STATUTORY INTERPRETATION IN ILLINOIS: ABANDONING THE PLAIN MEANING RULE FOR AN EXTRATEXTUAL APPROACH

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The plain meaning rule and the extratextual approach are two distinct methods of statutory interpretation. The plain meaning rule, currently used in Illinois, permits consultation of extratextual sources only after a court has determined that the statutory language in question is ambiguous. The rule attempts to prevent judicial lawmaking by limiting discretion. However, the author argues that the plain meaning rule is ineffective because it is "deliberately uninformed" and may lead to result-oriented decisions as a consequence. Also, the line drawing inherent in determining whether a statue is ambiguous invests judges with the kind of broad discretion that the plain meaning rule was designed to avoid in the first place.

The extratextual approach allows a court to interpret a statute in light of its history and purposes without first finding it to be ambiguous. The author argues that a modified form of this approach should be adopted in Illinois. Although interpretive tools like legislative history and the canons of construction are subject to criticism, this should not preclude their use. Courts should merely be aware of their shortcomings and proceed with the appropriate level of caution.

An original examination of the recently interpreted Illinois Ticket Scalping Act demonstrates how the different modes of statutory interpretation can produce contradictory results. Even within the constrictive bounds of the plain meaning rule, opposite results may issue depending on whether a court decides that the statutory text is ambiguous. Both the plain meaning and extratextual methods of statutory interpretation are assailable on the grounds that they permit courts too much discretion. Ultimately though, a limited version of the latter approach is preferable because it allows courts to make a more informed decision after exhausting all of the interpretive tools at their disposal.

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I. INTRODUCTION

Statutory interpretation is one of the most vital tasks confronting American courts. Statutes codify the principles by which all citizens must abide, lie at the heart of many disputes, and are often susceptible to different interpretations which produce different results. However, while laws are codified, the procedures used to interpret them are not.[1] The process of gleaning the legislative intent from a statute is more of an art than a science, focusing less on strict analytical rules or procedures and more on creativity and the ability to implement the goals of the legislative body.

The difficulties inherent in statutory interpretation are manifested by both the various interpretive approaches used by different jurisdictions and the differences among judges about how to apply those approaches. The majority of jurisdictions abide by the plain meaning rule,[2] which in its most commonly stated form holds that the interpretation of statutes begins and ends with the literal text when that language is clear and unambiguous.[3] Under this rule, the use of interpretive tools, such as legislative history or the canons of construction, is reserved only for cases where the statute's language is ambiguous. However, the more flexible minority approach to statutory interpretation shuns the notion that ambiguity is a threshold which must be crossed before consultation of extratextual sources is appropriate.[4]

This note will examine both of these approaches in the context of Illinois precedent to determine which method should be utilized by Illinois courts. Part II discusses Illinois courts' current adherence to the traditional plain meaning rule and the divergence from the rule that has occurred in three other jurisdictions. Part III then examines the pros and cons of the extratextual and plain meaning approaches, using an original analysis of the Illinois Ticket Scalping Act[5] as an illustration of the different results produced by the two distinct interpretative methods. Part IV concludes that the optimal approach for Illinois would be to embrace the policy and rationale behind the extratextual approach while imposing loose guidelines to prevent judicial activism and ensure that statutes are applied to implement the policy goals of the legislature.

1. For a discussion of codified statutory interpretive rules similar to the federal rules of evidence and civil procedure, see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002), for an argument that Congress has both the constitutional authority and the political mandate to enact such guidelines. *Id.* at 2090.

2. *See infra* notes 6–42 and accompanying text.

3. *See infra* notes 6–28 and accompanying text.

4. *See infra* notes 29–42 and accompanying text.

5. 720 ILL. COMP. STAT. 375/1-4 (2002). The act was recently invoked and interpreted in *Cavoto v. Chicago National League Ball Club, Inc.*, No. 02 CH 18372 (Cir. Ct. Cook County Nov. 24, 2003) (on file with author), as discussed in Part III.

II. BACKGROUND

A. Traditional Statutory Interpretation in Illinois

The interpretation of statutes entails the utilization of various methods, techniques, and tools,[6] and neither courts nor commentators are harmonious as to the proper or most effective mode of interpretation.[7] Illinois courts begin the task of gleaning the proper meaning of a statute by examining the plain meaning of the language itself, adhering to the so-called cardinal rule of statutory interpretation.[8] The plain meaning rule holds that statutory interpretation begins with the language of the statute, and, if the language is clear and unambiguous, ends with the same.[9]

However, even when the language of a statute clearly evinces the intent of the legislature, the Illinois version of the plain meaning rule allows for limited exceptions to its rigid focus on statutory text. First, even if the text of a statute is explicitly clear, courts will look to extratextual sources if a literal interpretation would lead to an absurd or bizarre result.[10] Similarly, a typographical error or punctuation mistake will be ignored by courts when strict construction would clearly contravene the legislature's intent.[11] Furthermore, courts will not refrain from examining additional tools of interpretation in situations where the plain language is clear but inconsistent with other provisions in the same statute or with another statute as a whole.[12]

6. *See generally* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 4–56 (1997) (providing a general discussion of the basic framework of traditional statutory interpretation and the various methods used therein).

7. *See* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807–08 (1983) (arguing that the proposition that courts adhering to the plain meaning rule necessarily begin with the text of the statute is false).

8. Paszkowski v. Metro. Water Reclamation Dist., 789 N.E.2d 342, 344 (Ill. App. Ct. 2003) ("The cardinal rule of interpreting statutes, to which all other canons and rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature. 'The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning.'" (citations omitted)).

9. *In re* D.F., 802 N.E.2d 800, 804 (Ill. 2003) ("Where the language is clear and unambiguous, it will be given effect without resort to other aids of construction." (citation omitted)); *see also* Davis v. Toshiba Mach. Co., America, 710 N.E.2d 399, 401 (Ill. 1999) ("When the language of a statute is clear, no resort is necessary to other tools of interpretation." (citation omitted)); *Paszkowski*, 789 N.E.2d at 344 ("When the plain language is clear and unambiguous, the legislative intent that is discernable from this language must prevail, and no resort to other tools of statutory construction is necessary." (citation omitted)).

10. *In re D.F.*, 802 N.E.2d at 805 (stating that adherence to the plain meaning rule is not required in situations where literal interpretation of the text causes unjust consequences or a result that is clearly absurd given the intent of the legislature).

11. *Id.* at 807 (stating that punctuation which is clearly erroneous may be disregarded).

12. *See* People v. Moffitt, 485 N.E.2d 513, 522 (Ill. App. Ct. 1985) (stating that the plain meaning rule "should not prevail" in situations where adherence to the literal interpretation of the text would create an inconsistent result with related provisions or statutes, absent an intent by the legislature to alter the conflicting provisions or statutes).

While the plain language of a statute is undisputedly an essential element of statutory analysis, ambiguity in a statute's text opens the door to a plethora of interpretive tools.[13] It is with respect to these extratextual tools that the debate livens and the uncertainty increases. One such tool, legislative history, is addressed by the diametrically opposed schools of textualism[14] and dynamic statutory interpretation,[15] and provides a lucid example of the different methods employed to ascertain the legislative intent of a statute, particularly with respect to ambiguous language. Textualism rejects the use of legislative history by asserting that the ineffectiveness and inherent difficulty in attempting to discern the unexpressed intent of the legislature create more problems than they solve.[16] Dynamic statutory interpretation takes a more open-ended approach, touting the benefits of judicial discretion and greater latitude for judges to interpret statutes.[17]

Despite this theoretical disagreement, legislative history can provide insight into legislative intent, the effectuation of which is the overarching premise of the judicial interpretation of statutes. To this end, Illinois courts, in conforming to the plain meaning rule, take the approach that a court may consider legislative history, but only when the statutory language is ambiguous[18] or when one of the aforementioned exceptions applies to an unambiguous statute. Situations involving the latter are extremely rare and arise when, despite the clear text, the legislative history suggests that the intent of the lawmakers was not expressed correctly in the statute, and statements by legislators at the time of drafting contradicting the statutory language exist to serve as proof of the error.[19]

A second extratextual tool often used by Illinois courts is the so-called spirit of the statute approach.[20] This concept was originally articulated by the U.S. Supreme Court more than a century ago in the famous

13. *See Paszkowski*, 789 N.E.2d at 344 (implying that although the analysis ends when the plain language of the statute is clear and unambiguous, ambiguous language directs the court to consider other tools of statutory interpretation); *cf.* Posner, *supra* note 7, at 808–09.

14. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23–25 (1997).

15. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

16. SCALIA, *supra* note 14, at 17–18 (stating that the threat of allowing judges to attempt to determine the unexpressed intent of the legislature is that judges will simply act according to their own personal objectives and will in effect impose their viewpoints, and not necessarily those of the legislature, upon the parties).

17. *See* ESKRIDGE, *supra* note 15, at 48–81.

18. *See, e.g.*, Krohe v. City of Bloomington, 798 N.E.2d 1211, 1214 (Ill. 2003) ("a statute's legislative history and debates are '[v]aluable construction aids in interpreting an ambiguous statute.'" (quoting Advincula v. United Blood Servs., 678 N.E.2d 1009, 1018 (Ill. 1996))).

19. *See* Thies v. State Bd. of Elections, 529 N.E.2d 565, 568 (Ill. 1988) ("[T]he plain meaning rule should not be applied to thwart the *obvious intent* of the drafters by excluding enlightening material. This case involves one of the *rare instances* where resorting to the debates of the convention reveals that the exact question presented for review in this court was asked and answered by the delegates to the convention." (citation omitted) (emphasis added)).

20. *In re* Lieberman, 776 N.E.2d 218, 230 (Ill. 2002) (stating that a court's primary objective when interpreting a statute is to uncover the intent of the legislature, which may necessitate modification or alteration of portions of the statute if they obviously contradict the legislative purpose).

case of *Church of the Holy Trinity v. United States*:[21] "[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."[22] In *Church of the Holy Trinity,* the Court held that a statute prohibiting importation of immigrant workers to the United States did not apply to a religious organization contracting with a foreigner to serve as its rector and pastor, even though the statute did not include these clergical positions in a list of exceptions to the rule.[23] While similar in theory to an exception to the plain meaning rule, this purposive method of interpretation focuses less on the actual language of a statute and more on the rationale behind the legislation.

The Supreme Court of Illinois has refined the spirit of the statute approach by resolving that the spirit of the statute should control when it conflicts with the literal language of the statute and its various provisions.[24] However, courts in Illinois have been hesitant to apply this approach, confining its use only to those situations where the "literal text of a statute would produce a result that is clearly and demonstrably at odds with the intent of the General Assembly."[25]

A final interpretive tool utilized by Illinois courts to interpret ambiguous statutes is the canons of construction, which are generally defined as "judicially crafted maxims for determining the meaning of statutes."[26] An example of a canon utilized by courts is the proposition that remedial legislation implemented to cure a defect in existing law should be liberally construed so as to effectuate its purpose.[27] However, while the numerous canons can be used to shed light onto the meaning of a statute, they are subject to much criticism. Most notably, critics fustigate the canons for being susceptible to judicial manipulation in order to achieve a desired result without a legally sound rationale for doing so.[28]

B. Divergence from the Plain Meaning Rule in Other Jurisdictions

While adherence to the plain meaning rule is the approach used by the vast majority of jurisdictions, Alaska[29] and Texas[30] (and for a short

21. 143 U.S. 457 (1892).

22. *Id.* at 459.

23. *Id.* at 472.

24. Gill v. Miller, 445 N.E.2d 330, 333 (Ill. 1983). The court further noted: "[i]n ascertaining the legislature's intent we should consider the statute in its entirety, noting the subject it addresses and the legislature's apparent objective in enacting it." *Id.*

25. *Lieberman*, 776 N.E.2d at 230.

26. MIKVA & LANE, *supra* note 6, at 23.

27. People v. Rodriguez, 791 N.E.2d 707, 710 (Ill. App. Ct. 2003).

28. Posner, *supra* note 7, at 806 (citing KARL N. LLEWELLYN, COMMON LAW TRADITION: DECIDING APPEALS 521–35 (1960)).

29. Wold v. Progressive Preferred Ins. Co., 52 P.3d 155, 161 (Alaska 2002) ("[y]et because Alaska does not follow the plain meaning rule, the plain language of these provisions does not itself end the inquiry. Under Alaska's sliding-scale approach to statutory construction, strong legislative history may support a different meaning." (citations omitted)).

time until recently Connecticut[31]) employ an extratextual approach under which ambiguous statutory language is not a prerequisite for consultation of interpretative tools such as legislative history or the canons of construction.[32] While this reliance on interpretive tools notwithstanding clear language represents the minority approach, its convincing policy rationale calls into question the legitimacy of the plain meaning rule.

Of most interest is the situation in Connecticut, in which the state's highest court renounced the plain meaning rule in *State v. Courchesne*[33] and adopted a sliding scale method of analysis. The sliding scale approach weighs the degree of ambiguity in a statute against the amount of evidence supporting a construction that contradicts the literal interpretation.[34] The *Courchesne* court defined the traditional plain meaning rule as consisting of three parts: (1) preclusion of the use of extratextual interpretive tools if the statutory language is plain and unambiguous; (2) adherence to the proposition that courts should interpret what the legislature said rather than what it meant to say; and (3) inclusion of an exception for plain meaning interpretations that lead to bizarre or unworkable results.[35] In enumerating and expounding upon its reasons for abandoning the plain meaning rule,[36] the court stressed that the plain meaning rule is not only self-contradictory, but also inconsistent with the nature of legislative language and imposes upon the court an obligation to determine the level of ambiguity that sufficiently allows for consultation of extratextual sources.[37] *Courchesne*, in endorsing the use of legislative history as an interpretive aide, stated that "when reviewed and employed in a responsible, discriminating, and intellectually honest manner, legislative history can constitute reliable evidence of legislative intent."[38] Accordingly, the court eschewed the plain meaning rule and embraced an approach under which legislative history and the canons of

30. TEX. GOV'T CODE ANN. § 311.023 (Vernon 2002).

31. The Supreme Court of Connecticut adopted such an approach in *State v. Courchesne*, 816 A.2d 562, 570 (Conn. 2003). However, the Connecticut legislature superceded the decision by enacting legislation to specifically establish the plain meaning rule as the appropriate method of statutory interpretation. 2003 Conn. Act 03-154 (Reg. Sess.). *See infra* notes 33–42 and accompanying text for a more thorough discussion.

32. It is worth noting that while the statutory approach used in Alaska has been solely a product of the judiciary, state legislatures in both Texas and Connecticut have entered the statutory interpretation debate in their respective states. *See supra* notes 30–31 and accompanying text.

33. 816 A.2d 562, 582 (Conn. 2003). Connecticut law provides that a defendant convicted of the murder of two or more persons in the same criminal act is eligible for the death penalty. *Id.* at 564. The statutory provision at issue before the court was an aggravating factor which permitted a sentence of death if the offense was committed in "an especially heinous, cruel, or depraved manner." *Id.* at 564–65 (citation omitted). The specific interpretive issue before the *Courchesne* court was whether the statutory aggravating factor required all of the murder victims, or only one of them, to have been murdered in a heinous or cruel manner. *Id.* at 567.

34. *Id.* at 585. For further discussion of the sliding scale method, see *infra* notes 68–73 and accompanying text.

35. *Courchesne*, 816 A.2d at 581–82.

36. *See infra* Part III.

37. *Courchesne*, 816 A.2d at 582–84.

38. *Id.* at 589.

construction are part of the interpretive process even in the construction of the most concise and clearly written statutes. The court summarized its approach as the use of four sources to determine the intent of the legislature: the words of the statute, the legislative history, the legislative policy implemented by the statute, and the relationship of the statute to existing statutes and precedents in the same area of the law.[39]

However, in response to the controversial majority opinion, other Connecticut justices, lower Connecticut courts, and eventually the Connecticut legislature expressed their discontent with both the majority's analysis and its result. The *Courchesne* dissent vehemently objected to the method of interpretation presented by the majority and proposed its own analytical regime which comported with the plain meaning rule and attempted to structure the interpretation of ambiguous statutes by sequentially describing the steps in which the resort to interpretive tools and the elimination of alternative interpretations should be performed.[40] Finally, only three months after the *Courchesne* decision, the Connecticut legislature approved legislation that stated the following:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.[41]

This act went into effect on October 1, 2003 and explicitly ended the *Courchesne* approach to statutory interpretation in Connecticut.[42] Thus, Connecticut was once again aligned with Illinois and the vast majority of jurisdictions in abiding by the plain meaning rule of statutory construction and resorting to extratextual tools of interpretation only in the face of ambiguous statutory language.

III. ANALYSIS

While the approach to statutory interpretation outlined by the Supreme Court of Connecticut in *Courchesne* was overturned by the Connecticut legislature, the rationale for the court's sliding scale approach

39. *Id.* at 586.

40. *Id*. at 617 (Zarella, J., dissenting). The dissent's approach contained five steps: (1) inspection of the plain meaning of the statute, after which analysis is continued only if the language is ambiguous; (2) elimination of any interpretations which are inconsistent with the general statutory scheme; (3) elimination of any interpretations which are inconsistent in the context of other existing legislation; (4) review of the legislative history; and (5) application of any appropriate presumptions. *Id*.

41. 2003 Conn. Act 03-154 (Reg. Sess.).

42. The Supreme Court of Connecticut recognized the effect of the new law in *Paul Dinto Electrical Contractors, Inc. v. City of Waterbury*, 835 A.2d 33, 39 n.10 (2003). However, the court did not consider the new law because the circumstances of the case did not present an opportunity to do so. *Id.*

has substantial merit and should be examined in the context of statutory interpretation precedent in Illinois. The arguments advanced by proponents of uninhibited reliance on extratextual sources,[43] contrasted with the principles of the plain meaning rule,[44] particularly as it has been applied in Illinois, demonstrate the beneficial results that can be achieved by adopting a *Courchesne*-type approach. In addition, the analysis of an existing Illinois statute through the lens of statutory interpretation[45] further supports the notion that courts should stray, but not wander too far, from the strict confines of the plain meaning rule.

A. The Extratextual Approach

As discussed above, the extratextual approach to statutory interpretation is premised on the idea that while inspection of the text of the statute is the beginning of any analysis, it is never the end, even if the meaning appears conclusive on its face.[46] In advancing this all-inclusive approach where all tools of construction are in play, proponents rely on five main arguments: the purposive nature of legislation, the self-contradiction of the plain meaning rule, the uninformed nature of strict textual interpretation, the reality of construction in plain meaning jurisdictions, and the line-drawing issue attendant with the plain meaning rule. Analysis of each of these arguments, as well as of the sliding scale approach proposed by opponents of the plain meaning rule, sheds light on the social and judicial costs incurred by a court in adhering to the plain meaning rule.

1. Arguments in Favor of Abandoning the Plain Meaning Rule

First, opponents of the plain meaning rule note that the rule is "fundamentally inconsistent with the purposive and contextual nature of legislative language."[47] Their argument is that the plain meaning rule focuses on the statutory language to the exclusion of its purpose, thus divorcing the language from its proper context.[48] In support of this assertion, proponents of the extratextual approach aver that courts should take the purpose of the statute into account when construing its meaning,

43. *See infra* notes 46–73 and accompanying text.
44. *See infra* notes 74–124 and accompanying text.
45. *See infra* notes 125–79 and accompanying text.
46. *See supra* notes 29–41 and accompanying text.
47. State v. Courchesne, 816 A.2d 562, 582 (Conn. 2003).
48. *Id.* The court continued: "it *does* matter, in determining that meaning, what purpose or purposes the legislature had in employing the language; it *does* matter what meaning the legislature intended the language to have." *Id.* (emphasis in original).

and the assistance of extratextual sources has proven reliable in this endeavor.[49]

Furthermore, promoters of the extratextual method insist that the exception to the plain meaning rule for absurd results is self-contradictory because it implicitly relies on the use of extratextual tools of construction.[50] However, this argument lacks persuasiveness, since a clear distinction exists between an exception to a rule and a self-contradictory rule. In applying the exception for absurdity, Illinois courts carefully delve into the policy behind the legislation at issue and deviate from its plain meaning only if the inconsistency between the policy and the language is obvious.[51] Yet it is only in situations of blatant conflict between the language and the policy that courts even consider extratextual factors, thus placing the absurd result aspect of the plain meaning rule in the exception category.

Proponents of the extratextual approach argue that an interpretation limited to consideration of the text of a statute is necessarily unapprised.[52] Justice Stevens has criticized strict adherence to statutory language and refusal to look beyond the text as "deliberately uninformed"[53] and has expressed concern that such an approach "may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted."[54] Implicit in this statement is the idea that strict textual construction can lead to result-oriented interpretations. This is also a common criticism of the extratextualist approach,[55] but extratextualists respond that it is the uninformed judge, not the judge who consults additional sources for interpretive guidance, who is guilty of judicial lawmaking and a result-oriented approach.[56] This argument, as well as Justice Stevens' assessment, relates to the purposive focus of the extratextual approach.[57] A court's refusal to look beyond the statutory text may lead to the exclusion of probative arguments which contradict the apparent clear language of the statute but are more consistent with the purpose of the legislation.[58] Such exclusion effectively renders the textual interpretation not

49. *Id.* at 587 ("[T]he experience of this court demonstrates no particular difficulty in reliably ascertaining such [legislative] purposes, based not on our own personal preferences but on both textual and extratextual sources.").

50. *Id.* at 582–83.

51. *In re* D.F., 802 N.E.2d 800, 805 (Ill. 2003).

52. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132–33 (2001) (Stevens, J., dissenting).

53. *Id.* at 133.

54. *Id.*

55. *Courchesne*, 816 A.2d at 612–13 (Zarella, J., dissenting). The dissent in *Courchesne* stated that "[i]n light of the majority's new approach to statutory construction, individuals no longer can rely on the plain meaning of the laws of this state in conducting their affairs. Instead, they will be forced to rely on this court's ex post facto use of extratextual sources to discern the scope of a statute." *Id.* at 613.

56. *See Circuit City Stores*, 532 U.S. at 132 (Stevens, J., dissenting).

57. *Courchesne*, 816 A.2d at 582.

58. *Id.*

only uninformed, but also inconsistent with the legislative intent supporting the statute.[59]

Proponents of the extratextual approach also question whether courts in plain meaning jurisdictions actually adhere to the strict tenets of the rule. The Supreme Court of Alaska, in explicitly rejecting the plain meaning rule, noted that the rule is often ignored in practice.[60] Similarly, the Chief Justice of the Wisconsin Supreme Court, dissenting from an application of the plain meaning rule, criticized the majority for merely "paying lip service" to the strict confines of the plain meaning rule.[61] Furthermore, Judge Posner has decried the plain meaning rule as an "unrealistic" ideal of how judges really read and interpret statutory language.[62] It has also been suggested that the plain meaning rule is not immune from judicial manipulation and is just as susceptible to result-oriented judicial maneuvering as extratextualism.[63]

Finally, and most emphatically, proponents of the extratextual approach argue that the main defect of the plain meaning rule is that it requires the court to determine whether the statutory language is sufficiently ambiguous to permit consultation of extratextual tools of interpretation.[64] The *Courchesne* court harshly criticized this threshold requirement for causing "intellectually and linguistically dubious" edicts.[65] Jurisdictions adhering to the plain meaning rule have not developed a consistent and inclusive definition of ambiguity, and thus the line-drawing problem presents a situation where deviation from the text of the statute, permissible only in the presence of an ambiguity, is predicated upon an arbitrary and unguided determination of what is ambiguous. Additionally, words do not have an inherent meaning, and thus ambiguity is in the eye of the beholder.[66] This exacerbates the result-oriented problem caused by the plain meaning rule and renders the rule ineffective.[67]

59. *Id.*

60. North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 540 n.7 (Alaska 1978).

61. *In re* Byers, 665 N.W.2d 729, 739 (Wis. 2003) (Abrahamson, C.J., concurring). Concurring in the result but dissenting from the use of the plain meaning rule, the Chief Justice argued that his state should "stop paying lip service to the supremacy of the plain meaning rule and clearly adopt a more encompassing analytic model for statutory interpretation." *Id.* at 438–39.

62. Posner, *supra* note 7, at 808. In fact, Judge Posner states that "[t]he judge rarely starts his inquiry with the words of the statute, and often, if the truth be told, he does not look at the words at all." *Id.* at 807–08.

63. *Byers*, 665 N.W.2d at 739 n.4.

64. *See, e.g.*, *Courchesne*, 816 A.2d at 583–84.

65. *Id.* at 583.

66. State v. Alex, 646 P.2d 203, 209 n.4 (Alaska 1982).

67. *Courchesne*, 816 A.2d at 583.

2. The Sliding Scale Approach

While the *Courchesne* court's alternative approach to statutory interpretation expressly eradicated adherence to the plain meaning rule,[68] remnants of the rule still exist in the sliding scale analysis the court adopted in its place. This approach, also adopted by the courts of Alaska,[69] has emerged as the version of construction embraced and implemented by proponents of the extratextual approach. The sliding scale method retains the notion of the primacy of the statutory language but holds that the extent to which a court may rely on extratextual sources is a function of the degree by which the language of the statute fails to evince a clear meaning.[70] In other words, the clearer the language of the statute, the higher the burden the extratextual evidence must bear in order to overcome the seemingly unambiguous and presumptively conclusive statutory text.[71]

The sliding scale approach is designed to permit the judiciary greater latitude in construing statutes while preventing the kind of excessive discretion that can frustrate legislative intent. However, even proponents of the sliding scale approach recognize its major pitfall—difficulty of application.[72] Even more troubling than the difficulty of application is the fact that a balancing test in which a court must weigh the clarity of a statute's language against the strength of the extratextual sources once again requires a discretionary and unguided determination of the vagueness or soundness of the statutory text.[73] Thus, this sliding scale approach is just as susceptible to line-drawing problems as the plain meaning rule it purports to replace. Hence, the sliding scale approach eliminates some, but not all, of the plain meaning rule's shortcomings.

68. *Id.* at 586 ("Thus, we do not follow the plain meaning rule.").

69. State v. City of Haines, 627 P.2d 1047, 1049 n.6 (Alaska 1981) (stating that although Alaska rejects the traditional plain meaning rule and its attendant preclusion against resorting to legislative history when the statutory language is clear, courts must refrain from expanding or modifying statutes unless the resort to extrinsic aids clearly refutes the plain language of the statute); *see also* Wold v. Progressive Preferred Ins. Co., 52 P.3d 155, 161 (Alaska 2002) ("Yet because Alaska does not follow the plain meaning rule, the plain language of these provisions does not itself end the inquiry. Under Alaska's sliding-scale approach to statutory construction, strong legislative history may support a different meaning. But '[when] a statute's meaning appears clear and unambiguous, . . . the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent.'" (citations omitted)).

70. *Courchesne*, 816 A.2d at 585.

71. *Id.* ("[T]he more strongly the bare text of the language suggests a particular meaning, the more persuasive the extratextual sources will have to be in order for [the court] to conclude that the legislature intended a different meaning.").

72. *Id.* at 585 (recognizing that the sliding scale approach is "easier to state than to apply").

73. *Id.* (noting that the construction will hinge on a balancing of the weight of all the evidence surrounding the statute).

B. The Plain Meaning Approach

While the arguments for adoption of an extratextual approach to statutory interpretation are compelling, the plain meaning rule remains the controlling approach in Illinois.[74] However, a closer inspection of the rationale behind the plain meaning rule and criticisms of particular extratextual sources suggest that the plain meaning rule is just as vulnerable to misuse, misinterpretation, and even abuse as the extratextual approach. Finally, the problems faced by courts in applying the plain meaning rule are aptly demonstrated by the Supreme Court of Illinois' attempt to interpret the Illinois Marriage and Dissolution of Marriage Act.[75]

1. Arguments Supporting the Plain Meaning Rule

The most prominent rationales supporting the continued application of the plain meaning rule are the notions of separation of powers, judicial restraint, and predictability.[76] Supporters of the rule urge that the plain meaning rule promotes stability and precludes judicial lawmaking while an extratextual approach allows courts to "pick and choose from among various tools of interpretation" in order to create a result-oriented statutory construction.[77]

The idea that the plain meaning rule will curtail judicial expansion of legislation is subsumed into the thrust of the separation of powers argument. The primary advantage of the plain meaning rule claimed by its proponents is that the rule eliminates the threat that judges will assume the constitutional role of the legislature and substitute their own policy preferences for those of the drafters.[78] Justice Scalia describes this problem as follows:

> The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you

74. *See supra* notes 6–28 and accompanying text.

75. 750 ILL. COMP. STAT. 5/101-802 (2002).

76. *Courchesne*, 816 A.2d at 613 (Zarella, J., dissenting). Each of these notions is discussed more thoroughly in this section of the analysis.

77. *Id.* at 610.

78. *Id.* at 613.

> think it *ought* to mean—which is precisely how judges decide things under the common law.[79]

In addition to the constitutional dangers inherent in allowing judges to depart from the language of the statute, proponents of the plain meaning rule also assert that it has long been the accepted standard for judicial construction in nearly all jurisdictions, including Illinois.[80] It follows, then, that there is insufficient precedent to support deviation from the time-honored and venerable plain meaning approach.[81] However, the arguments laid out above supporting an extratextual approach demonstrate that, although there may be a lack of solid precedents supporting such abandonment, strong public policy and logical arguments have been advanced to counter the dominance of the plain meaning rule.

Furthermore, proponents of the plain meaning rule assert that it encourages stability and predictability in statutory construction.[82] Advocates of the rule opine that an extratextual approach jeopardizes public trust and confidence in the law since citizens will no longer be able to rely on the statutes as enacted to guide their everyday behavior and may instead be subject to ex post facto judicial legislation.[83] However, the credibility of this argument is abated by the regularity with which courts in plain meaning jurisdictions ignore the rule and consult extratextual sources even in the face of unambiguous statutory language.[84] Furthermore, the idea that citizens actually rely on statutory text for behavioral guidance is extremely aspirational.[85]

Finally, champions of the plain meaning rule maintain that the plain meaning rule provides optimum incentives to legislatures and special interest groups to ensure that their views are enacted into law.[86] The *Courchesne* dissent asserted that "the plain meaning rule encourages legislators to 'fulfill their constitutional responsibility to legislate by disabusing them of the expectation that the courts will do it for them.'"[87] However, since lawmakers cannot possibly enact statutes with full knowledge of the array of problems which will arise in their application,[88] the motivation of legislators and special interest groups to effectuate their policy preferences into law is not hindered by judicial consultation of extratextual sources.

79. SCALIA, *supra* note 14, at 17–18 (emphasis in original).

80. *Courchesne*, 816 A.2d at 613 (Zarella, J., dissenting). The dissent notes that Connecticut abided by the plain meaning rule for over 100 years. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*; *see also* SCALIA, *supra* note 14, at 17 (recognizing, as quoted in the *Courchesne* dissent, the inherent unfairness of such a system).

84. *See supra* notes 60–63 and accompanying text.

85. *See* Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057 (1995). Professor Ross notes that "ordinary meaning is significantly less relevant than legislative history." *Id.* at 1057 n.1.

86. *Courchesne*, 816 A.2d at 614 (Zarella, J., dissenting).

87. *Id.* (citation omitted).

88. *See* Posner, *supra* note 7, at 811.

2. Criticisms of Particular Extratextual Sources

Proponents of the plain meaning rule also point to the flaws inherent in two commonly relied-upon extratextual sources: the canons of construction and legislative history. As discussed in Part II of this note, the canons of construction are often criticized as groundless judicial maxims which contradict each other and produce divergent results depending upon the canon applied.[89] Legislative history is also subject to criticism on numerous grounds as discussed below.[90] However, while these criticisms have merit, they do not support a strict allegiance to the plain meaning rule and its attendant requirement of ambiguity before consultation of extraneous sources.

a. Canons of Construction

Judge Posner enumerates several arguments against the use of the canons of construction in support of his thesis that the canons are simply incorrect.[91] He first argues that the canons are not a method of code-breaking because legislators pay little attention to, and have limited, if any, knowledge of, such a code.[92] He also argues that the canons do not curtail the problem of judicial lawmaking because while some canons may compel a strict reading of the statutory language, others may allow for a more liberal interpretation.[93] In summary, Judge Posner argues that the canons of construction should not even serve as logical guides to statutory interpretation, let alone as ardently followed rigid rules.[94]

Thus, given Judge Posner's constriction of the worth of the canons of construction, a proponent of the plain meaning rule could argue that this position obviates the need for extratextual sources, and thus reinforces the arguments in favor of the plain meaning rule. However, Judge Posner rejects the plain meaning rule.[95] Instead of embracing such a restrictive view of interpretation conditioned on inspection of the text of the statute, Judge Posner embraces a theory of "imaginative reconstruction" in which "[t]he judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[96] Thus, while he recognizes the deficiencies of the canons of construction, Judge Posner adopts

89. *Id.* at 806.

90. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861–69 (1992).

91. Posner, *supra* note 7, at 806–17.

92. *Id.* at 806. Judge Posner concludes the argument by stating that "[w]e should demand evidence that statutory draftsmen follow the code before we erect a method of interpreting statutes on the improbable assumption that they do." *Id.*

93. *Id.* at 806–07 (referring to the common criticism that for almost every interpretive issue, two canons can be utilized which provide conflicting and, in most cases, completely opposite results).

94. *Id.*

95. *Id.* at 817.

96. *Id.*

an extratextual approach that encompasses not only traditional extratextual tools of statutory interpretation, including legislative history, statutory purpose, and relation to other statutes, but also two more novel aids: (1) the values and attitudes of the period during which the statute was enacted and (2) legislative indicia relating to whether the statute should be read narrowly or broadly.[97] Such an approach demonstrates that a weakness in an extratextual tool of construction does not mandate a reversion back to the plain meaning rule.

b. Legislative History

Likewise, Justice Breyer identifies the potential weaknesses of the reliance on legislative history in statutory interpretation.[98] However, he ultimately refutes these criticisms and defends the use of legislative history as a valuable tool of statutory construction.[99]

First, Justice Breyer notes that critics of legislative history assert that it is useless and should be abandoned.[100] However, this argument rests on the incorrect assumption that legislative history is supposed to be dispositive rather than merely helpful.[101] Second, opponents aver that the use of legislative history is constitutionally unsound for two reasons: (1) statutes, not debates and reports, are the law and (2) such debates and reports are prepared largely by unelected congressional assistants or lobbyists.[102] Proponents of extratextualism do not hold that legislative history purports to be the law but rather serve as an ancillary guide to assist in interpreting the law.[103]

Perhaps the two strongest arguments against the use of legislative history are that the concept of congressional intent is a legal fiction and that legislative history is extremely difficult to apply.[104] The first argument focuses on the fact that the term "legislative intent" is a misnomer since it is impossible to discern the intent of an entire legislative body in enacting a particular statute.[105] However, this argument ignores the distinction between "purpose" and "motive."[106] Individual, discrete motives

97. *Id.* at 817–18.

98. Breyer, *supra* note 90, at 861–69.

99. *Id.*

100. *Id.* at 861–62. Justice Breyer acknowledges that legislative history can be vague or even conflicting, but states that we should not disregard it as an interpretive tool as long as it is used cautiously. *Id.*

101. *Id.* at 862. ("No one claims that history is *always* useful; only that it *sometimes* helps." (emphasis in original)).

102. *Id.* at 862–63.

103. *Id.* at 863. Furthermore, Justice Breyer notes that these arguments do accurately describe the way Congress goes about making laws. Congress is not constitutionally precluded from utilizing appointed assistants or special interest groups in drafting legislation. *Id.* at 863–64.

104. *Id.* at 864–69.

105. *Id.* at 864. In fact, Justice Breyer points out that it is difficult to determine the intent of a single Congressman or Senator, let alone the entire legislative body. *Id.*

106. *Id.* at 865.

can coexist within the sphere of a larger, unified purpose, and it is the purpose of the legislature as a whole, and not the isolated motives of individual legislators, that a court extracts from the use of legislative history.[107] Thus, legislative history is a valid tool of statutory interpretation since it examines the collective purpose of the legislature and not the individual motives of the legislators.

Second, opponents of extratextualism point to the difficulties of using legislative history. In light of the sheer volume of legislative history available, some commentators worry that judicial reliance thereon will force ordinary citizens to familiarize themselves with not only statutes, but also the attendant legislative history.[108] However, this argument also lacks merit because legislative history is not the law, but merely a means utilized in interpreting the law.[109] Furthermore, the idea that citizens would even consider consulting legislative history as an insight into the interpretation of laws is extremely idealistic.[110]

In summary, the ideas of Judge Posner and Justice Breyer demonstrate that the weaknesses inherent in extratextual methods of statutory interpretation should not preclude their use. Rather, the criticisms merely call for a greater awareness of the potential problems in the appropriate use of extratextual sources and an understanding of the bases for such reliance and use.

3. The Difficulty in Applying the Plain Meaning Rule: An Illinois Example

In re Marriage of O'Neill,[111] decided by the Supreme Court of Illinois in purported adherence to the plain meaning rule, demonstrates the pitfalls of the rule. The issue before the court was whether section 503 of the Illinois Marriage and Dissolution of Marriage Act (the Marriage Act),[112] in mandating the division of assets in dissolution of marriage, permitted consideration of assets dissipated during the entire marriage or only those dissipated during the period when the marriage was experiencing an "irreconcilable breakdown."[113] While the text of the Marriage Act at the time of the case did not specify a time period during which the dissipation of assets should be considered, the court noted that numerous prior judicial decisions had attached an irreconcilable breakdown limita-

107. *Id.* ("The members of a group participating in the group activity—indeed, whose actions are necessary conditions for its action—may have different, private *motives* for their own actions; but that fact does not necessarily change the proper characterization of the group's purpose." (emphasis in original)).

108. *Id.* at 868–69.

109. *Id.* at 869.

110. *See generally* Ross, *supra* note 85.

111. 563 N.E.2d 494 (Ill. 1990).

112. 750 ILL. COMP. STAT. 5/503 (2002).

113. *O'Neill*, 563 N.E.2d at 498–99.

tion to the Act,[114] and subsequent legislative amendments to the Marriage Act neither changed nor addressed this judicial interpretation.[115] The court, relying on the canon of construction that legislative inaction subsequent to judicial construction signifies acceptance of the courts' interpretation,[116] held that the Marriage Act did include the limitation that dissipation of assets is to be considered only during the period in which the marriage is undergoing an irreconcilable breakdown.[117]

However, the dissent accused the majority of ignoring the plain meaning rule and instead resorting to extratextual sources despite the clear and unambiguous statutory language.[118] The dissent argued that the text of the Marriage Act did not impose a time limitation, and thus the addition of a limitation by the judiciary was contrary to the text of the legislation.[119]

The dissent argued that the majority was guilty of nonapplication, not simply misapplication, of the plain meaning rule.[120] This argument highlights two major flaws of the plain meaning rule. First, the majority and dissent's disagreement over whether the Marriage Act was ambiguous or clear exemplifies the line-drawing problem that plagues every application of the plain meaning rule.[121] Second, and more importantly, the dissent concluded that the majority had not even applied the plain meaning rule.[122] Rather, the dissent accused the majority of relying on a canon of construction without ever explicitly finding an ambiguity in the language of the Marriage Act.[123] Thus, the *O'Neill* court may have subscribed to the plain meaning rule in theory but did not abide by its strictures in practice.[124]

C. Analysis of the Illinois Ticket Scalping Act

The contrast between the extratextual and plain meaning approaches is best illustrated by analyzing a current Illinois statute using

114. *Id*. at 497–98.

115. *Id.* at 498 ("Nevertheless, the General Assembly has left the language of subsection (d) unchanged.").

116. *Id.* (stating the canon as follows: "[w]here the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of the legislative intent." (citation omitted)).

117. *Id.*

118. *Id.* at 499 (Stamos, J., dissenting).

119. *Id.* at 499–500 (Stamos, J., dissenting). The dissent states: "[I]t is immediately evident that the language of section 503(d)(1) [of the Marriage Act] is plain and unambiguous and that the construction of section 503(d)(1)'s plain language by some panels of the appellate court, which the majority has unquestioningly adopted, is wrong." *Id.* at 500 (Stamos, J., dissenting).

120. *Id.* at 500 ("Yet in the present case the majority has seen fit to ignore the plain-meaning rule.").

121. *See supra* notes 64–67 and accompanying text.

122. *O'Neill*, 563 N.E.2d at 500 (Stamos, J. dissenting).

123. *Id.*

124. *See supra* notes 60–63 and accompanying text for a discussion of numerous scholars noting the reluctance of courts in plain meaning jurisdictions to actually apply the plain meaning rule.

each method. The Illinois Ticket Scalping Act (the Act)[125] provides an excellent illustration of the fundamental difference—the determination of whether the statutory text is ambiguous—between the two approaches. The issue which the following analysis will address is whether the Act's prohibitions on scalping apply to subsidiaries established by venue owners, managers, and operators for the purpose of selling tickets at inflated prices.[126] The Circuit Court of Cook County recently addressed this issue in *Cavoto v. Chicago National League Ball Club, Inc.*[127] *Cavoto* involved a class action lawsuit brought by plaintiffs who purchased tickets for Chicago Cubs' baseball games from Wrigley Field Premium Ticket Services, Inc., a lawfully licensed ticket broker and subsidiary of the Tribune Company, which also owns the Cubs.[128] The plaintiffs in *Cavoto* argued that the defendants violated the Act by establishing an outlet through which they could circumvent the Act's mandate that owners, managers, and operators of a venue not sell tickets to their own event at prices higher than those printed on the face of the ticket.[129] Specifically, the plaintiffs asserted five arguments in support of their contention that the defendants had violated the Act, all of which were rejected by the court.[130] The court, in rejecting these arguments, noted that the Act is "quite detailed" but does not prohibit the establishment of

125. 720 ILL. COMP. STAT. 375/1-4 (2002).

126. *Id.* For a more thorough analysis and discussion of the specific prohibitions therein, see *infra* notes 133–79 and accompanying text.

127. No. 02 CH 18372 (Cir. Ct. of Cook County Nov. 24, 2003).

128. *Id*. The plaintiffs alleged that the defendants violated three Illinois acts—the Ticket Scalping Act, 720 ILL. COMP. STAT. 375/1-4 (2002), the Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/1-2 (2002), and the Uniform Deceptive Trade Practices Act, 815 ILL. COMP. STAT. 510/1-7 (2002). *Cavoto*, No. 02 CH 18372 at 23–39. However, with regard to all three Acts, the court focused only on the plain meaning of the language of the statute and did not resort to extratextual sources of interpretation. *Id.*

129. *Cavoto*, No. 02 CH 18372 at 23–32.

130. The five arguments are summarized as follows. First, the plaintiffs unsuccessfully asserted that the transactions by which the subsidiary broker (Wrigley Field Premium Ticket Services, Inc.) obtained its tickets were not sales within the meaning of the Act because they were effectuated through the use of intercompany accounts of the parent Tribune Company. *Cavoto*, No. 02 CH 18372 at 24–26. The court noted that such a method is a "customary way to enter payments and receipts" for transactions between subsidiaries of the same parent company, that only the broker set the price of resale, that the defendant Cubs paid a required amusement tax subsequent to the transactions, and that the broker suffered losses due to its assumption of the risk of ownership of the tickets. *Id.* at 25. Second, the court rejected the plaintiffs' argument that the subsidiary broker, by virtue of its failure to sell tickets to any other events besides Cubs' games, did not meet the provision in section 1.5(b) of the Act which requires that the business of a licensed broker be a "regular and ongoing" activity. *Id*. at 26.

The final three arguments all dealt with a variation of the same theme—control. *Id*. at 27–32. The plaintiffs first made a public policy argument, claiming that the defendants were collaborating to share in the premium obtained by the broker's sale of tickets above face value, but the plaintiffs failed to provide any evidence showing such an agreement. *Id*. at 27–29. Next, the plaintiffs argued that the court should consider substance over form and disregard the "corporate separateness" of the defendant entities, asserting that the defendants were cooperating to circumvent the Act. *Id*. at 29–31. However, the court also rejected this claim due to a lack of evidence. Finally, the plaintiffs contended that the defendant Chicago Cubs were essentially controlling the broker, its sister corporation, and thus the "corporate separateness" should be disregarded. *Id*. at 31–32. Once again, the court refused this contention, pointing to a lack of any evidence of domination or control on the part of the Cubs over its sister corporation. *Id*. at 32.

subsidiary brokers by venue owners, managers, or operators.[131] Although the defendants were ultimately cleared of any wrongdoing, the court's decision in *Cavoto* was based on the application of what it determined was an unambiguous statute.[132] However, upon reconsideration of this issue from a statutory interpretation standpoint, the plain meaning approach and the extratextual approach entail different analyses which are capable of producing different results.

1. Application of the Plain Meaning Approach

Analysis of the Act under the plain meaning approach begins with the language of the statute.[133] Section 1 of the Act prohibits entities that own, manage, or operate any "place of public entertainment or amusement" or any "agents" thereof from selling tickets at a higher price than they are sold at the venue's box office.[134] The statute is silent as to whether the prohibition of selling tickets at inflated prices extends to subsidiaries of the owning, managing, or operating entity.[135] Accordingly, such entities could argue that the subsidiaries unambiguously fall outside the scope of the statute's prohibitions, which is what the court determined in *Cavoto.*[136] While this argument is seemingly supported by the plain language of the text, challengers could argue that ambiguities meriting further analysis do exist in the language of the statute.

This highlights the fundamental distinction between the competing approaches to statutory interpretation. Under the extratextual method, the court need not determine whether an ambiguity exists, since the use of extratextual sources is not contingent on the vagueness of the statutory language. Under the Illinois plain meaning approach, however, the court must determine that the language is in fact ambiguous before pursuing extratextual interpretive guidance.[137] Thus, this threshold inquiry under the plain meaning rule requires a level of analysis parallel to that undertaken in determining the meaning of the statute as a whole. As Judge Posner, in referring to the plain meaning rule, suggests: "[i]t is

131. *Id.* at 32.
132. *Id.* at 23–32.
133. People v. Markwart, 762 N.E.2d 623, 629 (Ill. App. Ct. 2001).
134. 720 ILL. COMP. STAT. 375/1 (2002). Section 1 states, in pertinent part, that:

> It is unlawful for any person, firm or corporation, owner, lessee, manager, trustee, or any of their employees or agents, owning, conducting, managing or operating any . . . place of public entertainment or amusement where tickets of admission are sold . . . to sell or permit the sale . . . at any other place than in the box office or on the premises of such . . . place of public entertainment or amusement, but nothing herein prevents such place of public entertainment or amusement from placing any of its admission tickets for sale at any other place at the same price such admission tickets are sold by such . . . place of public entertainment or amusement at its box office or on the premises of such places . . . .

Id.
135. *Id*.
136. *Cavoto*, No. 02 CH 18372 at 23–32.
137. *In re* D.F., 802 N.E.2d 800, 800–04 (Ill. 2003).

ironic that a principle designed to clarify should be so ambiguous."[138] Indeed, adherence to this ironic principle not only fails to clarify, but also is judicially inefficient.

Although *Cavoto* did not explore possible ambiguities, thus obviating the need to consult extratextual sources, the potential existence of competing interpretations—and the determination of whether such competing interpretations exist in the first instance—highlights the fundamental flaw of the plain meaning rule. In determining whether or not an ambiguity exists in the statute under the plain meaning rule, a court must examine the areas in the statute in which more than one interpretation is plausible.[139] First, although the legislature did not include the word "subsidiary" in the statutory language of the Act, the inclusion of the word "agent" could be interpreted as an attempt to curtail the establishment of such parent-subsidiary relationships to circumvent the prohibitions contained in the statute. An agent is defined as "[o]ne who is authorized to act for or in place of another; a representative."[140] A subsidiary corporation is defined as "a corporation in which a parent corporation has a controlling share."[141] Furthermore, Illinois precedent holds that mere ownership of a corporation by another corporation does not confer agency status upon the owned entity.[142] However, while ownership of a subsidiary by a parent corporation is insufficient by itself to create an agency relationship, the facts of a particular case may give rise to an agent-principal relationship between a parent corporation and its subsidiary.[143] Thus, while the statutory text does not expressly preclude subsidiaries from reselling tickets at higher prices, the use of the word "agent" in the Act could be interpreted as an ambiguous expression of the legislature's desire to prevent scalping by venue owners, managers, and operators.

Similarly, the distinction between "subsidiary" and "agent" gives rise to another potential ambiguity in the plain language of the Act. Section 1 prevents any owning, managing, or operating entity from "permit[ting] the sale" of any tickets at higher prices than the prices at which such tickets are sold at the box office.[144] Even if the subsidiary of an owner, manager, or operator is determined not to be an agent of the par-

138. Posner, *supra* note 7, at 808.

139. The Illinois Supreme Court defines a statue as "ambiguous" when "it is capable of being understood by reasonably well-informed persons in two or more different senses." Advincula v. United Blood Servs., 678 N.E.2d 1009, 1018 (Ill. 1996).

140. BLACK'S LAW DICTIONARY 64 (7th ed. 1999); *see also* LARRY E. RIBSTEIN & PETER V. LETSOU, BUSINESS ASSOCIATIONS 17 (4th ed. 2003) ("[A]n agent is one who has the power to control resources owned by the principal.").

141. BLACK'S LAW DICTIONARY 345 (7th ed. 1999).

142. Rymal v. Ulbeco, Inc., 338 N.E.2d 209 (Ill. App. Ct. 1975) (discussing the agent-subsidiary relationship in the context of determining the appropriate party for service of process).

143. Caligiuri v. First Colony Life Ins. Co., 742 N.E.2d 750, 756 (Ill. App. Ct. 2000). The court went on to define agency as "a consensual, fiduciary relationship between two legal entities created by law, where the principal has the right to control the activities of the agent, and the agent has the power to conduct legal transactions in the name of the principal." *Id.*

144. 720 ILL. COMP. STAT. 375/1 (2002).

ent corporation in a particular case, section 1 appears to preclude such a subsidiary from selling tickets at inflated prices, since doing so would implicitly involve the permission of the parent corporation—violating the "permit to sell" provision of section 1. However, this interpretation requires a very strict construction of the "permit to sell" language. A plausible alternative interpretation of this phrase is that owning, managing, and operating entities cannot knowingly permit persons to scalp tickets at its venue in blatant violation of the Act. These conflicting interpretations could arguably be ambiguous enough to move the analysis out of the confined rigidity of the plain meaning rule.

Another possible ambiguity appears in section 1.5 of the Act, which prohibits the sale of tickets at a price higher than face value[145] but provides an exception for brokers that meet the requirements set forth therein.[146] The statutory requirements for obtaining a brokerage registration do not exclude subsidiaries of owning, managing, or operating entities. On the other hand, brokerage registration requires compliance with "all applicable federal, State, and local laws,"[147] which ostensibly include the other relevant sections of the Act. However, section 1, as noted above, pertains to the sale of tickets by venue owners, managers, and operators at the box office and other locations.[148] Thus, this incongruence between sections 1 and 1.5 creates an ambiguity as to whether subsidiaries of owners, managers, and operators are prohibited from becoming licensed ticket brokers under section 1.5.

Finally, the phrase "near the facility"[149] could be construed as ambiguous for two reasons. First, the term "near" is inherently ambiguous when used to describe the proximity of one item to another. Second, in the context of the Act, it could lead to the conclusion that an entity which owns, manages, or operates an entertainment venue, although prohibited from selling tickets at prices above face value at its own box office or any other location under section 1, may establish a subsidiary to accomplish what it itself cannot (sell tickets at exaggerated prices), provided the subsidiary is located outside of the area determined to be "near the facility."[150]

145. 720 ILL. COMP. STAT. 375/1.5(a) (2002). The statute states that "it is unlawful for any person, persons, firm or corporation to sell tickets . . . for a price more than the price printed upon the face of said ticket, and the price of said ticket shall correspond with the same price shown at the box office or the office of original distribution." *Id*.

146. 720 ILL. COMP. STAT. 375/1.5(b) (2002). The statute lists requirements necessary to obtain registration with the Secretary of State. Such requirements include, *inter alia*, that the broker "engages in the resale of tickets on a regular and ongoing basis," "maintains as the principal business activity at those locations the resale of tickets," and pays an "annual registration fee of $100." *Id.*

147. 720 ILL. COMP. STAT. 375/1.5(b)(1)(E) (2002).

148. *See supra* notes 134–36 and accompanying text.

149. 720 ILL. COMP. STAT. 375/1.5(b)(3) (2002).

150. In *Cavoto v. Chi. Nat'l League Ball Club, Inc.*, No. 02 CH 18372 at 29 (Cir. Ct. of Cook County Nov. 24, 2003), the plaintiff made a similar argument that the defendant was in violation of the Act because it was doing indirectly what the Act prohibited it from doing directly, although not in the context of the "near the facility" language of the Act. However, the court rejected this argument,

The inconsistencies and vagueness in the language of the Act demonstrate that the plain meaning rule's threshold determination of ambiguity is not a simple task. The *Courchesne* court, in rejecting the plain meaning rule, described the dangers that a court faces in making the determination of whether or not such unclear language exists.[151] In particular, the court noted that a court's determination of the issue could leave open the door to criticism on the grounds that the court is "result-oriented."[152] In contrast, an approach which employs free use of extratextual sources irrespective of a required level of unclear language, while certainly not free from the disparagement of skeptics and critics, offers a more informed method of statutory interpretation.

2. Application of the Extratextual Approach

In fashioning its extratextual approach to statutory construction, the *Courchesne* court enumerated various sources of interpretation to be utilized for the task.[153] In addition, in finding the meaning of the language in the context of the rationale supporting the Act's passage, a court may turn to the spirit of the statute approach and the canons of construction.

a. Spirit of the Statute

An argument can be made that the "spirit of the statute" approach does not permit subsidiary brokers.[154] The Act does not explicitly include subsidiaries as falling within its prohibitions on scalping,[155] but the statute can be viewed as an attempt by the legislature to prohibit those in an advantageous position from taking advantage of not only other registered ticket brokers, but also consuming citizens. Accordingly, allowing owners, managers, and operators to use their subsidiaries to sell tickets at inflated prices frustrates the purpose and spirit of the Act and is an incorrect interpretation thereof. On the other hand, the *Cavoto* court noted that the legislature could have prohibited common ownership out-

holding that the plaintiff did not establish that the defendant was working in concert with Wrigley Field Premium Ticket Services, Inc., to get around the provisions of the Act. *Id*. at 31.

151. State v. Courchesne, 816 A.2d 562, 583 (Conn. 2003) (stating that the ambiguity requirement has caused the court to make numerous declarations that are "intellectually and linguistically dubious").

152. *Id.*

153. *Id.* at 578. The majority stated that a court is to consider the following sources: (1) the language of the statute; (2) the circumstances surrounding the enactment of the statute, which includes any relevant legislative history; (3) the policy rationale supporting enactment of the statute; and (4) the relationship of the statute in question to existing legislation on the same general topic. *Id.*

154. *See supra* notes 20–25 and accompanying text for a discussion of the general background of the spirit of the statute approach.

155. 720 ILL. COMP. STAT. 375/1 (2002).

right if it intended to ban such parent-subsidiary relationships.[156] Nonetheless, when taken out of the immediate context of the surrounding language and viewed in the context of the statute as a whole, the contention that a parent-subsidiary association upsets the spirit of the statute does have merit.

b. Canons of Construction

In addition to the spirit of the statute approach, the canons of construction provide guidance in determining the meaning of a statute through the use of legally supported propositions which place limits on the discretion of the judiciary in gleaning legislative intent.[157] Although the canons are often criticized for substituting mere maxims for legal reasoning,[158] they remain useful tools of statutory interpretation. Plain meaning analysis often fails to effectuate the full intent of the legislature. Judge Learned Hand stated that "although [the legislature's] words are by far the most decisive evidence of what they would have done, they are by no means final."[159] Examining the Act by considering three particular canons demonstrates both the illuminating effect of the canons in providing statutory insight and the frustrating aspect of the canons' contradictory results.

First, the canon that different parts of a statute must be read together to produce a consistent whole can be asserted in opposition of subsidiary brokers.[160] The purpose of this canon is to foster a congruous interpretation of the individual provisions of a statute, thereby better reflecting legislative intent.[161] Therefore, the requirements for registration under section 1.5,[162] while not explicitly excluding subsidiaries from statutory compliance, must be read in conjunction with the general prohibition against scalping by owning, managing, and operating entities contained in section 1.[163] A concordant reading of these two sections suggests that subsidiaries could not meet the registration requirements contained in section 1.5 of the Act.

156. Cavoto v. Chi. Nat'l League Ball Club, Inc., No. 02 CH 18372 at 29 (Cir. Ct. Cook County Nov. 24, 2003). The court stated the following: "[i]f indirect sharing is to be assumed because of the common ownership of Premium [the subsidiary] and Ball Club by Tribune Co. [the parent], then the legislature could prohibit common ownership outright, or prohibit a Ball Club from selling tickets to a broker also owned by a common parent. Both of these prohibitions are absent from the Ticket Scalping Act." *Id.*

157. MIKVA & LANE, *supra* note 6, at 24.

158. *See supra* notes 91–97 and accompanying text.

159. Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring). Judge Hand further states that "[t]here is no surer way to misread any document than to read it literally." *Id.*

160. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 233 (1975) (referring to the "'whole statute' rule") (citation omitted).

161. *See id.* (noting that "in the field of communication the whole transcends the parts.").

162. 720 ILL. COMP. STAT. 375/1.5(b) (2002).

163. 720 ILL. COMP. STAT. 375/1 (2002).

However, while the aforementioned canon tips the scales against the subsidiaries, other canons balance the scales and favor the subsidiaries' status as residing outside the ambit of the prohibitions of the Act. First, the canon of *expressio unius est exclusio alterius* provides a straightforward argument in favor of the subsidiaries.[164] This canon stands for the proposition that express inclusion of one item in a statute necessarily results in the exclusion of any others not included in the statute.[165] In applying this canon to the Act, the language of section 1 comes under scrutiny.[166] The Act expressly prohibits numerous entities from selling tickets at prices higher than face value at any location, whether at the box office of the venue or several miles away;[167] however, "subsidiary" is not among the actors listed in section 1.[168] Therefore, since certain entities are expressly prohibited from acting, and subsidiaries are not included among them, it follows that the legislature did not intend to include them within the scope of the statute's prohibitions.

A second canon which construes the Act in favor of the subsidiaries relates to special interest statutes. A prominent application of this canon appears in the Seventh Circuit's analysis in *Chicago Professional Sports Ltd. Partnership v. NBA*.[169] In this case, the plaintiffs (the Chicago Bulls and their broadcasting network, WGN-TV)[170] brought an antitrust claim against the defendant, who sought protection under the Sports Broadcasting Act.[171] The Sports Broadcasting Act[172] exempts basketball leagues which transfer the rights of their member clubs in the sponsored telecasting of games from the antitrust laws.[173] However, the court read the Sports Broadcasting Act as "special interest legislation, [entailing] a single-industry exception to a law designed for the protection of the public."[174] Consequently, the court construed the statute extremely narrowly and resolved any ambiguities against the special interest it protects (in

164. N. Shore MRI Ctr. v. Ill. Dep't of Revenue, 723 N.E.2d 726, 730 n.4 (Ill. App. Ct. 1999) ("*Expressio unius est exclusio alterius* is a rule of statutory construction which recognizes that 'the enumeration of one thing in a statute implies the exclusion of all others.'" (citation omitted)).

165. *Id.*

166. *Cavoto* indirectly noted the significance of this canon of construction. *See* Cavoto v. Chi. Nat'l League Ball Club, Inc., No. 02 CH 18372 at 40 (Cir. Ct. Cook County Nov. 24, 2003) ("Should the public have a concern about the common ownership of an amusement and a licensed ticket broker, the relationship of the subsidiaries or advantages they devise from that relationship, [then] the legislature can do the public's bidding by enacting desired limitations.").

167. 720 ILL. COMP. STAT. 375/1 (2002); *see supra* note 134 (restating in pertinent part the statute, including its enumerated prohibited actors).

168. 720 ILL. COMP. STAT. 375/1.

169. 961 F.2d 667 (7th Cir. 1992).

170. *Id.* at 669.

171. *Id.* at 669–70.

172. 15 U.S.C. § 1291 (2000).

173. *Id.*

174. *Chi. Prof'l Sports Ltd. P'Ship*, 961 F.2d at 671.

this case the defendant), since their lobbyists had the opportunity to clearly define the legislation when it was written.[175]

Application of the special interest canon to the Ticket Scalping Act necessitates strict construction of the Act against normally registered ticket brokers and in favor of subsidiary brokers.[176] Section 1.5 can be viewed as "special interest legislation" designed to protect registered brokers from unfair competition and the advantageous business position of subsidiary brokers.[177] Just like the Sports Broadcasting Act, the Ticket Scalping Act is a "single-industry exception to a law designed for the protection of the public"[178] in that it allows for registered brokers of tickets despite a general policy favoring the elimination of ticket scalping. Thus, during the drafting of the Act, ticket brokers presumably lobbied to protect themselves from the general restrictions on scalping in the statute.[179] While courts will enforce the legislative grant of immunity from the statutory constraints on scalping, they will not read into the Act any language not explicitly expressed and will construe any ambiguities against the special interest ticket brokers. In doing so, a court would likely conclude that since the brokers had the opportunity to exclude the subsidiaries from the statutory exception but failed to do so, the subsidiaries should not be prevented from selling tickets at inflated prices provided they meet the registration requirements of section 1.5 of the Act.

3. Results of the Analyses

The extratextual approach to interpreting the Act, in utilizing the canons of construction and the spirit of the statute approach, demonstrates that while arguments exist for both allowance and disallowance of subsidiary ticket brokers, the former result is more favorably supported than the latter. While the plain meaning approach yields a similar result, the determination of whether the text of the Act is ambiguous is a difficult analysis which fails to provide the stability and consistency asserted by advocates of the rule.

IV. RECOMMENDATION

Statutory interpretation, although one of the judiciary's most important roles, is an area replete with different approaches and theories but void of agreement or consensual support for any particular method. To some extent, the interpretation of statutory language is necessarily subjective, irrespective of the selected approach. This is best evinced by the

175. *Id.* "What the industry obtained, the courts enforce; what it did not obtain from the legislature—even if similar to something within the exception—a court should not bestow." *Id.*

176. *See id.*

177. 720 ILL. COMP. STAT. 375/1.5 (2002).

178. *Chi. Prof'l Sports Ltd. P'ship*, 961 F.2d at 671.

179. The general prohibition appears in 720 ILL. COMP. STAT. 375/1.5(a) (2002).

plain meaning rule, which in its strongest form attempts to eliminate discretionary interpretation of statutes by prescribing strict adherence to the text of a statute, yet as a corollary permits consultation of extratextual sources upon judicial determination of the existence of ambiguous text—an unrestrained and highly discretionary exercise.[180] The *Courchesne* majority suggested that a court seeking to impose its subjective view and reach a construction which it prefers regardless of the intent of the legislative body "will find a way to do so under any articulated rubric of statutory interpretation."[181] Proponents of both the extratextual and the plain meaning approaches criticize each other's method as susceptible to judicial manipulation, thus underscoring the element of subjectivity inherent in both methods. Different courts approach statutory interpretation differently, and it is not uncommon for different courts in the same jurisdiction to employ different methods of statutory interpretation.[182]

Countless scholars have proposed methods or guidelines for interpreting statutes, but there is no consensus on the appropriate method. Judge Posner, in his imaginative reconstruction theory, suggests that courts should consider additional factors, including the societal values and beliefs of the time period during which the statute was enacted.[183] In addition, one scholar has proposed the adoption of a codified set of Congressionally mandated rules of statutory interpretation,[184] while another has suggested that courts give credence to specific "interpretive communities" in gleaning the intent of the legislature.[185]

While no infallible method of interpretation exists, comparison of the plain meaning rule to the countervailing extratextual approach demonstrates that utilizing multiple tools of interpretation should be preferred to the confining approach of the rule. The cases involving statutory interpretation by Illinois courts discussed above (most notably *O'Neill*[186] and *Cavoto*[187]) evince not only the difficulty of application but also the ineffectiveness inherent in the rigid plain meaning rule.

180. For a discussion of the requisite ambiguity accompanying resort to extratextual sources under the plain meaning rule, as well as arguments for and against the rule and this requirement, see *supra* notes 46–124 and accompanying text.

181. State v. Courchesne, 816 A.2d 562, 587 (Conn. 2003).

182. *See supra* notes 60–63 and accompanying text.

183. Posner, *supra* note 7, at 818; *see supra* notes 95–97 and accompanying text for a description of Judge Posner's "imaginative reconstruction" theory.

184. *See* Rosenkranz, *supra* note 1, at 2156. Rosenkranz argues that a set of codified rules, passed by Congress but drawing on the expertise of the Supreme Court through a proposed "Canons Enabling Act," would provide a "clear, predictable, and internally coherent" method of statutory interpretation. *Id.* at 2157.

185. *See* William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 676 (2001). Blatt concludes that "representative democracy directs judges to adopt the perspective of the community responsible for the issue." *Id.*

186. *See supra* notes 111–24 and accompanying text for a discussion of the difficulty in applying the plain meaning rule by the Supreme Court of Illinois in *In re Marriage of O'Neill*, 563 N.E.2d 494 (Ill. 1990).

In particular, an interpretive analysis of the Illinois Ticket Scalping Act demonstrates that the plain meaning and extratextual approaches are capable of producing inconsistent results, or at the very least, varied analytical procedures. Under the plain meaning approach, it is possible to conclude that the Act is unambiguous and does not preclude owners, managers, or operators of a venue from establishing subsidiary brokerage outlets. This is the analysis under which the Circuit Court of Cook County decided *Cavoto*.[188] On the other hand, the plain meaning analysis could also lead to the conclusion that the statutory language is ambiguous, thus opening the door to arguments under various interpretive tools that the statute should be read to prohibit subsidiary brokers.

The extratextual approach abolishes the notion that an ambiguity is a condition precedent to the consultation of useful instruments of statutory interpretation. This fact highlights the ineffectiveness of the plain meaning rule. The plain meaning analysis, by virtue of the ambiguity requirement, allows for the danger of uninformed decision making without consulting interpretive tools, thereby leaving unexplored potential arguments that, even if without conclusive or substantial merit, deserve judicial consideration. Thus, while the *Cavoto* court reached the correct conclusion that the statute does not prohibit subsidiary brokers, its plain meaning analysis did not exhaust the potential arguments to the contrary, which is a dangerous path to tread in the realm of statutory interpretation. This view is consistent with the concern of Justice Stevens: "when [the Court's] refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by members of the enacting Congress and that remain valid today, the Court misuses its authority."[189]

Thus, Illinois should abandon its rigid adherence to the plain meaning rule and join Alaska[190] and Texas[191] in adopting an extratextual approach. Such a method of interpretation would allow for more informed analyses and better-reasoned decisions. However, as discussed above, the sliding scale approach fashioned by the Alaska courts and the Supreme Court of Connecticut in *Courchesne* fails to solve the primary flaw associated with the plain meaning rule—the discretionary determination of ambiguity.[192] A more effective response to the ills of the plain meaning rule would allow for tempered, but not unfettered, judicial liberty in consulting extratextual sources within the confines of some loosely structured guidelines. Judge Posner's imaginative reconstruction theory pro-

187. *See supra* notes 125–79 and accompanying text for an analysis of the Illinois Ticket Scalping Act, considered in *Cavoto v. Chicago Nat'l League Ball Club, Inc.*, No. 02 CH 18372 (Cir. Ct. of Cook County Nov. 24, 2003), using both the plain meaning approach and an extratextual approach.

188. *Cavoto*, No. 02 CH 18372 at 5.

189. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting).

190. *See supra* note 29 and accompanying text.

191. *See supra* note 30 and accompanying text.

192. *See supra* notes 68–73 and accompanying text.

vides quasi guidelines, including consideration of the values and attitudes present at the time of the enactment of the statute at issue.[193] Imaginative reconstruction is impractical, though, since it freezes a statute in time and forces judges to engage in the inherently difficult exercise of applying past values and attitudes to present issues and disputes.

A more pragmatic guideline, or consideration, is for judges to interpret statutes in a way that gives the legislative body notice as to how its statutes will be interpreted. While not a codification of interpretive principles, this approach would focus not only on the judiciary's attempt to glean legislative intent, but also on the legislature's interest in understanding judicial standards of interpretation. The primary goal of statutory interpretation must always be to determine the purpose and intent of the legislature, and consideration by the courts of their effect on the legislative process could lead to more stable and consistent statutory interpretation. The results of such an approach would ideally include providing the legislature with a better idea of how its statutes will be interpreted and applied by courts, and thus it would encourage legislators to draft statutes in a manner which will aptly elucidate the intent of the drafters.

Such an approach is susceptible to criticism on several grounds. First, it is highly optimistic, even wildly idealistic, to assume that any judicial approach to statutory interpretation will inspire legislators to draft laws which clearly enucleate legislative intent. In fact, statutes often do not have a so-called legislative intent, as it is difficult, if not impossible, to ascribe a unified purpose to a collective legislative body.[194] Second, such a guideline, while perhaps conceptually attractive, may in practice prove ineffective due to its difficulty of application. Finally, consideration by the judiciary of the effects of interpretation on legislative action can be viewed as a blatant form of judicial lawmaking.

While these assertions do have merit, they are among the chorus of criticisms that can be levied against any approach to statutory interpretation. Statutory interpretation is a liberal art, not a rigid science. As such, interpretive approaches should allow for consideration of external factors. Judicial consideration of externalities, including the need for legislative notice within the framework of an extratextual approach, would facilitate reasoned, practical, and effective judicial interpretation of statutes.

V. CONCLUSION

Illinois courts currently subscribe to the plain meaning rule when interpreting statutes. The rule requires a literal interpretation of the statu-

193. *See* Posner, *supra* note 7, at 818.

194. *See* Breyer, *supra* note 90, at 864; *see also supra* notes 104–07 and accompanying text for a general discussion on the difficulty in attributing a single intention to an entire legislature.

tory text and permits consultation of extratextual sources only if the text of the statute is ambiguous. However, the rule is inhibiting, exclusive, and difficult to apply. The changing dynamic of society in general, and the law in particular, often render statutory language effectively obsolete as applied to a particular issue. Therefore, abandonment of the plain meaning rule in favor of an extratextual approach would provide the most pragmatic and effective method of statutory interpretation for Illinois courts. This approach endorses judicial consideration of an array of interpretive tools, thus aiding courts in defining the purpose for which a legislative body enacted a specific statute and applying that statute to a specific issue.