in *Sloan* went on to adopt Restatement (Second) of Torts § 876. *Sloan*, 784 P.2d at 897.

94. 298 A.2d 349 (Del. Ch. 1972).
at the then-market price of $63 per share on March 14, 1968. Six days later, Glen Alden purchased 945,126 shares of Schenley stock from a third party at $80 per share and announced a tender offer for Schenley at that price. Plaintiffs argued as follows: Glen Alden's board had wasted corporate assets by selling the Schenley stock to IDS at $63, which was less than what the board “knew . . . to be its true worth.” The board had disclosed that worth to IDS and its investors aided and abetted the board’s breach of fiduciary duty because it knew it was dealing with fiduciaries and knew the true worth of the stock. The court held that the plaintiff's legal theory was sound: “[O]ne who knowingly joins with any fiduciary, including corporate officials, in a breach of his obligation is liable to the beneficiaries of the trust relationship.”

In Steelvest, Inc. v. Scansteel Service Center, Inc., plaintiffs alleged that First National Bank (FNB) had provided loans to Steelvest and had also provided financing to Scanlan, a former officer of Steelvest who had formed Scansteel, a direct competitor of Steelvest. The trial court granted summary judgment to FNB, but the Kentucky Supreme Court reversed on the ground that FNB could be liable for aiding and abetting because it knew that Scanlan was a fiduciary and that Scanlan’s business would substantially impact Steelvest.

Finally, as a matter of federal statutory law, one who knowingly aids a person who commits a federal crime, with the intent to facilitate the crime, commits the federal crime of aiding and abetting under 18 U.S.C. § 2. A primary violation of rule 10b-5 is a federal crime. As the majority in Central Bank acknowledged, therefore, it is a federal crime, even after Central Bank, to knowingly

95. Id. at 350.
96. Id. at 350-51.
97. Id. at 351.
98. Id.
99. Id.
100. Id.
101. 807 S.W.2d 476 (Ky. 1991).
102. Id. at 479.
103. Id. at 486; see also Weinberger v. Rio Grande Indus., Inc., 519 A.2d 116, 131 (Del. Ch. 1986) (“[Aiding and abetting] requires that three elements be alleged and ultimately established: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary’s duty and (3) a knowing participation in that breach by the defendants who are not fiduciaries.”) (citing Gilbert v. El Paso Co., 490 A.2d 1050, 1057 (Del. Ch. 1984)).
and substantially further a primary violation of rule 10b-5 with the intent to do so.

In short, an intent-to-abet interpretation of section 10(b) and rule 10b-5 would be congruent with both state and federal law in very closely related areas. These state and federal laws are part of the context within which section 10(b) and rule 10b-5 must be interpreted.

(2) Congruence with policy. Next, an intent-to-abet interpretation would largely satisfy the three policy arguments that the majority adduced to show that aiding-and-abetting liability should not be imposed under section 10(b) and rule 10b-5. The policy argument based on the need for certainty and predictability would carry little weight if aiding and abetting could be imposed only on a person who had committed a federal crime. If a rule is considered sufficiently certain and predictable to impose criminal liability for its violation, it should be considered sufficiently certain and predictable to impose civil liability, and under the intent-to-abet interpretation an aider and abettor would not civilly violate rule 10b-5 unless the person also criminally violated 18 U.S.C. § 2. The policy argument based on frivolous litigation would also fail. If the standard of proof for aiding-and-abetting liability under section 10(b) and rule 10b-5 required the plaintiff to show that the defendant had knowingly and substantially furthered a primary violation with intent to do so, it could not readily be claimed that such liability would uniquely invite frivolous suits. The third argument, that uncertainty and excessive litigation would have ripple effects, would fall with the first two.

(3) Congruence with text. With this background, let us return to the texts of section 10(b) and rule 10b-5. Take the followinghypotheticals:

1. A proposes to fraudulently sell to the public undivided interests in salad oil that is actually nonexistent. The interests are “securities” within the meaning of the securities acts. To achieve A’s end, A enlists B to construct piping and trap doors in a cluster of salad-oil storage tanks so as to lead prospective purchasers erroneously to believe that the nearly empty tanks are filled with salad oil. A tells B exactly what fraud is planned and exactly what role B is to play in the fraud. B does the work, and A defrauds a number of purchasers by selling them interests in nonexistent salad oil.

2. C proposes to fraudulently sell forged General Motors stock certificates. To this end, C enlists D to forge the certificates. C tells D exactly what the forged certificates
will be used for.  D forges the stock certificates and C defrauds various buyers by selling them the forged stock. Recall that section 10(b) provides, in pertinent part:

It shall be unlawful for any person, directly or indirectly . . .

(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.  

The Random House Dictionary defines "indirect" to include "coming or resulting otherwise than directly or immediately," "not direct in action," "devious," or "not straightforward." These meanings are not obscure. Surely, then, no one with any sensitivity to the principles of living English could conclude—although the majority did conclude—that the text of section 10(b) uncontrovertially could not be construed to mean that B and D have "indirectly . . . use[d] or employ[ed], in connection with the purchase or sale of any security any manipulative or deceptive device or contrivance." Still less, of course, could a person with any sensitivity to the principles of living English conclude that the test of rule 10b-5 uncontrovertially could not be construed to mean that B and D have "indirectly . . . [employed a] device, scheme, or artifice to defraud" or "indirectly . . . [engaged] in any act, practice, or course of business which operates or would operate as a fraud" under the text of rule 10b-5.

Because the intent-to-abet interpretation is used in this Article simply to show that there is a plausible interpretation of section 10(b) and rule 10b-5 that flatly contradicts the majority's claim that the text of section 10(b) and rule 10b-5 "uncontrovertially" could not encompass aiding and abetting a rule 10b-5 violation, it is not strictly relevant whether that interpretation was before the Central Bank Court. After all, it is the strict textualist's job to back up an assertion that the text is unambiguous. As it happens, however, an intent-to-abet interpretation, or at least a very close variant, was presented to the Court in Central Bank. In an amicus brief, the SEC argued that section 10(b) and rule 10b-5 be construed congruently with 18 U.S.C.

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106. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 973 (2d ed. unabridged 1993).
§ 2, the federal aiding-and-abetting statute.\textsuperscript{107} That section, in turn, requires proof that the defendant "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed."\textsuperscript{108} The majority responded to this suggestion by stating that the issue of interpreting section 10(b) in this way was not before it! "[R]ecklessness," the majority said, "not intentional wrongdoing, is the theory underlying the aiding and abetting allegations in the case before us."\textsuperscript{109}

Of course, the proper interpretation of section 10(b) was exactly what was before the Court, and exactly what the Court decided. If the issue before the Court was confined to whether reckless aiding and abetting violated section 10(b), so should have been the majority's opinion. The majority could hardly say—although it did say—that it would not consider an intent-to-abet interpretation of section 10(b) because the only issue before it was recklessness, and then go on to hold that intentional as well as reckless aiding and abetting is excluded from section 10(b).

Furthermore, recall that the Bank had petitioned for certiorari on two questions: (1) Whether an indenture trustee could be liable as an aider and abettor where it did not breach any of its indenture-trustee duties; and (2) Whether recklessness satisfied the scienter requirement for aiding and abetting even where there was no breach of duty to disclose or to act.\textsuperscript{110} The Court could have decided both of these questions by considering only the recklessness issue. However, the Court granted certiorari on a different question: "Whether there is an implied private right of action for aiding and abetting violations of section 10(b) of the Securities Exchange Act of 1934 and SEC rule 10b-5."\textsuperscript{111} The only sensible meaning for the recasting of the issue in this way was precisely to change the question from whether reckless aiding and abetting violated section 10(b) and rule 10b-5 to

\begin{footnotes}
109. \textit{Id.}
\end{footnotes}
whether even knowing aiding and abetting fell within section 10(b) and rule 10b-5. Given the question that the Court told the parties to address, and the majority’s resolution of the case, the majority’s claim that an intent-to-abet interpretation was not before the Court lacked intellectual integrity.

I reiterate that my point is not that section 10(b) and rule 10b-5 should have been given an intent-to-abet interpretation. Rather, my point is that only judges who lacked any sensitivity to the principles of living English could have asserted that it was “uncontroversial” that the texts of section 10(b) and rule 10b-5 could not have been interpreted to encompass any kind of aiding-and-abetting liability. This point, in turn, is part of a larger thesis: Not only in Central Bank, but characteristically, judges who apply a strict-textualist approach on the ground that the relevant text is unambiguous on its face almost invariably lack sensitivity to the principles of real, living English. The larger thesis cannot be conclusively established without reading every strict-textualist case. I haven’t done this and don’t propose to do it, but no counter examples have ever come to my attention.

In short, even taking strict textualism on its own terms, the lack-of-ambiguity predicate almost invariably fails as a matter of practice because texts that strict textualists claim to be unambiguous on their face are almost always ambiguous on their face. Even more important, strict textualism cannot sensibly be taken on its own terms because the concept that a statutory text can be unambiguous on its face is incoherent. That concept rests on the assumption that words can be interpreted outside of the context in which they were written. In fact, however, purposeful words, like those of statutes, have no intelligible meaning out of the context of the applicable legal, social, and historical propositions in which the words were written. Words out of context are like fish out of water—dead or dying.

This does not mean that there are no easy cases in interpreting statutory texts. It does mean that easy interpretation cases are never easy simply because of the text, but only because the text in its legal, social, and historical context is easy to interpret. For example, suppose a statute makes it an offense to drive more than 60 miles per hour. A drives 70 miles per hour because he is late for an appointment. B, a highway patrol officer, drives 75 miles per hour to catch up with and ticket A. C drives 80 miles an hour because she sees an avalanche that will kill or seriously injure her unless she accelerates to escape. The problems that would obviously be encountered in
applying the statute to the conduct of B and C show that what makes A's case easy is not the text of the statute alone, but the text of the statute in the context of applicable legal and social propositions.

To put this differently, there is a critical distinction between the concept of facially unambiguous text and the concept of easy cases. Almost any legal text is potentially ambiguous, in the sense that if the text were to be matched against each point on the spectrum of its possible applications, one or more problems of interpretation would arise. For most statutory texts, however, a substantial part, often an overwhelming part, of the spectrum of potential applications will give rise to easy cases because the meaning of the text in its legal, social, and historical context is clear. However, the methodology for resolving the easy cases is no different than the methodology for resolving the hard cases. It may seem different, but that is only because in the easy cases the applicable legal and social propositions are so clear and so supportive of the apparent meaning of the text that they will not be contested and, indeed, may be taken into account on only a tacit rather than an explicit basis.

What counts as an applicable legal or social proposition in the interpretation of statutory texts—that is, what kinds of propositions, drawn from what sources, may properly be taken into account in that great enterprise—and what weight should be given to propositions or sources that count, but conflict, is to be determined by the theory of statutory interpretation. As I stated at the outset, what that theory should be is not the subject of this Article. Here I show only that strict textualism is unacceptable not simply because it is a bad theory, but because it is so incoherent that it is not a theory at all. Like the impossibility of identifying a canonical text and the inconsistency of the bizarre-result exception, the flaws in the lack-of-ambiguity predicate strike to the heart of strict textualism. By its terms, strict textualism is only applicable if the text is unambiguous on its face. Because this predicate of strict textualism is incoherent, so too is strict textualism itself.

VI. STRICT TEXTUALISM IS INSTITUTIONALLY IMPELLISSIBLE

I now come to another problem. Even if it were assumed that strict textualism is an intellectually coherent methodology, taken on its own terms the methodology would be institutionally impermissible. The position is sometimes taken that in interpreting statutes courts are autonomous agents. In my view, this position is at odds with accepted and proper Constitutional and constitutional beliefs held by
both the legal and the general community in the modern period in this country. I take as a premise in this Article that as part of the doctrine of legislative supremacy, under our federal and state constitutions the relation between legislature and court is that of master and servant except in the adjudication of constitutional issues.\textsuperscript{112}

This principle applies to the Supreme Court as fully as it does to any other court. With the very limited exception of decisions concerning the constitutionality of federal statutes, in the domain of federal law Congress is the master and the Court is merely a servant. Some justices on the Supreme Court are fond of repeating that the U.S. Constitution provides for three branches of government and a separation of powers, as if the three branches were equal. Three separate branches of government there may be, but three equal branches there are not. As we know from \textit{Brown v. Board of Education},\textsuperscript{113} separate is one thing and equal is another.

The master-servant relationship between legislature and court bears directly on the question of statutory interpretation. Like any servant, a court is bound to give the instructions it receives from its master—statutes—a \textit{reasonable} interpretation. A reasonable interpretation of a text always depends on all the contextual circumstances, not just on a literal reading of the text. This is illustrated by the problem of translation. Frequently, the \textit{least} faithful translation of a text is a literal translation. An even more pertinent example of the difference between a reasonable and a literal interpretation is the way in which unions sometimes try to paralyze a company by \textit{working to rule}. In such cases, the union adopts a strict textualist approach for the very purpose of frustrating the jointly understood assumptions on which the labor-management enterprise goes forward. Like a translator who renders a literal translation of a text, a strict-textualist judge fails to be faithful to the text. Like a union that works to rule, a judge who uses the methodology of strict textualism steps out of the proper subordinate status to unfaithfully frustrate the legislation that the judge is institutionally bound to further. Strict textualism reflects not the obedience that the court owes to the legislature, but an


\textsuperscript{113} 347 U.S. 483, 495 (1954).
improper and indeed arrogant move by a subordinate to assume a role that is equal or even dominant to that of his master.

It is sometimes suggested that the use of strict textualism is justified because it will make the legislature more careful, and therefore produce better drafted legislation. This rationale is often cast in incentive terms, but that terminology is misleading. An incentive is a reward given to induce an action. A court cannot "reward" a legislature by properly interpreting a statute. That, after all, is the court's very function. Characterizing the courts' performance of their proper function as an incentive is like saying that the police provide an incentive to act lawfully by not arresting innocent people. What is really involved in the better-drafting rationale is not incentives, but sanctions. If the legislature does not draft a statute carefully, the court will sanction the legislature by not interpreting the statute reasonably.

Accordingly, far from justifying strict textualism on an institutional basis, the better-drafting rationale only underlines the arrogance of judges who adopt this approach. Who is the servant to sanction the master, or, for that matter, to dictate to the master how to draft instructions? If my servant told me that to improve my ability as a master in the future he would interpret my instructions not reasonably but literally, I would discharge him for being equally stupid and arrogant. That federal judges cannot be sanctioned in this way is a reason for them to give more, not less, deference to their master.

The better-drafting rationale is also inconsistent with the way strict textualism is applied. Under that rationale, strict textualism should not be applied retroactively to statutes, like section 10(b), that were drafted when strict textualism was not the official methodology for statutory interpretation, as it even now is not.

Finally, the better-drafting rationale can only be advanced by persons who do not understand legislative drafting. With limited exceptions, legislative drafters will try to draft as well as they can no matter what methodology the courts employ, because they want statutes to be effective, not ineffective. (This is most obvious in a statute that governs conduct without the intermediation of an administrative agency, but it is also true of statutes that involve delegations to agencies, although in such cases what is an effective statute must include the concept of delegation). And what, in any event, would be the drafting behavior that strict textualism would promote? To include in the four corners of every statute every relevant background rule of federal and state law? To include every
legal and historical condition that lead to the statute? To include every precedent concerning the interpretation of comparable language? To include every background proposition of policy, morality, and experience that affects the statute? To draft statutes without regard to the principles of living English, as opposed to dictionary definitions and hyperclever reading?

The basic reason that statutes require interpretation is not lack of care in drafting. Rather, the basic problem stems from the nature of legislative drafting. To begin with, legislative drafting relates to the future, and the future cannot be foretold. As a result, situations will invariably arise in which the text of a statute has to be adapted to the actual as opposed to the contemplated future. More profoundly, just as words can only be read in context, so they can only be written in context. No drafter, regardless of skill, can surmount this difficulty, because this difficulty is inherent in the principles of English, and indeed is inherent in language and meaning. Every drafter depends, and must depend, on her words being interpreted in context, just as they are written in context.

Admittedly, deliberate ambiguity is occasionally resorted to in legislation, and it might be thought that strict textualism properly sanctions legislatures who adopt this device. Again, however, the question arises, what is the right of the courts, as servants of the legislature, to prohibit the legislature from employing the device of deliberate ambiguity where the legislature deems the device useful and the use advisable? Furthermore, even putting aside the impropriety of courts sanctioning legislatures, and even putting aside the fact that deliberate ambiguity is an occurrence of relatively low frequency, the use of deliberate ambiguity would not be diminished by strict textualism, because strict textualism only applies where a statute is unambiguous.

VII. CONCLUSION

Strict textualism is intellectually incoherent because it assumes that a canonical statutory text can be identified, when in fact the problems of identifying canonical statutory texts, for the purposes of strict textualism, are insuperable. Furthermore, strict textualism incorporates, and must incorporate, two qualifications—one for bizarre results, and one for lack of ambiguity. The bizarre-result exception is fundamentally inconsistent with strict textualism because it requires the admission of extratextual considerations and cannot be easily cabined. The lack-of-ambiguity predicate is deeply flawed as
a practical matter, since in most or all cases a strict textualist is able to deem a text unambiguous only because he lacks sensitivity to the principles of living English. The lack-of-ambiguity predicate is also incoherent as a matter of principle, because a statutory text cannot coherently be determined to be unambiguous on its face. Since these two qualifications are necessary to strict textualism, on the one hand, and either inconsistent or incoherent, on the other, they further underscore the intellectual incoherence of strict textualism itself.

What kinds of legal and social propositions and sources may properly be taken into account in statutory interpretation, what method should be used in applying those propositions and sources, and what weight to give conflicting propositions and sources are questions for the theory of statutory interpretation. A rejection of strict textualism does not in itself dictate what that theory should be. For example, strict textualism is not required for a conservative interpretation of statutes, and a rejection of strict textualism does not in itself lead to an aggressive interpretation. Similarly, one might reject strict textualism and either believe or not believe that remarks of individual legislators and Founding Fathers concerning their subjective intention should be given weight in interpretation.

Nor does a rejection of strict textualism connote a rejection of the importance of text. On the contrary, just because a court is a servant of the legislature, it must begin with and be faithful to the legislative text. The point is not that the courts are free to be faithless to statutory texts, but that to be faithful to a text the text must be read in context. Context may be evidenced in the text of a statutory provision, in other parts of the statute in which the provision is embedded, and in related statutes, but it may also be evidenced in the text of all statutes adopted by the relevant legislature, in the text of all law, and in history, morals, policy, and experience. Sometimes choices among these sources are easy, and so is the weighting of these sources when they conflict. Sometimes, hard choices and difficult weightings are necessary. That is the lot of a servant.