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CALIBAN'S "GRACE": A STATUTORY INTERPRETATION OF SHAKESPEARE'S MONSTER

Jonathan Uffelman *

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"Though [w]e torture[] the English language, [w]e [have] never yet succeeded in forcing it to reveal its meaning." J.B. Morton, British writer, 1893–1979

INTRODUCTION

Law is art. This claim is hardly new, but its advocates assert it largely by analogizing law and literature.[1] Of course, no one thinks that law and literature are identical. The claim is rather that they enjoy a familial resemblance, with enough common attributes to make the analogy enlightening. I propose a variation: theatre, not literature, is the comparison by which best to understand law as art. The most illuminating analogy is not the judge as novel writer, reader, or literary interpreter, but rather the judge as actor—specifically, the Shakespearean actor. Before proceeding with a comparative illustration, I will first make some general observations about this analogy's validity.

At a high level of generality, two similarities between Shakespearean texts and statutory texts immediately present themselves. First, Shakespearean texts as a general matter do not speak to the public directly. I would hazard a guess that a large percentage of Americans do not encounter Shakespeare's text beyond a brief, violent skirmish in the tenth or eleventh grade and perhaps again in college.[2] Thereafter, if one encounters Shakespearean text, it will be in a theatre or on film. However, in theatre and film, unlike with a piece of literature, not every reader's interpretation of Shakespeare is relevant. The most relevant interpretation is that of the actor who has been trained and authorized (that is, cast in the part) to do the interpreting. In other words, between the Shakespearean text and the audience an

1. For example, James Boyd White argues as much in various books asserting that lawyers have much to learn from reading literature. *See generally* JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW & LEGAL EDUCATION (1999); JAMES BOYD WHITE, THE LEGAL IMAGINATION (1985). Ronald Dworkin compares the judge to a literary writer—one who writes a single chapter in an ongoing novel. *See* Ronald Dworkin, *Law as Interpretation*, 60 TEX L. REV. 527, 540–46 (1982). Stanley Fish articulates reader response theories emphasizing the judge as reader—one whose interpretation is constituted by the community to which he belongs. His thesis stated more broadly is that there is no meaning to the text prior to the reader's interpretation. *See generally* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980).

2. My speculation is based on four years I spent touring the country performing Shakespearean plays and teaching workshops on Shakespearean texts to adults, college students, and students ranging from the fourth to the twelfth grade.

intermediary stands to interpret and communicate meaning.

The law—specifically, statutes—as a general matter also does not speak to the public directly. As with Shakespeare, most members of the public do not read statutes and those who try probably find them just as impenetrable. Statutes thus speak first to lawyers and judges and, through them, as intermediaries to the parties concerned. Without the interpretive mouthpiece of professional legal actors, statutes do not reach the public. The written law clearly exists and may or may not influence those intended to be regulated. However, with both statutes and Shakespeare, until interpreted and communicated to the public, meaning, in some sense, will not exist[3]—at least, no fixed meaning will exist.

Second, Shakespeare's stories described the life of his era and are written in complex, often dense language—quite often Elizabethan/Jacobean-age verse. Even his prose can be difficult to untangle. Similarly, statutes are written to address the problems of a specific point in time and in the often densely-layered language of legislation. Though specifically time-located, both texts continue their relevance in modern contexts despite the passage of decades or centuries. The interpretive challenge in each case therefore requires modern speakers of ordinary English to decode the meaning of highly complex, often antiquated texts.[4] Upon our first encounter with Shakespeare or statutes, we may understand the individual words and even individual sentences. The meaning of the whole will likely elude us until we have read the text over and over again.

To cope with these challenges, Shakespearean actors grappling with Elizabethan verse and legal actors grappling with intricate statutes learn tools and techniques to wrest

3. *See generally* FISH, *supra* note 1.

4. As John Barton says, "The two chief ingredients with which we start rehearsals are Shakespeare's text and a group of modern actors who work mostly on modern plays." JOHN BARTON, PLAYING SHAKESPEARE: AN ACTOR'S GUIDE 6 (1984). Similarly, statutory interpretation begins with the statute's text and lawyers who do not typically think or speak in legislative language. *Accord* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 10 (2d ed. 2006) [hereinafter "ESKRIDGE ET AL."] ("The statute consists of words chosen by the legislature to bind citizenry."). Though hardly poetry, I take as understood that ordinary conversation does not always consist of legislative-like commands any more than it consists of rhyming couplets.

meaning from unwieldy texts and to communicate that meaning clearly to the public. The tools help reveal what the authors may have intended the words to mean. Before discussing more specific similarities, some large scale differences between the two interpretive endeavors are worth noting. One significant difference is that because of the legal actor's commitment to larger prescriptive principles, the legal actor often vigorously argues that one approach—and one approach alone—is valid as a method of tackling statutory interpretation.[5] At an ideological level, legal actors may feel that one particular legal theory should dictate their interpretive posture. For instance, a legal actor may feel compelled to shape his interpretation according to the rule of law theory, which requires "a law of rules that are predictably applied to everyone."[6] The legal actor who feels compelled by the democratic legitimacy theory, which suggests "that interpreters ought to defer to decisions made by the popularly elected legislators who enact statutes"[7] may reach a different result. Yet a third legal actor may believe the law's legitimacy is best served by pragmatic theories, which suggest "that interpreters have an obligation to contribute productively to the statutory scheme and, perhaps ultimately, to the common good."[8]

Shakespearean actors, by contrast, generally do not feel themselves constrained by commitments to any particular theory of Shakespearean acting or interpretation.[9] Though

5. *Compare* STEVEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (arguing for a variety of tools to shed light on a statutory question), *with* ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 14 (Amy Gutmann ed., 1997) (arguing for specific text-based method of interpretation).

6. ESKRIDGE ET AL., *supra* note 4, at 220. Justice Scalia believes that textualism is required by the rule of law. *See* SCALIA, *supra* note 5, at 25.

7. ESKRIDGE ET AL., *supra* note 4, at 220.

8. *Id.* I take this to be fundamental to Justice Breyer's commitment to an emphasis on statutory purpose. *See* BREYER, *supra* note 5, at 81–97. But pragmatic arguments can be made in many theories of statutory interpretation. Eskridge and Frickey note that Justice Scalia makes a pragmatic argument for hard textualism: that resort to legislative history is a waste of resources and carries too many risks. ESKRIDGE ET AL., *supra* note 4, at 249; *see also* SCALIA, *supra* note 5, at 3, 29–37.

9. To be fair, however, some Shakespearean actors are far more "purist" than others. An actor's commitment to Shakespearean text may in fact lead him to feel that more theatrical choices are not acceptable if not fully supported textually. Antony Sher

the Shakespearean actor, like the legal actor, relies on an array of tools and techniques that illuminate shades of textual meaning, for the Shakespearean actor "[t]here are few absolute rules about playing Shakespeare, but many possibilities. . . . much of it is instinct and guesswork."[10] As John Barton notes, Shakespearean actors do not, generally, "believe that there's only one way of tackling Shakespeare. That way madness lies."[11] Pragmatism is the legal theory that most closely aligns with a Shakespearean actor's constraints: what will be actable and what will best contribute to the story on stage is the overriding consideration.[12] Most serious Shakespearean actors, like legal actors, do share a deep commitment to the constraints of the text.[13] For these actors, any choice made must either arise

encountered some initial resistance to his highly theatrical (yet, I feel, textually supported) choices for Richard III from others in the cast on these grounds. *See* ANTONY SHER, YEAR OF THE KING: AN ACTOR'S DIARY 181 (1986).

10. BARTON, *supra* note 4, at 4. Compare this statement with ESKRIDGE ET AL., *supra* note 4, at 9 ("If there is no simple, universally accepted approach to interpreting statutes, and if . . . the interpretive models competing for judicial acceptance are rooted in conflicting assumptions, there is ample room for the skill and imagination of the able practitioner. Advocating a particular side in a close statutory case is an art, not a science.").

11. BARTON, *supra* note 4, at 4.

12. To the degree that the rule of law emphasizes clarity as a component of legitimacy, there is a further parallel to be drawn. Every actor performing Shakespeare concerns himself with making the text understood. Though the legitimacy in the audience's eyes of a performance clearly spoken is different than the legitimacy we speak of when we speak of law, the result is reasonably similar. A law that says one thing but means another will be viewed as suspect (as will the interpreter asserting these cross-purposes). Similarly, Shakespearean text suffers from interpretations that jar with the text. As Barton says: "If we don't reach our audience we fail." BARTON, *supra* note 4, at 5 (1984). Not only does the interpreter lose our confidence, the audience comes away convinced that Shakespeare is impenetrable and therefore not worth their time.

13. My own experience bears this out, as do many books discussing actors and their performances of Shakespearean parts. *See generally* PLAYERS OF SHAKESPEARE 6: ESSAYS IN THE PERFORMANCE OF SHAKESPEARE'S HISTORY PLAYS (Robert Smallwood ed. 2007); PLAYERS OF SHAKESPEARE 5: FURTHER ESSAYS IN SHAKESPEAREAN PERFORMANCE BY PLAYERS WITH THE ROYAL SHAKESPEARE COMPANY (Robert Smallwood ed. 2006); PLAYERS OF SHAKESPEARE 4: FURTHER ESSAYS IN SHAKESPEAREAN PERFORMANCE BY PLAYERS WITH THE ROYAL SHAKESPEARE COMPANY (Robert Smallwood ed. 2000); PLAYERS OF SHAKESPEARE 3: FURTHER ESSAYS IN SHAKESPEAREAN PERFORMANCE BY PLAYERS WITH THE ROYAL SHAKESPEARE COMPANY (Russell Jackson & Robert Smallwood eds. 1994); CLAMOROUS VOICES: SHAKESPEARE'S WOMEN TODAY (Faith Evans ed. 1989); PLAYERS OF SHAKESPEARE 2: FURTHER ESSAYS IN SHAKESPEAREAN PERFORMANCE BY PLAYERS WITH THE ROYAL SHAKESPEARE

from the text itself or find ample justification within it. Put another way, choices must illuminate Shakespeare's words and characters rather than simply impose arbitrary meaning from above.

However, this difference between the interpretive endeavors, though not theoretically or ideologically insignificant, may not be as profound in actual practice. In fact, as Eskridge, Frickey, and Garrett note, in practice, "[m]ost judges are not single-minded theoreticians in statutory interpretation, but instead undertake a cumulative inquiry examining all possibilities. . . . The cumulative method also helps narrow the range of conflict in a case."[14] This idea that the "cumulative method" leads to expanded possibilities of meaning that, in turn, yield a more narrow range of potentially "right" answers strikes me as brilliantly counter-intuitive; it also brings the two interpretive endeavors closer together. Like the legal actor interpreting statutes, the "cumulative method" expands possibilities for the Shakespearean actor to consider and subsequently winnow to find the "best" solution to a textual conundrum. Thus, if Eskridge, Frickey, and Garrett are correct, the process the legal actor undertakes to interpret statutes, in actual practice, looks similar to that of the Shakespearean actor: the commitment is essentially to the text—for all interpretation begins with the words on the page—with a pragmatic need driving the search for meaning and intent.[15]

COMPANY (Russell Jackson & Robert Smallwood eds. 1989);.PLAYERS OF SHAKESPEARE 1: ESSAYS IN SHAKESPEAREAN PERFORMANCE BY TWELVE PLAYERS WITH THE ROYAL SHAKESPEARE COMPANY (Philip Brockbank ed. 1988); BARTON, *supra* note 4.

14. ESKRIDGE ET AL., *supra* note 4, at 9.

15. This observation leads to a large scale difference worth mentioning at the outset. Theatre and acting in general is at its best when it looks easy; the audience should be unaware of all the sweat and hard work that has been invested. *Cf.* BARTON, *supra* note 4, at 53 ("We don't want them, as they're sitting through a play, to be aware of all this work that we've done."). If, during the performance, the audience thinks about how hard the actor is working and not about the character's story, then the actor has failed. In other words, actors want the audience to focus on the result, not the process. With statutory interpretation, the process is at least as important as the result and often more so. For a good discussion of how process can be a proxy for fairness, see TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH & YVEN J. HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY ch. 4 (1997); *see also* SCALIA, *supra* note 5, at 3, 25 ("[T]he rule of law is *about* form. . . . We insist that before the state can punish [a] miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism?" (emphasis in original)). Seeing the interpreters' work is thus

Two overriding themes characterize both interpretive endeavors, and both lead inevitably back to the primacy of the text itself. The first is constraint. The actor interpreting Shakespeare for performance is severely constrained. A misconception of art is that it concerns the unfettered expression of the artist's feelings.[16] Not so. For art to have meaning, structure must shape expression (whether that structure is apparent or not). Structure implies constraint. A sculptor is constrained by the material he sculpts; a musician is constrained by the notes on the page; actors are constrained by the words in the text.[17] For the artist, channeling feeling or thought through these limitations creates meaning.[18] The actor *can* play Mercutio as a drug-addicted transvestite and this approach may illuminate the Queen Mab speech in new and interesting ways.[19] But if the rest of Mercutio's text is not reconciled with this concept and if the needs of the play as a whole are not considered, the interpretation risks becoming detached from the text, and meaning and legitimacy may be lost. Similarly, various constraints shape the meaning a Judge derives from statutory text. The Constitution, the statute in question, past statutes, *stare decisis*, and other considerations establish boundaries that reign in a judge's

vital to the legitimacy and transparency of the law. *But see* ESKRIDGE ET AL., *supra* note 4, at 10 (2d ed. 2006) (pointing out that those immediately affected by the court's decision may not care so much about *how* the case was decided, only whether they won or lost).

16. *Cf.* WHITE, *supra* note 1, at 60 (noting that when talking of law and literature, some marginalize literature as concerned with "the sort of pleasure we refer to as *aesthetic*, with that word preceded, by implication at least, by a word like *merely*") (emphasis in original).

17. Stanley Fish makes a similar observation with respect to novel writing. *See* Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 553 (1982) ("[An] author has surrendered his freedom . . . as soon as he commits himself to writing a novel . . . . because the very notion 'beginning a novel' exists only in the context of a set of practices that at once enable and limit the act of beginning."). Further, the actor is constrained—or at least his interpretation must be shaped—by the needs of the production as the director and designers have conceived it.

18. Indeed, for the sophisticated craftsman, rules, limitations, constraints can be ultimately liberating. That is why accomplished musicians do scales or simple vocal exercises every day and dancers spend many hours every week doing simple ballet bars—exercises that drill basic strength and flexibility. Only when form and structure have been absorbed into the artist's bones is the artist free to unleash expressive content.

19. *See* WILLIAM SHAKESPEARE, ROMEO AND JULIET act 1, sc. 4. This was the approach of Baz Luhrmann's 1996 film. *See* ROMEO + JULIET (Bazmark Films 1996).

discretion. Like the actor interpreting Mercutio, if the judge ignores these constraints, if the interpretation strains too much against the written word, the law risks losing its legitimacy. Therefore, for both the actor and statutory interpreter, among the most significant constraints that shape meaning and interpretation is the text itself.

The second overriding theme is ambiguity, an essential component of both Shakespearean and statutory interpretation. Shakespearean text, spoken by the actor conveys far more than the text alone. When an actor speaks with the character's voice, he conceives of that voice communicating not merely the sense of the spoken words, but rather the entirety of his character—his feelings, thoughts, intentions, life circumstances—everything. Because human beings are complex and often contradictory, ambiguity (to be distinguished from vagueness) is thus highly desirable, dramatic, and often necessary. To aid the actor in this communication, Shakespeare often writes in verse. Utilizing the multiple shades of meaning that words may convey, poetry amplifies the complexity of a character's thought or relationship.[20]

As with Shakespearean text, ambiguity is also often a statutory necessity, but for different reasons. For one, the legislative process itself ensures that a single, controlling statutory meaning will often be elusive. Edward H. Levi notes: "[Legislative] [a]greement is [often] possible only through escape to a higher level of discourse with greater ambiguity. This is one element which makes compromise possible."[21] As legislators resort to higher levels of

20. In *Richard II*, King Richard, who has been deposed by Bolingbroke, looks at himself in a hand mirror and then, sensing the opportunity for a dramatic gesture, throws it to the ground shattering it. Regarding the shattered glass, he says to Bolingbroke: "Mark, silent King, the moral of this sport: / How soon my sorrow hath destroyed my face." Bolingbroke replies: "The shadow of your sorrow hath destroyed / the shadow of your face." WILLIAM SHAKESPEARE, RICHARD II, act IV, sc. 1. Bolingbroke's line can mean both that the reflection in the mirror was just a shadow of Richard's face and sorrow, *and* that the unreality of Richard's sorrow shattered the unreality of Richard's face, that is, his public persona. Also note that the imposition of a verse structure is yet another constraint placed on the Shakespearean actor. As we shall see, an actor cannot speak blank verse the way he speaks prose and expect to communicate his character fully. BARTON, *supra* note 4, at 151–52.

21. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 31 (1949); s*ee also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 48 (1994)

abstraction, the statutory text increasingly resembles Shakespearean text insofar as it opens itself to a broader range of interpretations. However, ambiguity can also result from carelessness on the part of the drafters or from the simple fact that the legislature, while setting out to address a specific problem, is unable to anticipate all the possible circumstances that may give rise to a statutory question.

Embedded in the question of ambiguity lies one of the more important, yet telling differences between the Shakespearean and statutory text: ideally, statutes should mean only what they say. Put another way, with Shakespearean interpretation, the goal is to uncover as much meaning as possible—to reveal ambiguity; in statutory interpretation, the goal is to isolate *the only* meaning—to eliminate ambiguity.[22] What unites the Shakespearean and the legal actor's job is that despite the fact that the Shakespearean actor embraces ambiguity, he must, somewhat paradoxically, strive for specificity. In other words, although the Shakespearean actor may desire the audience to receive several shades of meaning from his dialogue, the actor himself must decide, like the legal actor, what the words specifically mean and what the character specifically intends when speaking them. Ambiguity and its attendant challenges

[hereinafter "ESKRIDGE, DYNAMIC"] (noting that because statutes are aimed at big problems and are written to last a long time, they are written in general, abstract, and often theoretical terms). If higher levels of abstraction are more likely to adapt to changing conditions, worth noting is that Shakespeare wrote about universal human needs, desires, and behavior in ways that have spoken to us across the centuries. Whether Shakespeare intended his plays to last as long as they have is, of course, impossible to know, but given his apparent obsession with death and the ability of the written word to confer immortality, supposing such an intent may not be unreasonable. *See, e.g.*, WILLIAM SHAKESPEARE, SONNETS 15, 18, 19, 55, 60, 63, 65, 74, 76, 81, 100, 107.

22. *Cf.* ESKRIDGE, DYNAMIC, *supra* note 21, at 61 ("[T]he agency or court is both interpreter and censor; it chooses one interpretation and suppresses others."). The doctrine of *Chevron* deference illustrates the law's commitment to the paring away of possible interpretations. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984). *Chevron* deference dictates that if Congress has not addressed a particular question with statutory clarity, the court will give deference to a permissible administrative construction of the statute rather than impose its own view of the matter. *Id.* at 842–43. However, if the court determines that the agency empowered to establish regulations has construed the statute in a manner plainly at odds with congressional intent, the court will give effect to what it believes to be Congress's intention. *See id.* at 843 n.9 (citations omitted). One way or another, meaning becomes fixed and ambiguities dissolve.

are therefore a fundamental reality that must be dealt with in both Shakespearean and statutory interpretation. The need to cope with ambiguity, once again, places the interpretive emphasis on text, but also introduces intent to the consideration.

I will therefore emphasize textual and authorial intent as we turn to a more specific comparison of these two interpretive endeavors. Again, what makes an actor's interpretation a useful mirror to hold up to statutory interpretation is that the text speaks first to the actor, who then translates her interpretation to the audience. Similarly, the statutory text speaks first to the judge (or lawyer arguing for a particular interpretation) who then translates her received interpretation to the parties at issue and to the public who will be on notice as to the text's now-established meaning.

For this discussion, I will consider the character's intent parallel to a statute's intent: both are derived from the text. Likewise, I will equate Shakespeare's intent to the legislature's intent: both communicate their intent through the text *or other means* to the actor who then communicates it to the audience or public. The author and the interpreter are therefore partners (or at least both are required) in creating meaning.[23] In summary, for my purposes, Shakespeare = the legislature, the actor = the judge/lawyer, the Shakespearean character/text = the statutory text, and the audience = the public.[24] To aid the comparison and to illustrate this parallel

23. Note that this is a position that a hard textualist would presumably not share. *See, e.g.*, Scalia, *supra* note 5, at 17. ("[I]t is simply incompatible with democratic government, or indeed, with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.")

24. Yet another high level similarity exists in this construct: the degree to which the public accepts the interpretation of both the legal and Shakespearean actor depends, in part, upon how persuasive the interpretation is. A Shakespearean actor attempts to coordinate his choices seamlessly and consistently with the needs of the play as a whole and the production in which he finds himself. Similarly, a number of statutory canons suggest that interpretations should attempt to read statutes so as to create a seamless body of law. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n., 505 U.S. 88 (1992) (rule of avoiding inconsistency with the a necessary assumption of another provision); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661 (1990) (rule of avoiding inconsistency with the structure of a statute); California v. FERC, 495 U.S. 490 (1990) (super-strong presumption of correctness for statutory precedents); Massachusetts v. Morash, 490 U.S. 107 (1989) (whole act rule); Green v. Bock Laundry, 490 U.S. 504, 521 (1989) (rule of continuity); Kungys v. United States, 485 U.S. 759,

more vividly, I will analyze and interpret a piece of Shakespearean text using the tools and theories of statutory interpretation.

At the beginning of *The Tempest*, Caliban, an island creature of ambiguous origin, has been a slave to Prospero, a magician and the usurped Duke of Milan, who has been stranded on Caliban's island for twelve years. Prospero uses magic to create a storm—the titular tempest—that deposits onto the island the inhabitants of a ship—his brother (and usurping Duke of Milan), the King of Naples, and other members of both courts who conspired and succeeded in overthrowing him. Following their arrival, Caliban meets a drunken butler (Stephano) and a court fool (Trinculo) while gathering wood for Prospero and, having never seen a human being other than Prospero and Prospero's daughter Miranda, mistakes them for gods. Caliban solicits the help of these "gods" in a plot to murder Prospero. At the end, the plot fails and Caliban realizes that the two in whom he has placed his hopes for revenge are merely human (and unremarkable ones at that). The members of the court, who have never seen Caliban before, are startled by his "monstrous"[25] appearance and Prospero and Caliban share the following exchange:

> PROSPERO
>
> [Speaking first to the members of the court about Caliban]
>
> He is as disproportion'd in his manners
> As in his shape. [To Caliban] Go, sirrah, to my cell;
> Take with you your companions; as you look
> To have my pardon, trim it handsomely.
>
> CALIBAN
>
> Ay, that I will; *and I'll be wise hereafter*
> *And seek for grace*. What a thrice-double ass

778 (1988) (plurality opinion of Scalia, J.) (rule against superfluity); United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988) (rule of avoiding inconsistency with the policy of another provision).The idea of a "seamless body of law" is akin to a Shakespeare production's attempt to create a world without glaring inconsistencies that will undermine an audience's ability to suspend disbelief. However, the degree to which the public accepts the interpretation will be influenced also by each individual's normative preferences. *Cf. infra*, note 165 and accompanying text.

25. I shall turn in more detail to the question of exactly what his appearance may be in Part III.

Was I, to take this drunkard for a god
And worship this dull fool!

PROSPERO

Go to; away![26]

Just as a specific factual situation can focus the court's attention on the meaning of a single statutory word,[27] I will focus on the meaning of the word "grace" in Caliban's line in order to understand exactly what Caliban intends regarding his future relationship with Prospero.

Both Shakespearean and statutory interpretation may encompass three similar interpretive postures: textualism, intentionalism, and a dynamic assessment of textual and contextual factors.[28] I will address each of these in turn. Part I of this article examines textualism's justifications and tools, and compares them with the tools and interpretive stance of the Shakespearean actor. Part II compares the use of legislative history with the use of texts extant from the sixteenth and seventeenth century that can be useful to the Shakespearean actor. Part III addresses dynamic concerns that might affect the interpretation of both statutes and Shakespeare, particularly changed circumstances. The goal in all three parts to a greater or lesser degree is to uncover the meaning and intention of Caliban's use of the word "grace." I conclude with some observations about the relevance of this illustration. Let us first examine Caliban's line through the lens of textualism.

I: TEXTUALIST THEORIES AND CANONS

The pure statutory textualist and the Shakespearean actor share a fiction: that something objectively discoverable exists in the text beyond the words themselves.[29] In law, this

26. WILLIAM SHAKESPEARE, THE TEMPEST act 5, sc. 2 in WILLIAM SHAKESPEARE: THE COMPLETE WORKS (Alfred Harbage ed., Pelican 1969) (emphasis added). Unless otherwise noted, all references to The Tempest will be to this version.

27. *See,e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976) (deciding whether the word "race" in The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) includes white workers).

28. *See* ESKRIDGE ET AL., *supra* note 4, at 219.

29. *See* Philip P. Frickey, *On Statutory Interpretation: Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1087 (1995) (noting that textualists, as well as other theories,

textual fiction is akin to the pre-realist's belief that the law is just "out there" and the judge is no more than a vessel channeling these objective truths.[30] Similarly, the textualist merely reveals that which is inherent in the text if one only looks with enough care and has the proper training to find it. Although the Shakespearean actor has more discretion and freedom to impose an interpretation than the legal actor,[31] the Shakespearean actor also proceeds with the belief that something of Shakespeare's objective intent is discoverable. Thus, what John Barton says about Shakespeare could similarly be said about the textualist approach to statutes: "[T]he nature of the language tells us about the nature of the character [or statute], or maybe we should say the language *is* the character [or statute]."[32]

Like the statutory textualist, the Shakespearean actor's chief focus is the words themselves: the conditions surrounding their creation are far less important. These words reveal the character, the relationships with other characters, intentions, and so forth. Larger-scale considerations such as the design of the whole production, the setting, and the coherence of all the production's disparate aspects have been pre-determined and are in someone else's control. Put more concretely, not only did the actor have nothing to do with the play's authorship, but the actor rarely has anything to do with the directorial and design deliberations that led to setting *The Tempest* in the twenty-first, the sixteenth, or some future century. Similarly,

"consider 'text' as having some component (i.e., conventional usage) potentially independent of the meaning intended by the speaker"). To counter the notion that even textualism involves interpretive discretion, Justice Scalia notes that emphasis on the text is at least one step closer to democratic principles than the fiction that some objective, over-arching legislative intent is discoverable. *See* SCALIA, *supra* note 5, at 3, 17.

30. *See* Guarantee Trust Co. of New York v. York, 326 U.S. 99, 101–02 (1945) (Frankfurter, J.) ("Law was conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations."); *see also* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (rejecting the notion that there is some "transcendental body of law").

31. *See* ESKRIDGE ET AL., *supra* note 4, at 285–86 (noting that when the Court "authoritatively construe[s] a federal statute, that precedent is not only entitled to the usual presumption of correctness suggested by . . . *stare decisis*, but it is supposed to be given a heightened *stare decisis* effect).

32. BARTON, *supra* note 4, at 71 (emphasis in original).

textualism views the legal actor as unconcerned with the legislative deliberations out of which statutory text arose. The textualist's focus is the text.[33] The interpreter concerns himself with legislative intent only insofar as the statutory text reveals it. The weaker emphasis on legislative intent[34] is textualism's effort to constrain the legal actor's subjective discretion. "It asks [the legal actor] to avoid invocation of vague or broad statutory purposes and instead to consider such purposes at 'lower levels of generality.'"[35] As a faithful agent of the text,[36] the textualist interpreter is thus firmly rooted in a position similar to that of the Shakespearean actor.

However, although the Shakespearean actor was not involved in the authorship of *The Tempest* and the legal actor did not author or vote to pass a statute, authorial intent in each case might still reveal layers of meaning relevant to the analysis. The statutory textualist's approach therefore breaks down further into the new, or hard textualist approach and the soft textualist approach.

A. New Textualism

For the new textualist, legislative history is off-limits. "[T]he new textualis[m] holds that the only . . . legitimate sources for this inquiry are text-based or -linked sources."[37] Let us look at the justifications for this stance and compare them to the position of the Shakespearean actor. New textualists, most notably Justice Scalia, have advanced two main constitutional arguments for their interpretive theory. First, consultation of legislative history is forbidden by Article 1, Section 7 of the Constitution.[38] Because a bill does not

33. ESKRIDGE ET AL., *supra* note 4, at 231.

34. As compared to those who look directly to legislative history to help determine intent. *See infra* Part II; *see also* ESKRIDGE ET AL., *supra* note 4, at 231–45; SCALIA, *supra* note 5, at 3, 29–37. Justice Scalia says: "We did not use to [consult legislative history], and we should do it no more." *Id.* at 37.

35. BREYER, *supra* note 5, at 87 (citations omitted).

36. *See* ESKRIDGE ET AL., *supra* note 4, at 5 (using this characterization); *cf.* BARTON, *supra* note 4, at 53 ("Because Shakespeare is a great poet, an audience has as much right to expect us to be faithful to his text as they would to hear an orchestra play the right notes at the right time.").

37. ESKRIDGE ET AL., *supra* note 4, at 228; *see also* BARTON, *supra* note 4, at 71.

38. *See* SCALIA, *supra* note 5, at 34–35; *see also* ESKRIDGE ET AL., *supra* note 4, at

become a statute until the Senate, the House, and the President have accepted it, only the agreed-upon statutory text is law.[39] A committee member's unwritten intentions are therefore *ipso facto* not law. A second constitutional argument is that textualism is most consistent with separation of powers.[40] The power of legislating is non-delegable and no committee or judge may fill in the statutory gaps for Congress.[41] Additionally, textualists argue that their theory advances the rule of law—the idea that people should have clear notice as to their rights and obligations; that the statutory text is connected to majority preferences; and that the text is the most reliable and specific evidence of legislative intent.[42] Finally, a great deal of time and expense spent performing legislative research would be saved by both judges and lawyers, and "congressional deliberations could return to normal, unaffected by strategic plants of smoking guns that lobbyists hope to use in later interpretive battles."[43]

Although Justice Scalia's constitutional arguments have no parallel in Shakespearean interpretation, the general impact his textualist efforts have had on focusing statutory interpretation on the text mirror the actor's emphasis on text in interpretation.

One point of agreement that has emerged from the critical literature [surrounding Justice Scalia's attack on legislative history] is that neither citizens nor judges should consider legislative history to be *authoritative* in the same way the

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39. Interestingly, although Shakespeare was not under the same sorts of legislative pressures to form consensus, he was constrained in his intent by a public censor, The Master of the Revels, whose job it was to ensure that plays contained no offensive matter. *See* Cyrus Hoy, *The Original Texts*, *in* WILLIAM SHAKESPEARE: THE COMPLETE WORKS 41 (Alfred Harbage ed., 1969). Without wishing to strain a point, Shakespeare could put on the stage what he and the Master of Revels could agree upon.

40. *See* SCALIA, *supra* note 5, at 35.

41. *See id.* at 35; *see also* Marshall Field & Co. v. Clark, 143 U.S. 649, 692–94 (1892); John F. Manning, *Textualism as a Non-Delegation Doctrine*, 97 COLUM. L. REV. 673 (1997). *But see* BREYER, *supra* note 5, at 98–99 ("Legislation in a delegated democracy is meant to embody the people's will . . . . an interpretation of a statute that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose."); Manning, *supra* at 702–06 (noting the tension of the textualist claim with their use of extrinsic sources to discover meaning).

42. ESKRIDGE ET AL., *supra* note 4, at 34.

43. *Id.* at 237–38.

statutory text is authoritative: the latter is and has the force of *law*; the former is, at best, evidence of what the law means.[44]

As with statutes, so with Shakespeare: text is the chief conduit for communicating the character and the play.[45] Learning about Shakespeare's life and what he might have intended his lines to mean may shed light on the meaning of the text, but this inquiry is ultimately subordinate to the text the actor has to perform.[46] As such, text is where the actor focuses the emphasis of his study and where he derives the majority of his clues for interpretation. Let us turn then to the textualist's tools to analyze Caliban's line.

The starting point for all statutory interpretation, regardless of who is doing the interpreting, is the same: the plain meaning of the text.[47] The plain meaning of the text controls unless it produces an absurd result[48] or is the result of a scrivener's error.[49] With Caliban's line, the plain meaning of the word "grace," as understood by the man on the street,[50] would likely be "beauty" or "charm."[51] However,

44. *Id.* at 238 (emphasis in original).

45. *See* SHER, *supra* note 9, at 203 (quoting Bill Alexander "The verse, breathing through you via the character to us, is in itself thrilling. It is seventy-five per cent of what [the Royal Shakespeare Company] is about. . . . We've got to dazzle with Shakespeare's language.")

46. Admittedly, this interpretive posture may be influenced, in part, by the fact that there is very little we know with absolute certainty about Shakespeare's life. *See generally* BILL BRYSON, SHAKESPEARE: THE WORLD AS STAGE (2007). The dearth of information about what Shakespeare himself might have intended in his texts is explored further in Part II.

47. *See* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."). I have used Appendix 3 of ESKRIDGE, DYNAMIC, *supra* note 21, at 323–33 extensively throughout this part as a source for cases illustrating textual canons.

48. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457, 465–72 (1892) (holding that to find Congress intended to include the work of clergymen in the Alien Contract Labor Law's definition of "labor" or "service," 23 Stat. 332, would be an absurd result because of our history as a Christian nation).

49. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511–24 (1989) (finding evidence that Federal Rule of Evidence 609(a)(1) which, on its face, would have excluded evidence of prior convictions in both criminal *and* civil cases was likely a scrivener's error). This decision is discussed in ESKRIDGE ET AL., *supra* note 4, at 269–71.

50. *Cf.* Smith v. United States, 508 U.S. 223, 241–43 (1993) (Scalia, J., dissenting) (arguing for a definition of "use a gun" that, in context, would be understood by the

another rule of statutory interpretation is that the word should be read in context.[52] Read in the context of the scene, the idea that Caliban hereafter will seek for "beauty" or "charm" is facially absurd and may be dismissed outright. Here, Caliban's plot to murder Prospero has been revealed and Caliban is now at Prospero's mercy. The ordinary speaker might rather believe the line means something more like "seek for mercy" or "seek the favor of God."[53]

This text was written centuries ago and the meanings of words change over time.[54] Therefore, the Shakespearean actor, like the hard textualist, turns to the equivalent of a contemporary dictionary to learn what meanings may have been lost to time and custom.[55] For the Shakespearean actor, the primary source for the precise definition of words as Shakespeare used them is the *Shakespeare Lexicon*.[56] The

ordinary speaker of the language).

51. *See* THE AMERICAN HERITAGE DICTIONARY 569 (2d Coll. ed. 1985) [hereinafter "DICTIONARY"].

52. *See, e.g.*, Smith v. United States, 508 U.S. at 241 (Scalia, J., dissenting) ("It is . . . a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.") (citations omitted).

53. *See* DICTIONARY, *supra* note 51, at 579.

54. *See* ESKRIDGE, ET AL., *supra* note 4, at 233–34 n.25 (discussing the evolving meaning of the word "discriminate" and its impact on our understanding of the plain meaning of Title VII's use of the word). Further, the meaning of the same word may have different resonances with different readers in the same time period. A white man's and a black man's received meaning of the word "discriminate" would likely have been very different in the 1960's and indeed, still today. *Cf. id.* at 252–53. This insight is consistent with Stanley Fish's notion of "interpretative communities." *See generally* FISH, *supra* note 1.

55. *See, e.g.*, Price v. Time, 416 F.3d 1327, 1338 (11th Cir. 2005) (looking at contemporaneous dictionaries and sources for the definition of "newspapers" as used in the statute as passed in 1935 to determine whether a magazine is a "newspaper"). Worth noting is that reliance on dictionaries often leads courts to argue over which dictionary is better, see, e.g., MCI v. AT&T, 512 U.S. 218, 228 n.3 (1994) (arguing that Webster's Third New International Dictionary accepts too much slang as proper English), and as others have noted, "dictionary definitions do not necessarily reflect the legislature's intention in enacting statutes." 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46:2 (6th ed. 2005). Indeed, some commentators have asked, "[I]s this exercise in dictionary shopping and statute-parsing all we should be doing in statutory interpretation? Does it threaten to reduce a complex normative art to a shell game or an exercise in cleverness?" ESKRIDGE ET AL., *supra* note 4, at 243.

56. 1 & 2 ALEXANDER SCHMIDT, SHAKESPEARE LEXICON AND QUOTATION DICTIONARY (Gregor Sarrazom ed., Dover Publications 3d ed. rev. & enlarged 1971) (1902). While I was pursuing my M.F.A. in acting, I was taught that an actor should

Lexicon purports to define every word Shakespeare used and in every context that he used it as it would have been understood in late sixteenth/early seventeenth century England. Here the actor finds that, as used at this point in *The Tempest*, "grace" means "blessed disposition of mind, virtue."[57] On the one hand, this definition accords with the notion that Caliban seeks forgiveness from Prospero. In seeking virtue rather than vengeance, he will earn the pardon of his master. Seen another way, however, seeking for a blessed disposition of mind could also encompass the idea that Caliban must seek to forgive Prospero for the wrongs Caliban perceives have been done to him.[58] Our initial textual analysis has therefore revealed an ambiguity in meaning that involves deciding whether Caliban is wholly penitent, or if the moment is more complex.

To resolve this ambiguity, the hard textualist does not

consult the Lexicon not only for the meanings of words that seemed ambiguous, but for *every word he or she spoke*. According to my teacher, Theodore Swetz, Professor of Acting Performance, University of Missouri at Kansas City, until an actor explores every word, he never knows when he might come across a meaning that sheds unanticipated light on his character. The level of detail at which an actor researches Shakespearean text seems therefore at least comparable to the level of detail at which the new textualist examines statutory text.

57. 1 ALEXANDER SCHMIDT, SHAKESPEARE LEXICON AND QUOTATION DICTIONARY 489 (Gregor Sarrazom ed., Dover Publications 3d ed. rev. & enlarged 1971) (1902).

58. The essential conflict between Caliban and Prospero lies in Caliban's purported rape of Prospero's daughter Miranda. Long before the play begins, Prospero treated Caliban like a son, taught him language and other learning, and Caliban looked up to Prospero like a father. When Miranda reached adolescence, Prospero caught Caliban trying to rape her. Prospero chained Caliban outdoors and has been a harsh master ever since. Miranda and Caliban both seem to subscribe to this version of the story. However, considering Caliban's perspective for a moment, Caliban was a free soul upon the island until Prospero showed up and claimed it for his own. *See* THE TEMPEST, *supra* note 26, at act 1, sc. 2. As far as Caliban is concerned, unschooled and "natural" as he was, he may not have been doing anything wrong, only what comes naturally. Considering Caliban's "uncivilized" state, Prospero's severe reaction, Miranda's horror, and his subsequent shunning could have been deeply confusing. Thus, although Caliban now expresses glee at his attempted rape, given his current hatred of Prospero, he might simply subscribe to the rape story because he knows it will wound Prospero. At the very least, the events that led to the current relationship may be more complex than appear on the surface. Generally speaking, an audience gains little by questioning the truth of what a Shakespearean character says. If they lie, they will usually tell you beforehand. *See, e.g.*, WILLIAM SHAKESPEARE, OTHELLO (Iago); WILLIAM SHAKESPEARE, RICHARD III (Richard). But as we shall see, changes in culture over time impose an obligation to read deeper into certain character's motivations. *See infra*, Part III.

turn to legislative history, but rather to a variety of textualist rules. For instance, the whole act rule may offer insight or even resolve the question. The whole act rule dictates that "[e]ach statutory provision should be read by reference to the whole act."[59] In other words, does the interpretation conflict with an overriding purpose of the statute or some other provision within it? Similarly, the Shakespearean actor can look to see how his conflicting interpretations accord with the themes of the play as a whole. Here, either choice for Caliban accords with a central theme of the whole play: choosing forgiveness over revenge. Shakespeare evokes this theme in several storylines within *The Tempest*. First, Prospero, the former Duke of Milan, was overthrown by his own brother who conspired with the King of Naples. They plotted to kill him, but the kind (if weak-willed) Gonzalo saved Prospero and his baby daughter. Twelve years later, Prospero brings the conspirators to his island with the aid of his magic, and holds in his power all those who tried to take (and nearly succeeded in taking) everything he had, including his life. He spends the entire play bent on killing them all, but at the climax of the action, chooses instead to release and forgive them, difficult though that choice may be. Second, the audience has seen Prospero at his worst in this play. They have seen him act cruelly to both Ariel and Caliban, and they have seen him bent on the suffering and total destruction of at least three more people. Shakespeare therefore has Prospero, in his final lines, ask the audience's forgiveness.[60] Thus, given the leitmotif of forgiveness (or as Prospero puts it, "virtue" over

59. *See, e.g.*, Smith v. United States, 508 U.S. 223, 233 (1993) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citations omitted). The whole act rule is justified on legitimacy grounds: "A polity whose law knits together into a seamless fabric is one whose law enjoys greater authority than a polity whose statutory law appears largely random." ESKRIDGE ET AL., *supra* note 4, at 272. Similarly, though drama may embrace contradiction and inconsistency in human nature, the drama itself tends to play better when there is some coherence of theme throughout.

60. "As you from crimes would pardoned be, / Let your indulgence set me free." THE TEMPEST, *supra* note 26, at Epilogue. This line is the cue for the audience to applaud, and Shakespeare has written the epilogue to suggest that this applause signifies the audience's forgiveness.: *See id.* ("[R]elease me from my bands / With the help of your good hands.").

"vengeance"),[61] Caliban's seeking either Prospero's forgiveness or seeking to forgive Prospero harmonizes with the whole play.[62]

Another tool the hard textualist might invoke is the presumption of statutory consistency across different statutes.[63] For example, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, Justice Scalia, in dissent, interpreted the word "take" in Section 3(19) of the Endangered Species Act of 1973,[64] consistently with Section 703 of the Migratory Bird Treaty Act.[65] Similarly, the Shakespearean actor might look to other plays or literary uses of the phrase to shed light on the question. For example, Edmund Spenser, a Shakespeare contemporary, uses the phrase "seek for grace" to mean "sue for pardon."[66] This use, written in the same time period as Shakespeare, adds weight to the interpretation that Caliban seeks Prospero's forgiveness. Indeed, Shakespeare himself created similar situations in other plays where a character must choose revenge or forgiveness.[67] For example, In *The Merchant of Venice*, Shylock finds himself in a position of power over Antonio, a man who long has been Shylock's enemy, due to a contract that, on its face, allows Shylock to cut a pound of

61. *See id.* at act 5, sc. 1 ("The rarer act is / In virtue than in vengeance.")

62. Other scholars note that Caliban's presumed repentance contrasts with the other man in the play who attempted to kill Prospero before the play began: Antonio. ALDEN T. VAUGHAN & VIRGINIA MASON VAUGHAN, SHAKESPEARE'S CALIBAN: A CULTURAL HISTORY 19 (1993). When Prospero forgives Antonio at the end, Antonio remains silent. THE TEMPEST, *supra* note 26, at act 5, sc. 1. Thus, this structural contrast supports the idea of Caliban seeking forgiveness from Prospero.

63. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 717–18 (1995) (Scalia, J., dissenting) (interpreting the word "take" in § 3(19) of the Endangered Species Act of 1973, 16 U.S.C.A. §§ 1532(19) consistently with the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988 ed., Supp. V)).

64. 16 U.S.C. §§ 1532(19).

65. 16 U.S.C. § 703; *Babbitt*, 515 U.S. at 717–18 (1995) (Scalia, J., dissenting).

66. *See* THE CAMBRIDGE COMPANION TO ENGLISH RENAISSANCE DRAMA 124 (A.R. Braunmuller & Michael Hattaway eds. 2003).

67. The rule of *in pari materia* suggests that "similar statutes should be interpreted similarly." ESKRIDGE, DYNAMIC, *supra* note 21, at 327 (1994); *see, e.g.*, Wimberly v. Labor and Indus. Relations Comm'n of Mo., 479 U.S. 511, 514–20 (1987) (comparing MO. REV. STAT. § 288.050.1(1) which disqualifies a claimant for unemployment benefits who leaves work voluntarily without good cause attributable to employment with the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) and with other states' unemployment statutes that do not have special provisions related to pregnancy).

Antonio's flesh from a place nearest Antonio's heart.[68] How a character responds to the situation suggests how Shakespeare intended the audience to view that character. Those who are not able to forgive are the subject of ridicule, or at least pathos. Those who can forgive when every sinew cries out for revenge are ennobled. Shakespeare's handling of these similar situations lends support for the position that, having attempted revenge, Caliban now seeks an alternative: he will seek to forgive.[69]

The hard textualist has other rules to resolve textual ambiguity, but to examine them alongside Shakespeare, we must divert our attention briefly from our specific look at Caliban's line to a look at the similarities to Shakespearean textual interpretation in general. In particular, let us look at canons of word association and rules of punctuation. Neither is applicable to Caliban's line,[70] but contrasts and similarities to an actor's approach to Shakespearean text exist that are worth examining. With each canon, the main contrast to reemphasize is that in the statutory context, the rule narrows meaning to one thing, and in the Shakespearean context, the rules seek to uncover multiple meanings.

Three canons of word association are relevant to our comparison: *noscitur a sociis*, *ejusdem generis*, and *expressio unis*. *Noscitur a sociis*, "a thing shall be known by its associates," presumes that "when two or more words are grouped together, and ordinarily have similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word."[71] Similarly

68. *See* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1. Shylock chooses revenge. *See also* SHAKESPEARE, MEASURE FOR MEASURE act 5, sc. 1 (Isabella chooses forgiveness); WILLIAM SHAKESPEARE, TWELFTH NIGHT act 5, sc. 1 (Malvolio chooses revenge).

69. That we might find a clue to Caliban's intention by finding a posture antithetical to the one he expresses throughout the play has a pleasing symmetry with one of the key textual clues a Shakespearean actor looks for in the text generally. Antithesis crops up in Shakespearean text time and time again and is a marvelous tool for communicating meaning clearly to an audience. *See* BARTON, *supra* note 4, at 66 ("If I were to offer one single bit of advice to an actor new to Shakespeare's text, I suspect that the most useful thing I could say would be, 'Look for the *antithesis* and play them.'") (emphasis in original). Indeed, Shakespeare's most famous line of all expresses an antithetical thought: "To be or not to be , , , ,. . ." WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 3, sc. 1.

70. *But see infra*, Part III.

71. ESKRIDGE ET AL., *supra* note 4, at 261 (quoting 2A SUTHERLAND, STATUTES

ejusdem generis suggests "[w]here general words follow specific words in statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[72] *Expressio unius* tells the statutory interpreter that the "expression of one thing suggests the exclusion of others."[73] These three canons all suggest that words occurring in lists should be read to have a similar meaning, expanded either by *noscitur a sociis* and *ejusdem generis* or limited by *expressio unius*. The Shakespearean actor's approach to lists of words presents a contrast to these word association canons. Where the legal actor looks for similarity in the effort to limit or expand meaning by resort to a higher level of generality, the Shakespearean actor seeks to exploit and isolate fine distinctions. Thus, when Queen Gertrude, in *Hamlet*, tells Laertes that his sister has drowned, she tells him that she wove herself "fantastic garlands . . . Of crowflowers, nettles, daisies, and long purples . . . ."[74] When the actor speaks these lines, she must not think of all these generally as "flowers." Each word in the list must be particular and distinct in the

AND STATUTORY CONSTRUCTION § 47.16 at 183 (Norman Singer, ed., 5th ed. 1992)); *see, e.g.*, Babbitt v. Sweet Home Chapter Cmtys. for a Greater Or., 15 U.S. 687, 715 (1995) (Scalia, J., dissenting) (arguing that the word "harm" used in the definition of "take" in § 3(19) of the Endangered Species Act of 1973, 16 U.S.C.A. §§ 1532(19) should be read in light of the other, more specific words used in the statute: "harass . . . pursue, hunt, shoot, wound, kill, trap, capture, or collect").

72. ESKRIDGE ET AL., *supra* note 4, at 261–62 (quoting 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.17 at 188 (Norman Singer, ed., 5th ed. 1992)); *see, e.g.*, Hughey v. United States, 495 U.S. 411, 417-19 (1990) (deciding what restitution may be permitted under 18 U.S.C. § 3579 (1982 ed., Supp. IV) and determining that the catchall phrase "such other factors as the court deems appropriate" in 18 U.S.C. § 3580(a) (1982 ed.) should not be read to introduce into the restitution calculus losses that would expand a defendant's liability beyond the offense of conviction because the considerations enumerated immediately before, "the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents" suggested such a limitation).

73. ESKRIDGE, DYNAMIC, *supra* note 21, at 323; *see, e.g.*, Sullivan v. Hudson, 490 U.S. 877, 895 (1989) ("Applying the maxim of statutory construction *expressio unius est exclusio alterius*, the express congressional authorization [in 5 U.S.C. § 504(a)(1) (1982 ed., Supp. V)] for recovery of fees in adversary agency adjudications coupled with the lack of authorization for recovery of fees in nonadversary adjudications indicates Congress' intent not to authorize recovery of fees in nonadversary agency adjudications.") (White, J., dissenting).

74. HAMLET, *supra* note 69, at act 4, sc. 7.

actor's mind; a truly dedicated actor might go so far as to find these flowers in a field, hold them, smell them, and establish a strong visceral connection to them. If the actor expects the audience to picture the scene clearly, she must paint it with a fine brush.

Finally, basic grammar and punctuation rules help uncover meaning in both statutes and Shakespeare.[75] In the statutory context, "[c]ourts presume that the legislature expects its statutes to be read according to the ordinary rules of grammar and punctuation."[76] The rule of the last antecedent tells the legal actor that "referential and qualifying words refer only to the last antecedent, unless contrary to the statute's punctuation or policy."[77] For example, *Commonwealth v. Kelly*[78]

> construed a law prohibiting the sale of alcohol between eleven at night "and six in the morning; or during the Lord's day, except that [an innholder] may supply such liquor to guests." . . . The rule of the last antecedent suggested that the [innholder] proviso only modified "during the Lord's day." Sometimes courts will relax the rule when the proviso is set off from a series of items by a comma, but the comma-trumping exception was itself trumped in this case by the semi-colon separating the two items. That the legislature had specifically amended the statute to replace a comma with the semicolon was evidence strongly confirming the applicability of the rule of the last antecedent, the court ruled.[79]

To the degree that punctuation and grammatical considerations deal with how textual construction communicates thought, similar considerations play important roles for the Shakespearean actor as well—specifically, punctuation and verse structure.[80]

Turning back to Caliban, the hard textualist is probably finished. The meaning of "grace" seems clearly to mean that

75. A good example of how critical punctuation can be to an author's meaning is the difference between: 1) "A woman, without her man, is nothing"; and 2) "A woman: without her, man is nothing."

76. ESKRIDGE ET AL., *supra* note 4, at 264–65.

77. *Id.* at 266 (2d ed. 2006).

78. 58 N.E. 691 (Mass. 1900).

79. ESKRIDGE ET AL., *supra* note 4, at 266.

80. For a good example of how punctuation influences how an actor interprets Shakespeare's text, *see infra* text and accompanying notes 199-201 (discussing how David Suchet's investigation into the text's punctuation helped lead him to a new interpretation of Caliban).

Caliban seeks Prospero's forgiveness. Whatever ambiguities may still exist after an analysis with textualist tools may surely be resolved by one final point. Looking at the broader historical context, the Elizabethan world viewed a ruler as chosen by God. As God's chosen, the ruler is omnipotent and is "the sole dispenser of what is necessary for salvation."[81] To the Elizabethan man on the street, then, the very idea that "grace" could encompass the notion that Caliban would ever be in a position to forgive Prospero would be almost unspeakable. Thus, the hard textualist's conclusion has been buttressed by contemporary textual sources, by the historical context in which it is spoken, and is supported thematically by the play itself. Shakespeare's dramatic use of the forgiveness/revenge dynamic in other plays, if taken to support the opposite conclusion, would likely be outweighed for the new textualist by the historical context, which suggests Caliban could never be in a position to forgive his master. In other words, interpreting Caliban as seeking to forgive Prospero would be statutorily akin to an absurd result.[82]

For the Shakespearean actor, however, the inquiry is not at an end. Nor would it necessarily be for statutory interpreters who do not consider text the only source of meaning. Indeed, given the stakes involved in statutory construction, addressing the legislature's intent more holistically is arguably desirable and focusing on text alone seems too restricting if we are to arrive at a fully considered interpretation of Caliban's line.

B. Soft Textualism

As a general matter, the soft textualist's approach is probably most closely aligned with that of the Shakespearean actor. In both cases, the text is the most important consideration, but context and other considerations that provide clues to the intentions behind the text also might prove important. Indeed, given how much Shakespeare has

81. RENAISSANCE DRAMA, *supra* note 66, at 124. Worth noting is that Prospero never explicitly pardons Caliban for his attempted murder. He only gives the conditions of salvation. *See* THE TEMPEST, *supra* note 26, at act 5, sc. 1.

82. *Cf.* Holy Trinity Church v. United States, 143 U.S. 457 (1892).

packed into his text, the Shakespearean actor would be a fool not to consider everything at his disposal to help him uncover the intent behind the words. The soft textualist may not search as broadly as the Shakespearean actor, but nevertheless, the text's plain meaning is not the end of the inquiry.[83] The soft textualist is willing to look at legislative history.

Let us look at some justifications for this approach and their parallels to Shakespearean interpretation. First, soft textualism "might well be a tacit admission that the *goal* of the inquiry is intentionalist, and plain meaning is just one important *source* of information about legislative intent or purpose."[84] Similarly, for the Shakespearean actor, the text's meaning is a means to discover intent. Indeed, intent and meaning are intertwined and determining which comes first is difficult. In our present situation, when we decide what Caliban intends toward Prospero, we will know what the word "grace" means. However, we wouldn't have the choice to make had we not investigated the possible meanings of the word. Note the contrast to hard textualism: for the hard textualist, text determines intent and never the other way around.

A second justification for soft textualism is that it "might be a concession to normative complexity. If the rule of law requires interpreters to apply statutes to the letter, then sometimes the cost of 'lawfulness' will be too great."[85] In other words, if following the law to the letter leads people to act in ways that are clearly contrary to other, stronger, countervailing interests, those legal actors should not follow the letter of the law. Compare this to Shakespeare. The plain meaning of Kate's final speech in *The Taming of the Shrew*[86] can be read as an endorsement of man's superiority over woman. However, insisting the speech must be performed with that interpretation threatens to relegate the play to irrelevancy, when, in fact, richer interpretations

83. *See* ESKRIDGE ET AL., *supra* note 4, at 232–33 ("[T]he existence of an apparent plain meaning is not dispositive [for the soft textualist], because something deeper is going on when statutes are interpreted.").

84. *Id.* at 233.

85. *Id.*

86. *See* WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW, Act V, sc. ii [herein after "SHREW"].

informed by twentieth century enlightenment exist. Consider also the plain meaning of Hamlet's speech, "To be, or not to be."[87] On its face, this speech is a solitary contemplation of suicide. However, a look at the circumstances in the scene reveals another possibility. Claudius and Polonius are spying on Hamlet as he speaks. A critical choice for the actor playing Hamlet to make is whether he knows they are there. If he does, Hamlet's speech is a show Hamlet performs as part of his "antic disposition."[88] Such a choice will drastically change the interpretation of the speech.

Finally, soft textualism "might be a statement about plain meaning itself: you cannot be sure the meaning is so plain unless you consider the legislative deliberations and the practical consequences."[89] Indeed, a criticism leveled at new textualism is that it may actually sever the connection between democracy and the rule of law. The argument goes that Congress sought to solve a particular problem and that should make an interpretive difference.[90] As Justice Breyer said: "[O]veremphasis on text can lead courts astray, divorcing law from life, . . . creating law that harms those whom Congress meant to help."[91]

Justice Breyer's idea that the interpretation of statutes should be connected to life is similar to the theatrical art in general. Theatre and acting are meant to "hold, as 'twere, the mirror up to nature"[92]—that is, to reflect real life and human experience. A distinction, perhaps, may be made between these connections to life in that Shakespeare intends to *reflect* human behavior, whereas the law intends to *regulate* human behavior. However, this is all the more reason why the law should not be divorced from life and human experience any more than Shakespeare's text. If the judge is to connect the statutory text to the behavior intended to be regulated, the text and its authors' intent ought to be closely aligned. If the actor is to connect the Shakespearean text to human behavior, on the other hand, so direct an alignment between

87. *See* HAMLET, *supra* note 69, at act 3, sc. 1.
88. *See id.* at act I, sc. v.
89. ESKRIDGE ET AL., *supra* note 4, at 233.
90. *Id.* at 243.
91. BREYER, *supra* note 5, at 85.
92. HAMLET, *supra* note 69, at act 3, sc. 2.

text and authorial intention is not always necessary.[93] Rather, the connection will exist to the degree the actor believably recreates human behavior and emotion and communicates it through stage business and textual clarity. This difference notwithstanding, in law and with Shakespeare, the judge and actor are themselves the ultimate conduit connecting the text to life.

A cautionary parallel to note between soft textualism and Shakespearean interpretation, however, is that a similar experience arises when interpretations strain too mightily against the text. In theatre, sometimes an abstract interpretation of Shakespeare's language leads to startling effects and insights.[94] More often than not, one feels the actors, designers, and all involved struggling upstream against the powerful current of Shakespeare's language. Even with interpretations that do not aim at high concept but simply impose, for example, the North-South conflict of the

93. Although actors, for the most part, do not feel particularly constrained by authorial intent, there are authors whose intent is taken very seriously. David Mamet and Samuel Beckett's estate, for example, exercise a great deal of control over the manner of interpretation of their works and, probably not coincidentally, have some specific intent behind every comma written. These authors have specific intentions about what in life they mean to mirror. *See, e.g.*, Jason Zinoman, *Guided by Beckett from the Grave*, N.Y. TIMES, Jan. 2, 2008, http://theater.nytimes.com/2008/01/02/theater/02shaw.html?_r=0. Conversely, other playwrights acknowledge that they do not know everything that their writing ends up communicating. That is, they may have no specific intent. *See, e.g.*, Sarah Lyall, *Still Pinteresque*, N.Y. TIMES, Oct. 7, 2007, http://www.nytimes.com/2007/10/07/movies/07lyal.html?pagewanted=all (quoting Harold Pinter saying, "I don't make judgments about my own work, and I don't analyze it; I just let it happen"). With Shakespeare, the interpretation is much more likely to spring from the text than from any intent Shakespeare might have had when he wrote it four-hundred years ago. However, this state of affairs might be different if we had any direct evidence of his intent external to his texts, like letters or journals.

94. I speculate that among the reasons Peter Brook's 1970 staging of *Midsummer Night's Dream* was so revolutionary is that because it was set on an all-white stage with trapezes, juggling, and other circus trappings, the text was illuminated in startling and unpredictable ways. *See* Clive Barnes, *Historic Staging of "Dream"*, N.Y. TIMES, Aug. 28, 1970, *available at* http://www.alanhoward.org.uk/dreamnytimes.htm. *But see* RON ROSENBAUM, THE SHAKESPEARE WARS: CLASHING SCHOLARS, PUBLIC FIASCOES, PALACE COUPS 11 (2006) ("I've come to believe, on the contrary, that what made it so thrilling was not the way in which Brook's *Dream* was new but rather the way it was radically *old*. The way in which it seemed to capture what one imagines was the excitement of the moment the play was first produced four centuries ago.") (emphasis in original). Rosenbaum's insight suggests that though the production concept was abstract, the interpretation released a creative vitality within the spoken text.

Civil War era upon the familial conflict of *Romeo and Juliet*, the result is usually that Shakespeare reveals more about the Civil War than the Civil War reveals about *Romeo and Juliet*. Shakespearean text speaks to truths larger than any one era is likely to illuminate and the text becomes confined rather than enlarged. Worse, it becomes an obstacle the production's concept must overcome and the audience feels the strain of the effort. The consequence of this strain is that the interpretation loses its power to persuade. Similarly, interpretations of statutes that strain against the text as written impose a similar strain upon the reader seeking the justification of the decision.[95]

With this caution in mind, we will look to other sources for insight as to which choice will best serve our interpretation of Caliban.[96] Because the soft textualist looks to legislative history, I will subsume a closer examination of the soft textualist approach into the discussion of the use of legislative history in general. As we shall see, much of the specific discussion of Caliban's line must pause once more for a more general discussion of the similarities between Shakespearean and statutory interpretation.

II: INTENTIONALISM AND THE ROLE OF LEGISLATIVE HISTORY

As John Barton says, speaking of Shakespearean text: "[L]anguage doesn't exist in a vacuum but is a response to a situation and an attempt to work on that situation."[97] Shakespeare, like the characters he wrote, *needed* the language he chose to communicate his characters' intentions,[98] just as statutory text is the language the

95. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457 (1892). For a textualist critique of *Holy Trinity*, see SCALIA, *supra* note 5, at 3, 18–23.

96. When the statute is ambiguous, consider legislative history. *See* Landsgraf v. USI Film Products, 511 U.S. 244, 273 (1994).

97. BARTON, *supra* note 4, at 70.

98. Although a Shakespearean character should probably never be understood as speaking for Shakespeare, that character's intent nonetheless does go hand in hand with Shakespeare's. Thus, Polonius says to his son Laertes before sending him back to France: "This above all, to thine own self be true." HAMLET, *supra* note 69, at act 1 sc. 3. Whether Shakespeare expresses his own philosophy in this line is less important than the fact that Shakespeare has put those words in the mouth of Polonius rather than, for example, Hamlet, Claudius, or Gertrude. In other words, never forget that this piece of "wisdom" is dispensed by one who manipulates everyone with whom he

legislature needs to reach consensus on the proper way to address a specific problem. For the intentionalist legal actor, the text is important in the search for statutory meaning, but Congress's intention is the chief concern. Thus, intentionalist judges often consult a statute's legislative history to discover Congress's will. As Justice Breyer puts it, "[T]he Framers created the Constitution's complex governmental mechanism in order better to *translate* public will, determined through collective deliberation, into sound public policy. The courts constitute a part of that mechanism."[99] The translation of another's will, rather than pure textual analysis, lies at the heart of intentionalism.

Generally, intentionalism breaks down into three further approaches each with its own conceptual problems and advantages: specific intent, imaginative reconstruction, and purposivism.[100] Both specific intent and imaginative reconstruction seek to find legislative intent at a lower level of generality than purposivism. Specific intent asks how Congress actually felt about a "particular issue of statutory scope or application" and imaginative reconstruction asks "what the legislators would have decided had they thought about the [specific] issue[.]"[101] Purposivism, on the other hand, is broader in scope.

> [It] allow[s] context to determine the level of generality at which [the statute's purpose may be described] . . . legislative history [is examined], often closely, in the hope that the history will help [the judge] better understand the context, the enacting legislators' objectives, and ultimately the statute's purpose. At the heart of a purpose-based approach stands the "reasonable member of Congress."[102]

Leaving aside some of the more specific problems

comes in contact and who plans to have his own son spied upon. *See id.* at act 2 sc. 1. Thus, Shakespeare's intent is best understood as the character's intent as revealed through the text. There are situations, however, where even what we, in the twenty-first century, perceive a Shakespearean character to intend might be very different from what Shakespeare himself thought he was writing. *See, e.g.*, MERCHANT OF VENICE, *supra* note 68; SHREW, *supra* note 86. I take this discussion up further in Part III.

99. BREYER, *supra* note 5, at 101 (emphasis added).

100. *See* ESKRIDGE ET AL., *supra* note 4, at 222; Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267, 1272–73 (2004-2005).

101. ESKRIDGE ET AL., *supra* note 4, at 222.

102. BREYER, *supra* note 5, at 87–88.

presented by each different approach to intentionalism, determining a legislature's intent shares two general difficulties with determining Shakespeare's intent[103]: the aggregation problem and the attribution problem. These two problems are distinct, but connected and worth exploring before looking at the benefits of intentionalism.

A. The Problems with Intentionalism: Aggregation, Attribution, and a Judge's Normative Preferences

The aggregation problem in the statutory context is that majorities of both the House and Senate had to agree to the statutory language, and the President had to sign off on it.[104] Each legal actor in this process may have had very different intentions in passing the bill, and determining an intention that they all shared is deeply problematic.[105] Relatedly, the attribution problem encompasses concerns such as which legislator's intent should control,[106] how much weight should be given to malleable reports and statements made in heated debates, and the fact that "evidence of actual intent might itself be subject to varying interpretations."[107] In Shakespearean interpretation, the aggregation and attribution problems are similarly intertwined.

One might guess that in the case of a single author, like

103. I note that the literary world, rather than the theatrical world, is the locus of the vast majority of issues related to Shakespeare's actual intent. *See* ROSENBAUM, *supra* note 94, at xiv ("The question of whether we have two Lears and three Hamlets has provoked a veritable civil war among Shakespeare scholars over the past three decades, the resolution—or irresolution—of which can mean all the difference in the world to how we view two of the foundational works of Western culture.").

104. Provided, of course, that the President did not veto the bill, in which case a supermajority would have been needed. *See* U.S. CONST. art. I, § 7.

105. *See* ESKRIDGE ET AL., *supra* note 4, at 224; ESKRIDGE, DYNAMIC, *supra* note 21, at 16; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body." (citing Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992))).

106. *See* ESKRIDGE ET AL., *supra* note 4, at 224–25. These commentators note that invoking legislative intent at all "may place too much weight on reports subject to manipulation and statements made in the course of heated, phony, or strategic debates." *Id.* at 224.

107. *See id.* at 224–25 (2d ed. 2006). These commentators note that even if one were to try to focus on the intentions of "pivotal" legislators "it's not always easy to figure out who were the pivotal legislators and what were their sincere preferences, which are bound to be conflicting and hard to aggregate." *Id.*

Shakespeare, these problems would be, at the very least, substantially diminished. One would be wrong. The difficulties begin with the fact that we have none of Shakespeare's personal manuscripts of the plays. Indeed, for the Shakespearean interpreter, this fact and the fact that Shakespeare did not leave any other writings that might illuminate his authorial intentions compound intentionalist problems.

Our sources for the plays themselves reduce to only "[two] printed texts . . . the quarto editions of single plays published prior to the folio collection of 1623, and the edition of the folio collection itself."[108] The authority of any play in these early editions depends on which of two sources was used for printing.[109] Most theatrical companies of the late sixteenth century and early seventeenth century kept two copies in their archives: the author's "foul papers," which contained last-minute corrections, and the "fair copy," which was the cleaned-up version used as a prompt book and used for future revivals.[110] A problem for the researcher is that "[i]t is not to be supposed that these two manuscript categories are always readily distinguishable."[111]

The question of authoritativeness is further muddied by the fact that, after two of Shakespeare's surviving co-members in The Lord Chamberlain's Men, John Heminge and Henry Condell, had gathered what they considered to be authoritative copies of the plays to be published in the Folio of 1623,[112] they claimed that earlier distributions of the plays were stolen, maimed, and lacked authority.[113] However, subsequent scholars have since learned that Heminge and Condell used some of those same versions in their submissions to the five compositors for typesetting, thus casting their claim into doubt.[114] Thus, to the degree that one can make distinctions as to which of these sources might

108. Alfred Harbage, *General Introduction* to WILLIAM SHAKESPEARE: THE COMPLETE WORKS 40 (Pelican 1969).
109. *Id.*
110. *See id.* at 40, 41.
111. *Id.* at 40.
112. Doug Moston, *Introduction* to THE FIRST FOLIO OF SHAKESPEARE xix (Applause Books 1995).
113. *See* ROSENBAUM, *supra* note 94, at 35.
114. *Id.* at 36; *see also* Moston, *supra* note 112, at xix.

carry greater authoritative weight than others, the inquiry begins to resemble the question of which piece of legislative history one should find most persuasive: committee reports, explanatory statements by sponsors, and so forth.[115] Additionally, the typesetters to whom these texts were given, in turn, made many errors,[116] as did the proofreaders.[117] No matter how authoritative the sources for the Folio, they "were likely to undergo a certain amount of alteration."[118]

Further, just as legislative reports are subject to malleability,[119] so modern Shakespearean editors have historically played a significant role in what we are presented with as representing Shakespeare's text. Editors make changes in typography, spelling, punctuation, verse lineage, and words.[120] When dealing with a line of text then, are we dealing with Shakespeare's intention, the intention of those who compiled the quartos, Heminge's and Condell's, the typesetter's, or the intention of a modern editor who attempts to make the text more understandable? Which of these modern editors is more persuasive?

Before examining the benefits of using legislative history in textual analysis, let us look briefly at how these problems play out in an actual case of statutory interpretation. In short, two justices looking at the same legislative history can arrive at very different conclusions. In *United Steel Workers*

115. *See* ESKRIDGE ET AL., *supra* note 4, at 310–17 (discussing the "hierarchy" of legislative sources).

116. Moston, *supra* note 112, at xx.

117. *Id.* Moston is somewhat forgiving of the proofreader, noting that "[t]he inevitable danger inherent in proofing a writer who himself coined some 1700 words is obvious." *Id.* at xx–xxi.

118. *Id.* at xxi (quoting Charlton Hinman, THE NORTON FACSIMILE, THE FIRST FOLIO OF SHAKESPEARE xx (W.W. Norton & Company 1968)). Compare this to the problem of scrivener's errors. *See supra* note 49.

119. *See* Daniel Engber, *What's in the Congressional Record? Anything your congressman wants*," SLATE (Nov. 21, 2005 6:12 PM), http://www.slate.com/articles/news_and_politics/explainer/2005/11/whats_in_the_congressional_record.html (outlining various ways congressmen can insert material not heard on the floor into the Congressional Record).

120. Moston, *supra* note 112, at xiii; *see also* Ann Thompson & Neil Taylor, *Introduction* to WILLIAM SHAKESPEARE, HAMLET 91 (Ann Thompson & Neil Taylor eds., Arden Shakespeare 2006) (Noting that most editions of *Hamlet* publish some combination of the Second Quarto and First Folio). Thompson and Taylor's discussion of its different versions suggests that there probably is no such thing as an "authoritative" text of *Hamlet*. *See id.* at 74–94.

v. Weber[121] the Court confronted the question of whether an affirmative action program designed to remedy underrepresentation of minorities among craft workers violated Title VII's rule that employers cannot "discriminate against any individual" because of "race."[122] Justice Brennan, writing for the majority, consulted the legislative history and determined that Congress's intent was to bring minority workers into the workforce by opening opportunities to them. Congress therefore did not intend to prohibit affirmative action programs that would accomplish this goal.[123] Writing in dissent, Justice Rehnquist also consulted the legislative history of Title VII and determined that, Congress, in fact, intended to eliminate employment decisions based on race. The affirmative action program therefore, clearly violated that intention.[124] What does not get acknowledged in their disagreement is that Congress may well have had *both* these intentions (and others) and they might be reconcilable.[125] Perhaps the subtler view of their disagreement is that Justices Brennan and Rehnquist simply balance these interests differently and therefore see different means to Congress's end.

As different statutory actors may read differing intents from the same legislative history and different means intended to accomplish those ends, different Shakespearean actors may find differing intentions in a character and different ways of accomplishing those intentions. The need to reconcile competing interests in legislative purposes finds a parallel in our struggle with Caliban. Shakespeare must have had a number of intentions for this character. On the one hand, he is a comic character. His plot to kill Prospero is aided by a drunkard and a fool, turning his otherwise dark purpose into an opportunity for ridiculousness. On the other hand, Shakespeare gives him a powerful back story and puts some of the most moving poetry of the play into his mouth. The idea of Caliban clearly stimulated something more than

121. 443 U.S. 193 (1979). Eskridge, Frickey, and Garrett use *Weber* extensively to illustrate a variety of strengths and weaknesses of intentionalist and soft textualist approaches to statutory interpretation in ESKRIDGE ET AL., *supra* note 4, at 221–35.

122. United Steel Workers v. Weber, 443 U.S. 193, 197 (1979).

123. *Id.* at 201–04.

124. *Id.* at 230–54 (Rehnquist, J., dissenting).

125. *See, e.g.*, *infra*, text accompanying note 160–162.

comedy in Shakespeare's artistic sensibilities. How to balance those competing interests will depend on the sensibilities of each actor who tackles the part. Indeed, how the actor balances those interests may determine their answer to the meaning of "grace." If Caliban is no more than comic relief, deciding he needs to forgive Prospero may not make any sense.

On another level, even if actors agree on a character's intention, the means to achieve that intention may vary enough to create very different impressions. Two actors may agree that Richard III threatens, deceives, and cajoles various characters throughout the play to get what he wants,[126] but how each individual actor plays these actions will be different. In other words, there may be different ways of threatening, deceiving, cajoling, and so forth, even within the strictures of the text and circumstances. Thus, one rarely sees two highly skilled actors give similar performances of the same Shakespearean character.[127]

All of which reveals yet a further problem with the use of legislative history: "application [of legislative purpose] will depend heavily upon context and the interpreter's perspective."[128] In other words, how each individual judge sees the statutory question in the first instance shapes the lens through which they view the already controversial legislative history. For Justice Rehnquist, the question the court was to decide was "should voluntary quotas be allowed in hiring?"[129] Justice Brennan, on the other hand, saw the question as "if the low numbers of minorities in the work force

126. *See generally* RICHARD III, *supra* note 58.

127. *Compare* LAWRENCE OLIVIER, ON ACTING 114–30 (1988) (discussing his interpretation of Richard III), *with* SHER, *supra* note 9 (detailing the evolution of his interpretation of Richard III). In contrast to statutory interpretation where the rule of precedent exerts a controlling effect on interpretation, most actors deliberately avoid copying another actor's interpretations of a character. *See id.* at 28, 35, 37–38, 67, 97, 135, 176 (showing examples of Sher's obsession with Lawrence Olivier's interpretation of Richard III and his determination to avoid any hint of Olivier in his performance); *cf.* ESKRIDGE, DYNAMIC, *supra* note 21, at 49 ("When successive applications of the statute occur in contexts not anticipated by its authors, the statute's meaning evolves *beyond* original expectations.") (emphasis in original). For instance, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), which has undergone sever scrutiny in modern times, *see, e.g.*, SCALIA, *supra* note 5, at 3, 18–23 had no dissenters in 1892.

128. ESKRIDGE ET AL., *supra* note 4, at 230.

129. *See* United Steel Workers v. Weber, 443 U.S. 193, 221–22 (1979) (Rehnquist, J., dissenting).

are due to ongoing discrimination, should employers be allowed to voluntarily prefer minority workers to remedy the situation?"[130] The different perspectives and normative goals of the Justices in framing the question influenced their ultimate opinions as to which legislative intent was controlling. How one frames the question in the first instance and from what perspective one asks shapes the result.

B. The Benefits of Intentionalism and Comparison of Shakespearean Texts

What, then, are the benefits to the Shakespearean actor of a "legislative" inquiry into Shakespeare's intent? With statutes, intentionalism's best claim to legitimacy is that it "advances democracy by carrying out the will of the elected legislators."[131] A fundamental assumption of intentionalism is that the text alone may not contain the entire will of Congress. They might have used inappropriate language to deal with the evil they sought to remedy; they might not have considered the specific problem before the court; and foreseeing all possible fact patterns that the language might encompass is impossible.[132] Thus, consulting legislative history is required to carry out the people's will as enacted through their democratically elected officials.[133]

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130. *See id.* at 197. I am grateful to Professor Chai Feldblum, Georgetown University, for pointing out this contrast to me and for her thoughtful analysis of the Justices' statutory interpretation in *Weber* in general. Eskridge, Frickey, and Garret also make this point about the difference between Justices Rehnquist's and Brennan's formulation of the question and discuss more thoroughly its implications to their resulting interpretations of Title VII. *See* ESKRIDGE ET AL., *supra* note 4, at 227.

131. ESKRIDGE, DYNAMIC, *supra* note 21, at 14.

132. BREYER, *supra* note 5, at 85–86.

133. As noted, when judges consider legislative history, Justice Scalia finds a tension between what he considers judicial lawmaking and democracy. *See* Amy Gutmann, *Introduction to* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW ix (1997). To the extent that Justice Scalia's concern centers on judicial lawmaking supplanting the constitutional grant of legislative authority, *see supra*, note 41, I find this concern puzzling in at least one respect: the interpretive act alone changes that which is interpreted. Simply by resolving ambiguity through either text or legislative history, judges create meaning—and therefore, law—that was not present before. Thus, to say that textualism avoids judicial lawmaking appears problematic.
Even if we argue that of all interpretive postures textualism *best* avoids judicial lawmaking, other problems emerge to challenge us. For instance, determining that the text is "plain" or that Congress's intent is clearly expressed therein with any degree of certainty may not always be persuasive. Thus, as Justice Stevens has noted rejecting

Stated another way, looking at legislative history illuminates the policy questions the legislators attempted to address. This, in turn, allows the statutory interpreter to understand the specific factual circumstances he faces in the light of what the democratically elected representatives were trying to achieve. As *Weber* demonstrates, this inquiry does not guarantee a uniformity of results. However, the analysis and dialogue between Justices Rehnquist and Brennan does unearth a significant policy challenge equality efforts face: what is the best way to achieve equality? Once the Court gives its interpretation and discusses and challenges the given justifications, the public emerges with a deeper understanding of the problem and, ideally, a richer dialogue may begin.[134] If Justices Rehnquist and Brennan in *Weber* had been actors interpreting Caliban, we would be grateful for two different yet compelling pictures of the character. Both are drawn from the text, both find justification in legislative intent, and both are intertwined with the legislature's policy considerations. Their dispute, in effect, centers more on policy than on text.

The most analogous policy questions the Shakespearean interpreter faces is how to make Shakespeare's characters

the notion that the Court should only consult legislative history when the text is ambiguous, "It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product." Koons Buick v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., joined by Breyer, J., concurring). Or, in the words of Chief Justice Marshall, "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." United States v. Fisher, 2 Cranch 358, 386 (1805).

In contrast to the expectation that interpretation merely reveals that which is inherent in the text, when the Shakespearean actor interprets Shakespeare's text, the audience expects— maybe even demands—that something new be revealed, even if that something is simply a deeper understanding. That something might have been present in the text, but until the actor illuminates it—that is, *chooses* it as a result of the research and investigation he has done—that something did not exist concretely for the audience. If determining meaning is equivalent to creating law, then for the Shakespearean actor, a theatrical analogue to Justice Scalia's concern does not exist.

134. In this regard, the dialogue between Justices Rehnquist and Brennan could almost be likened to a play by George Bernard Shaw. Among Shaw's particular talents was the ability to take two competing intellectual, political, or policy-based ideas, embody them in characters, and then place those characters in dramatic circumstances where they must confront each other and the contradictions inherent in their positions. *See,.e.g.*, GEORGE BERNARD SHAW, CANDIDA; GEORGE BERNARD SHAW, MAJOR BARBARA.

relevant to a twenty-first century audience.[135] As we shall see in Part III, with characters like Shylock, Kate, and Caliban, policy arguments are especially important. In these instances, looking to the origins of the texts' creation proves crucial both to what those policy questions involve as well as to fully understanding the text. However, such an inquiry can also illuminate more discrete questions about the text's meaning and character's moment to moment intentions. In other words, the inquiry uncovers the sorts of questions the interpreter should be asking.

Let us, then, examine some of the benefits of a Shakespearean actor's "legislative" inquiry. Just as a court might compare a bill as it was first proposed and subsequent proposed changes with the enacted statute in the search for legislative intent,[136] Shakespearean actors find illumination by comparing texts extant from the late sixteenth and early seventeenth century with modern editors' versions of Shakespeare's plays. Many of Shakespeare's textual questions cannot be appreciated—and therefore capitalized upon—by mere perusal of one editor's version of Shakespeare's plays. To fully appreciate them, one must consult sources closer to Shakespeare himself. Consulting these sources, like consulting legislative history, roots these issues out and can point to what the proper answer (or question) should be.[137]

135. Another policy question might involve the degree to which a particular actor views the text as the principal driver of interpretation. Antony Sher has indicated that for certain roles at least, the need for theatricality should be a concern at least as important as the text. *See* SHER, *supra* note 9, at 181. Thus, a tension might arise as a matter of "policy" when one's choice for theatricality comes in tension with what the text can support.

136. *See, e.g.*, Commonwealth v. Kelly, 58 N.E. 691, 691 (Mass. 1900) ("As the act is printed in Pub.St. c. 100, § 9, and in the second supplement of the General Statutes, published in 1878, and in St.1885, c. 90, there is a semicolon after the word "morning," although when the original act was first published the point used was a comma."). This court found the change evidence of Congress's intent that the rule of the last antecedent should control the interpretation of the statute. *See also supra*, note 78 & 79 and accompanying text.

137. Ron Rosenbaum quotes Philip Edwards, editor of the New Cambridge *Hamlet*, and what he says with regard to Shakespeare, seems equally applicable to the consultation of legislative history: "Everyone who wants to understand *Hamlet*, as reader, actor or director, *needs to understand the nature of the play's textual questions* and to have his or her own view of the questions in order to approach the ambiguities in the meaning." ROSENBAUM, *supra* note 94, at 30 (emphasis added).

Indeed, the answers to these questions may have a profound impact upon the meaning of a character or even the whole play. For example, Hamlet's speech "How all occasions do inform against me, / And spur my dull revenge!"[138] is present in the Good Quarto version of 1604, but absent from the First Folio, published in 1623.[139] As Rosenbaum says, "To lose (or add) thirty-five of Hamlet's most self-lacerating lines—about 'thinking too precisely,' the end point of his introspection, a self-consciousness *about* self-consciousness—is not inconsiderable."[140] In another example, late in *Hamlet*, Laertes is bent on killing Hamlet for killing Polonius (Laertes's father). While plotting with Claudius, Laertes learns that Hamlet has returned to Denmark and says:

> It warms the very sickness in my heart
>
> That I shall live and tell him to his teeth
>
> "Thus didst thou."[141]

The 1623 version has the last line as "Thus didest thou" and the 1604 Good Quarto has it as "Thus didst thou."[142] The Bad Quarto has it simply as "Thus he dies."[143] However, Harold Jenkins, a respected editor, believes that Shakespeare's actual intent was that the line should read "Thus *diest* thou."[144] Given an actor's pragmatic approach to interpretation, these versions not only lead to very different readings of Laertes, but also lead one to see the force of "Thus diest thou" in performance: it is clearer and packs a greater emotional punch.[145]

Of perhaps even greater moment, King Lear's final line is

138. HAMLET *supra* note 69, at act 4, sc. 4.
139. ROSENBAUM, *supra* note 94, at 32.
140. *Id.* at 32.
141. HAMLET, *supra* note 69, at act 4, sc. 7.
142. *See* ROSENBAUM, *supra* note 94, at 29.
143. *See id.* at 34.
144. *Id.* at 29. Jenkins bases this on the idea that the Bad Quarto was a reconstruction of something heard in performance. If what one has heard is "Thus dies thou" one is more likely to remember it as "Thus he dies." Jenkins has thus combined these texts to arrive at what he believes was Shakespeare's specific intent. *Id.* at 33–34. For a good overview of the debate over the three texts of *Hamlet* and whether the changes involved represent Shakespeare's or someone else's revisions, see *id.* at 29–101.
145. Indeed, this was the line used in Kenneth Branagh's film of *Hamlet*. *See Hamlet* (Castle Rock Entertainment 1996).

currently in dispute.[146] The 1623 Folio has Lear, after carrying Cordelia's corpse onto the stage, cradling her in his arms, utter: "Do you see this? Look on her! Look her lips, / Look there, look there."[147] Perhaps, in his dying breath, Lear believes he sees Cordelia breathe. His last line could either be a vision of redemptive hope, or the last crushing delusion of a foolish old man.[148] The 1608 Good Quarto, on the other hand, gives a line traditionally thought to be Kent's to Lear following his "Look there": "Break, heart, I prithee break."[149] This version presents a vision of unrelieved suffering.[150] Which text we choose will have a resounding impact not only on our interpretation of Lear's dying (and possibly most important) moment, but also on the play as a whole.

Thus, despite the difficulties determining Shakespeare's actual, specific intent in any given instance, considering the history of its drafting nevertheless may shed light on textual meaning and illuminate the direction in which Shakespeare desired the actor to proceed. Such illumination can only aid the interpretation and the production as a whole. In the statutory context, even if two interpretations clash as they did in *Weber*, the policy question at issue may crystallize in such a way as to be of use to a future legislature. The argument may prompt Congress to take the specific question up in the same way that a rigorous textualist reading of a statute might, *while at the same time* potentially serving those Congress meant to help. Whether textualist or intentionalist, the judge's interpretation plays a role in effecting or blocking congressional intent. Without wanting to minimize the legitimate objections new textualists have to intentionalism, to suggest that the judge can somehow remain outside that policy conversation, to me, seems highly questionable. As such, the judge that makes a good faith effort to effect congressional intent appears to be in the least objectionable posture.

Unfortunately, consulting the folio of 1623 reveals little that may be of help in our inquiry into "grace." The only clue

146. For a good discussion and overview of this scholarly debate, see ROSENBAUM, *supra* note 94, at 114–54.
147. WILLIAM SHAKESPEARE, KING LEAR act 5, sc. 3.
148. ROSENBAUM, *supra* note 94, at 115–16.
149. *Id.* at 114–15.
150. *Id.* at 114–15.

to the actor lies in the fact that the folio line is "Ile be wife hereafter, / And [s]eeke for grace."[151] The fact that the word "[s]eeke" is spelled with an additional "e" on the end suggests that Shakespeare intended the word to be given more emphasis than we might give it today.[152] Such an emphasis might hint that Caliban has hitherto either waited for grace to fall upon him as the "sounds and sweet airs" of the island have been wont to do,[153] or that he has not even considered the idea until now. However, coming before a caesura, "grace" is more likely to be the operative word and the one the actor would wish to emphasize. This textual clue therefore would enrich the actor's imaginative life, perhaps lead to other discoveries about Caliban's journey earlier in the play, or enhance his understanding of the role as a whole, but not provide substantial insight into Caliban's intention in this particular moment.

Because the "legislative history" of *The Tempest* casts no light on our inquiry we might, again, consider ourselves done. We have found nothing to suggest that Caliban's seeking Prospero's forgiveness is absurd or counter to Shakespeare's intent. Given the textual evidence we uncovered in Part I, even the intentionalist interpreter might conclude that the inquiry should go no further. However, we interpret a text over 400 years old and, if it is to be more than a museum piece, we must make our interpretation relevant to our lives today. To do this we must go beyond the author's intent.

III: DYNAMIC THEORIES OF STATUTORY INTERPRETATION

Justice Breyer presents a conundrum for the judge that parallels the situation in which a Shakespearean actor often finds himself. Justice Breyer notes that the purpose, language, structure, and history of a statute, "without more, may simply limit the universe of possible answers without clearly identifying a final choice. What then?"[154] For both statutory and Shakespearean interpreters, the world of

151. WILLIAM SHAKESPEARE, THE TEMPEST act 5, sc. 1 *in* THE FIRST FOLIO OF SHAKESPEARE 1623 18–19 (Applause Books 1995).

152. Elizabethan spelling was often a matter of how words sounded. Moston, *supra* note 112, at xlv.

153. THE TEMPEST, *supra* note 26, at act 3, sc. 2.

154. BREYER, *supra* note 5, at 86.

possible interpretive answers must sometimes open wider than the text and its author's intentions would otherwise allow. Indeed, in contrast to the more restricting approach of asking what a text meant when it was written, Shakespearean interpreters almost always must ask how the plays speak to us today. This need often demands what the statutory interpreter might call a dynamic posture to interpretation.

A. Three Dynamic Theories and their Justifications

Dynamic theories recognize, like the Shakespearean interpreter, that prudential or pragmatic concerns should be allowed to shade a text's meaning. Eskridge, Frickey, and Garrett identify at least three different dynamic theories of statutory interpretation that merit comparison to a Shakespearean actor's approach: best answer theories, pragmatic theories, and critical theories.[155] Let us briefly state these theories and their problems so we have a general understanding of what drives the dynamic interpreter as well as the theoretical challenges they face.

Best Answer Theories. Best answer theories suggest that laws should be interpreted "to produce an 'optimal state of affairs,' which can be found by construing them 'in light of the purposes that they may best be made to serve,' rather than 'the intentions which legislators had in drafting them.'"[156] This theory reflects the modern actor's approach: in light of all other considerations, how does the play best speak to us today and how does the interpretation of the character best suit the production? Parallel concerns for rule of law, democracy, and predictability—problems for the best answer theorist[157]—do not trouble the Shakespearean actor. Quite the opposite: uncovering a fresh and unexpected approach to the character is a highly desirable result.

Pragmatic Theories. Pragmatic theories recognize and attempt to account for the complexity of human belief and decision making. "[O]ur intellectual framework is not single-

155. *See* ESKRIDGE ET AL., *supra* note 4, at 245–56.
156. *Id.* at 247 (quoting Heidi Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 1028 & n.177 (1990)).
157. *See id.* at 247.

minded, but consists of a 'web of beliefs,' interconnected but reflecting different understandings and values."[158] Thus, pragmatic theories "look to multiple goals for statutory interpretation and insist on considering multiple sources."[159] For example, in contrast to Justices Brennan and Rehnquist discussed in *Weber*, Justice Burger in *Griggs v. Duke Power*, believed that "[t]he objective of Congress in the enactment of Title VII was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[160] He arrived at this conclusion by examining "the integrative purpose of Title VII . . . the evolution of the statute, and the best answer, in light of the country's sorry record of pushing people of color to the bottom."[161] Justice Burger's approach mirrors the actor's practical and holistic approach to the search for meaning. Just as the Shakespearean actor must weigh the needs of his character, the needs of the play, and the needs of the production to arrive at an interpretive answer that will best serve all, so too the pragmatic statutory interpreter "consider[s] several values, and the strength of each in the context at hand, before reaching a decision."[162] The resulting interpretation does not simply draw a line of logic connecting the dots one after another, but rather, like an artist, presents us with a picture filled with shading and nuance.[163]

Critical Theories. Critical theories tend to focus on the subjective perspective or experience of the writer in question. These theories "deconstruct[] statutory texts, typically in order to show how particular readings are ideologically rather than objectively grounded."[164] The idea is, in part, to pave the way for new interpretive possibilities by revealing the limitations of the author's perspective. As Eskridge, Frickey,

158. *Id.* at 249.
159. *Id.*
160. 401 U.S. 424, 429–30 (1971).
161. ESKRIDGE ET AL., *supra* note 4, at 251.
162. ESKRIDGE, DYNAMIC, *supra* note 21, at 55.
163. Put another way, "[The] reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibres may be ever so slender, provided they are sufficiently numerous and intimately connected." *Id.* at 55-56 (quoting 5 Charles Peirce, Collected Papers ¶ 264 (Hartshorne & Weiss eds. 1960)).
164. ESKRIDGE ET AL., *supra* note 4, at 252 n.62.

and Garrett observe, "Why should a provision put in to satisfy objectives of white conservatives not be read from the perspective of people of color?"[165] The interpretive posture of the critical theorist is particularly vital to the Shakespearean actor approaching plays such as *Merchant of Venice* and *The Tempest*. Jewish people occupied a significantly different place in Elizabethan England than they do in modern England or America, and the actor playing Shylock who ignores Shakespeare's possible biases does so at his peril. Similarly, as we shall see, Shakespeare's view of Caliban was likely far different from our modern view, which has been influenced by our understanding of American colonialism.

Taken as a whole, dynamic theories recognize the complexity of real world, human decision making. They attempt to account for the possible subjective preferences of the decision maker and broaden his perspective. By contrast, an approach that insists on only one lens through which to see a question, ignores the inherent subjectivity of the exercise. Worse, it pretends that subjectivity does not exist in the name of objectivity.

Crucially, dynamic theories share an implicit or explicit recognition of changed circumstances. As we shall see, the recognition of changed circumstances is particularly relevant to Shakespearean interpretation. In the statutory context, Eskridge notes that

> [S]tatutes begin to evolve from the moment people start applying them to concrete problems. Over time that statutory evolution becomes ever more striking because the world changes, often as a result of the statute itself. . . .

At the level of society and culture, changed circumstances include new understandings about individual, group, or institutional behavior; revised professional consensus or popular mores; and fresh factual information or intellectual paradigms.[166]

An excellent example of an unspoken dynamic

165. *Id.* at 252 (referencing United Steel Workers v. Weber, 443 U.S. 193 (1979)).

166. ESKRIDGE, DYNAMIC, *supra* note 21, at 52–53. Note that "Hermeneutics suggests that statutory interpretation . . . involves an interaction between interpreter and text that creates new and perhaps unexpected meaning over time. . . . [H]ermeutics posits that statutory meaning is constructed, not discovered, by the interpreter." *Id.* at 62.

interpretation of a regulation occurred in *Braschi v. Stahl*.[167] A man who was the tenant in a rent-controlled New York City apartment had died and his same-sex "permanent life partner" who lived with him sued for the right to continue to occupy the apartment. The New York City Rent and Eviction Regulations stated that a landlord could not evict him under these conditions if he was a member of the dead tenant's "family."[168] The court ruled in favor of the partner finding that the meaning of the word "family" should "find its foundation in the reality of family life."[169] In support of its decision, the court found that 1) the appellant and his partner had lived together as permanent life partners for more than ten years; 2) they regarded one another, and were regarded by friends and family, as spouses; 3) the two men's families were aware of the nature of the relationship; 4) they regularly visited each other's families and attended family functions together, as a couple; and 5) he continued to maintain a relationship with his lover's niece, who considered him an uncle.[170] This result is surely the consequence of changed circumstances. To suggest that legislators inthe 1940's, when sodomy was against the law,[171] intended "family" to encompass a man's gay lover would surely be absurd.[172]

However, if the use of legislative history is controversial, allowing considerations outside the statutory text or legislative history to inform the analysis will often be that much more problematic.[173] Indeed, dynamic theories are all particularly vulnerable to attacks based on rule of law and democracy concerns.[174] Responding to the democracy

167. 74 N.Y.2d 201 (1989).

168. *See* 9 N.Y.C.R.R. 2204.6(d).

169. Braschi v. Stahl Assocs. Co., 74 N.Y.2d at 208–12.

170. *Id.* at 213.

171. *See* People v. Onofre, 415 N.E.2d 936 (1980) (striking down as unconstitutional New York's Penal Law, § 130.38, which had its origins in a law dating back to 1886).

172. I am grateful to Professor Timothy Westmoreland, Georgetown University Law Center, for this insight. *But see* Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (finding that although the Congress that passed the Civil Rights Act of 1866 would not have intended it to prohibit private racial discrimination, the prevailing sense of justice today and the policy of the Nation accord with this construction).

173. Justice Scalia mockingly characterizes the dynamic approach to statutory interpretation: "The law means what it ought to mean." SCALIA, *supra* note 5, at 22 (reviewing ESKRIDGE, DYNAMIC, *supra* note 21).

174. Indeed, William N. Eskridge, Jr., a chief proponent of dynamic theories, acknowledges that he can offer no "normative theory for dynamic interpretation that

concerns, Eskridge and others assert that "consent and process are not the only ways to look at law's legitimacy."[175] Substantive, rather than procedural justifications should equally drive our obedience to the law.[176] Eskridge proposes a theory of statutory interpretation whose application is analogous to Shakespearean interpretation: critical pragmatism.[177] Like the pragmatic modern actor, critical pragmatism asserts that "we can figure out what works best in specific cases even without a general theory of what works. . . . No single legal convention governs statutory interpretation, but all are relevant—statutory text, legislative intent or purpose, the best answer."[178] Eskridge is also careful to note the difference between critical pragmatism and mere pragmatism.

> I am *in the exceptional case* open to statutory interpretations that press beyond or criticize existing conventions and traditions. For if law's legitimacy is not mechanically established by a rule's pedigree or its process of formulation, the interpreter has a grave responsibility to reestablish the productivity of law every time she construes a statute.[179]

This notion, from a Shakespearean actor's point of view, is appealing because it corresponds to the actor's responsibility on stage. The actor is not simply free to do with a character whatever he wants. Scrupulous and exacting care must be paid to the text and its meaning, and interpretations that stray beyond the text's bounds must have a sound reason for

satisfies" either of these criteria. *See* ESKRIDGE, DYNAMIC, *supra* note 21, at 175.

175. *Id.* at 174. "Let us transport ourselves into a hypothetical country that, in a democratic way, practices the persecution of Christians, the burning of witches, and the slaughtering of Jews. We should certainly not approve of these practices on the ground that they have been decided on according to the rules of democratic procedure." *Id.* (quoting JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY, 242 (1961)).

176. *Id.*

177. Eskridge also notes the strengths and weaknesses of various other substantive or "normative" theories that might drive statutory interpretation, including natural law, which "asserts . . . that a statute is not law unless it is consistent with larger moral precepts," dialogic theory like feminist and republican theories that "assert that law's legitimacy rests on norms that are derived from dialogue among diverse groups in a society," and postmodernism which "challenges the interpreter to be eclectic, tolerant, and nondogmatic in understanding law's practice" because of "skepticism about an objective rule of law and majority-based statutory applications." *Id.* at 175.

178. *Id.* at 200.

179. *Id.* at 201 (emphasis added).

doing so if they are to gain acceptance by an audience.

Changed circumstances, among all the motivations driving dynamic theories of statutory interpretation, is perhaps most relevant to the interpretation of Shakespeare in general and Caliban in particular. I will therefore look at three Shakespearean characters for which this inquiry is particularly relevant, concluding with Caliban.

B. Changed Circumstances and Shakespeare

Shakespeare poses a paradox with regard to changing circumstances. Shakespeare's texts speak to universal truths about human needs, wants, and behavior. On the one hand, because these truths are "universal," they are unchanging. They speak to us today on the same fundamental level as they spoke to audiences in the late sixteenth century to early seventeenth century. The fiery heat of youthful passion given life in *Romeo and Juliet* is as relevant and true now as then. On the other hand, Shakespeare's texts have also changed because attitudes and social mores have shifted and transformed over four centuries. Further, "London play goers of 1596–97 would have included many who jibed at Dr. Roderigo Lopez, the Christianized Portuguese Jew and royal physician, who . . . was convicted on doubtful evidence of plotting to poison Queen Elizabeth."[180] We might, however, hesitate in rushing to accuse Shakespeare of anti-Semitism.[181] Not only did Shakespeare substantially humanize Shylock, but he also concealed his own attitudes in favor of his characters—a skill at which he is better than many authors. Shakespeare does not reveal his personal attitudes in his plays. The character is all. Given the lack of personal writings, what Shakespeare thought or felt is pure speculation. However, given the time period in which he wrote, Shakespeare could have intended Shylock to be the object of ridicule. However, in light of the Holocaust, evolving cultural attitudes, and increased sensitivity to cultural

180. *Id.*

181. Notably, Shakespeare made his Elizabethan audience hear Shylock say as a response to the many abuses he has suffered at the hands of the Christians, "Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? . . . If you prick us, do we not bleed?" MERCHANT OF VENICE, *supra* note 68, at act 3, sc. 1.

differences in general, such a reading of Shylock today is all but unthinkable. Though the historical arguments supporting Shakespeare's anti-Semitism may be persuasive, if we are to produce *The Merchant of Venice* for today's audience, we must go beyond the historical context and find what remains in the text that may be of value.[182]

Kate in *Taming of the Shrew* presents a similar case. At the end of the play, her husband Petruchio makes a bet with two other recently married men that of their three wives, only Katherine will come to him from another room when he calls for her. The first two husbands respectively "bid" and "entreat" their wives to come, but are refused. Petruchio then "command[s]" Kate to come to him and she complies.[183] Petruchio then has Kate "tell these headstrong women / What duty they do owe their lords and husbands."[184] Kate replies with a speech that, on its face, confirms the superiority of the husband and the subservience of the wife.[185] In the Elizabethan world, the supremacy of the husband would hardly have been questioned (at least openly). Indeed, there was one tradition of entertainment in the Elizabethan world

182. Note, however, that there are those who feel the play should never be produced. *See* ROSENBAUM, *supra* note 94, at 291 ("James Bowman, former editor of *TLS* reviewing in *The New York Sun*, . . . said [the Al Pacino 2006 film of *Merchant of Venice*] convinced him that *Merchant* was just no longer playable.").

183. SHREW, *supra* note 86, at act 5, sc. 2.

184. *Id.* at act 5, sc. 2.

185. Fie, fie, unknit that threat'ning unkind brow
And dart not scornful glances from those eyes
To wound thy lord, they king, they governor. . . .
Thy husband is thy lord, thy life, thy keeper,
Thy head, they sovereign; one that cares for thee
And for they maintenance; commits his body
To painful labor both by sea and land,
To watch the night in storms, the day in cold,
Whilst thou lie'st warm at home, secure and safe;
And craves no other tribute at thy hands
But love, fair looks and true obedience—
Too little payment for so great a debt. . . .
Then vail your stomachs, for it is no boot,
And place your hands below your husbands foot,
In token of which duty, if he please,
My hand is ready, may it do him ease.

Id. at act 5, sc. 2. At this point, the actress generally places her foot on the floor to allow Petruchio to step on her foot if he so desires. How Petruchio responds speaks volumes about the relationship they arrive at by the end of the play.

that involved a husband seeking to tame his shrewish wife with extreme Grand Guignol violence.[186] Though Shakespeare adopted the basic situation of this tradition, he did not overtly adopt its brutally, physically abusive methods (though with twenty-first century eyes, you would probably still interpret what he does to Kate as abuse). Instead, he chose the more humanist tradition of the husband leading the wife "gently but firmly, to accept his rightful authority, much as he would teach a colt to go through its paces or a hawk to fly to the lure."[187] In this light, the meaning of Kate's speech seems plain on its face and is amply supported by whatever "legislative history" we might choose to explore. However, in view of the Women's Rights movement and our evolving understandings of the historical repression of women (and, indeed, of spousal abuse), the modern reader sees this speech in a very different light than her Elizabethan counterpart.[188] Therefore, how to interpret the speech presents choices to the modern actor not available to the Elizabethan actor.[189]

Shylock and Kate are the most obvious examples of changed circumstances in Shakespeare. But Caliban has also undergone a sea change in the twentieth century. For years the theatrical tradition had been to play Caliban as some variation of a monster.[190] Textually, Shakespeare has both

186. *See* Alfred Harbage, *Introduction* to THE TAMING OF THE SHREW *in* WILLIAM SHAKESPEARE: THE COMPLETE WORKS 80 (Pelican 1969) (discussing the anonymous Elizabethan ballad, *A Merry Jest of a Shrewd and Curst Wife Lapped in Morel's Skin for Her Good Behavior* (printed about 1550)).

187. *See id.*

188. Though not necessarily. When I taught this speech to students across the country, I was surprised to hear the number of men *and* women (young high school students no less) who believed that Kate hits the nail on the head. We have even heard similar views expressed by the public in relation to the Democratic presidential campaign between Barack Obama and Hillary Clinton. *See, e.g.*, Katharine Q. Seelye, *Clinton-Obama Quandry for Many Black Women*, N.Y. TIMES, Oct. 14, 2007, http://www.nytimes.com/2007/10/14/us/politics/14carolina.html?pagewanted=all ("'A man is supposed to be the head,' she said. 'I feel like the Lord has put man first, and I believe in the Bible.'").

189. For a fascinating discussion of several late twentieth century actresses discussing their experiences interpreting Katherine, see CLAMOROUS VOICES, *supra* note 13, at 2–25.

190. *See* Alden T. Vaughan, *Shakespeare's Indian: The Americanization of Caliban*, 39 SHAKESPEARE QUARTERLY 137, 138 (Summer 1988) ("[Caliban] evolved generally and gradually from a drunken beast in the late seventeenth century, to a fishy monster in the eighteenth, to an apish missing link in the nineteenth."). We cannot be sure how Shakespeare's audience saw Caliban because accounts do not exist to report. However,

Trinculo and Stephano call Caliban "monster" throughout the play.[191] He is also referred to as a "fish,"[192] "a villain,"[193] "beast,"[194] "devil, a born devil,"[195] "thing of darkness,"[196] and "misshapen."[197] When David Suchet first undertook the part at the Royal Shakespearean Company in 1978 and told others he was to play Caliban, they asked: "'How are you going to play him?', or 'Are you going to wear a special skin like a fish and have scales and fins?'"[198]

What spurred Suchet to investigate Caliban's physical shape more closely was the following textual sequence:

> Prospero: Then was this island—
>
> Save for the son that she did litter here,
>
> A freckled whelp, hag-born—not honored with
>
> A human shape.
>
> Ariel: Yes, Caliban her son.
>
> Prospero: Dull thing, I say so: he, that Caliban
>
> Whom now I keep in service.[199]

One could interpret the sequence as follows: Prospero is describing Caliban as a "freckled whelp, hag born" and "not honored with / A human shape," at which point, Ariel interrupts his train of thought, and Prospero lashes out at him for it. The phrase "not honored with / A human shape" could be therefore taken to apply to Caliban, and one could

the above account suggests that Shakespeare's audience probably did not see a substantially different Caliban than the audience of the Restoration. For a full history of evolving interpretations of Caliban discussing text, literary criticism, and performance, see VAUGHAN, *supra* note 62 at 23.

191. *See, e.g.*, THE TEMPEST *supra* note 26, at act 3, sc. 2.

192. *Id.* at act 2, sc. 2.

193. *Id.* at act 1, sc. 2.

194. *Id.* at act 4, sc. 1.

195. *Id.* at act 4, sc. 1.

196. *Id.* at act 5, sc. 1.

197. THE TEMPEST *supra* note 26, at act 5, sc. 1.

198. PLAYERS OF SHAKESPEARE 1, *supra* note 13, at 167. This also reveals the way stare decisis plays a role in acting Shakespeare. When characters are interpreted the same way for a long time, the expectation that the next actor will follow suit can exert a powerful influence on those who seek to interpret the roles themselves as well as on the audience. *See generally supra* note 127 discussing the role of precedent in acting.

199. PLAYERS OF SHAKESPEARE 1, *supra* note 13, at 167.

easily see how the traditional approach to Caliban was justified. Suchet, however, noted that in all editions he consulted, including the folio of 1623, that in Prospero's line

> Then was this i[s]land
>
> (Saue for the Son, that she did littour heere,
>
> A freklld whelpe, hag-borne) not honour'd with
>
> A humane [s]hape.[200]

the parenthesis indicate that the line means the island was not honored with a human shape *except for Caliban's*.[201] He also noted that Trinculo says, upon first encountering Caliban that he has "fins like arms"[202] and not "arms like fins." Coupled with Caliban's song where he sings "No more dams I'll make for fish . . . nor scrape trenchering, nor wash dish."[203] With the realization that Caliban could not perform these chores if he had fins for arms, Suchet became convinced that Caliban was human shaped.[204] Suchet gradually came around to a view that had been gaining acceptance in scholarly circles since the early twentieth century, but that

200. WILLIAM SHAKESPEARE, THE TEMPEST act 1, sc. 2 *in* THE FIRST FOLIO OF SHAKESPEARE 1623 4 (Applause Books 1995); *cf.* THE TEMPEST, *supra* note 26, at act 1, sc. 2.

201. PLAYERS OF SHAKESPEARE 1, *supra* note 13, at 170. Worth noting is that some versions use parentheses and some use "M" dashes. *See, e.g.*, William Shakespeare, *The Tempest*, act 1, sc. 2, *available at* http://www.shakespeare-literature.com/The_Tempest/2.html (using "M" dashes). Arguably, catching this meaning is easier when the phrase is set off by parentheses than by "M" dashes. To the degree that is true, consulting the folio or "legislative history" here would potentially reveal this new interpretation to the actor whose performance edition sets it off with dashes. In Suchet's case, we see that Shakespeare's "legislative history" can also be used to confirm textual clues, much as courts often say that their textual analysis is confirmed when they consult the legislative history. *See, e.g.*, American Federation of Musicians v. Wittstein, 379 U.S. 171, 176 (1964) ("Whatever doubts may be left by sole and plenary reliance on plain meaning are fully resolved by consideration of the legislative history behind § 101(a)(3) (B) and of other provisions of the [Labor-Management Reporting and Disclosure Act of 1959]."). This also raises a point about how normative choices can inhibit one's ability to find relevant meaning. Once we posit Caliban's human shape, the text reveals a wealth of clues supporting that hypothesis. *See* VAUGHAN, *supra* note 62, at 7–20 (detailing textual and structural support for Caliban's human shape). But the assumption had been otherwise for so long that these textual clues remained hidden.

202. THE TEMPEST, *supra* note 26, at act 2, sc. 2.

203. *Id.* at act 2, sc. 2. Both these refer essentially to washing dishes.

204. PLAYERS OF SHAKESPEARE 1, *supra* note 13, at 170–72.

had not yet found its way into the theatre: that Caliban and *The Tempest* as a whole had its inspiration in a 1609 shipwreck of *Sea Venture* where the crew miraculously survived in Bermuda.[205] Caliban is therefore not a monster, but a native, "natural" man who, to Shakespeare, would have seemed exotic and strange, but would, nonetheless, resonate with Elizabethan audiences who, by the early seventeenth century, had become somewhat familiar with accounts of native, "uncivilized" peoples. Suchet's performance of Caliban was a "composite of the Third World Native, a generalized conception of primitive man."[206] He arrived at this interpretation by close textual examination and comparison of extant texts (Shakespeare's legislative history) all seen through the lens of his own modern perspective.

Finally, circumstances have changed with regard to the way actors approach acting in general. The impact of Freud and modern psychology has certainly had an impact on actors as they sought over the course of the twentieth century to further understand psychological complexity in the characters they play.[207] My own experience with acting Caliban[208] was that when I spoke the line "I'll be wise hereafter, / and seek for grace" with the intention of asking for forgiveness, this intention did not feel right.[209] Prospero has never forgiven

205. *See* Vaughan, *Americanization*, *supra* note 190, at 137. Note that the themes of colonialization and anti-slavery had begun to shape performances of Caliban as early as 1934, but even in these performances, Caliban is hairy and scaly. *See* VAUGHAN, *supra* note 62, at 189. Note, however, that there were no natives on Bermuda, *id.* at 43 (citations omitted), so although this might have inspired the storm and shipwreck in *The Tempest*, this event alone could not have been a direct source for Caliban. In the view of these authors, Shakespeare's source for Caliban cannot be reduced to any one historical event or literary text. *Id.* at 274. What seems as likely as any possibility is that, as an artist, he was influenced by a variety of sources that played on his imagination to create an amalgam that best suited his purpose.

206. Virginia Mason Vaughan, *"Something Rich and Strange": Caliban's Theatrical Metamorphosis*, 36 SHAKESPEARE QUARTERLY 390, 403 (Winter 1985).

207. Credit for this revolution in the acting approach is usually given to Constantin Stanislavski and three books he published in particular: AN ACTOR PREPARES (1918), BUILDING A CHARACTER (1918), and CREATING A ROLE (1918); *cf. supra* note 30 and accompanying text (noting changes in the legal approach to interpreting law).

208. I played the role for The Acting Company in their 1998–99 tour as part of their repertoire mounted exclusively for schools.

209. Here, the position of Stanley Fish becomes particularly relevant. To a large extent, the interpretive choices I made as an actor were unquestionably partly the result of my own experience as an educated, liberal man committed to egalitarian values in the late 20th century. *See generally* FISH, *supra* note 1. *See also* ESKRIDGE,

Caliban for what he believes was an attempted rape of Miranda and treats him accordingly.[210] Indeed, Caliban's fear of Prospero is as evident as his hatred.[211] Given the wrongs done to Caliban and my understanding of the lingering effects of abuse, it did not seem believable to me that Caliban, his bitterness and rage already inflamed, could so quickly overcome the vengeful feelings that had driven him throughout the play and which had probably eaten away at him for years before. Caliban seemed intelligent and imaginative enough to me to recognize the potential value of the opposite choice; that forgiveness might ultimately benefit him more than allowing resentment to fester in him long after Prospero is gone. Thus, weighing the text, Shakespeare's interest in the redemptive power of forgiveness in general, and changed circumstances, to me, "grace" came to mean "the capacity to forgive."

My conclusion (which others may surely disagree with) was informed both by the text and by the interpretation of Suchet and others who saw through a textual presumption that had dominated the interpretation of Caliban for centuries. Because of Suchet's careful attention to the text and his desire to see the character with more complexity, the play as a whole has been transformed. Yet this transformation has not stretched the plain meaning of the text into a shape it will not bear. On the contrary, the text itself contains ample justification for this more complex view of the character. As a result, the door has been opened to interpreters who wish to continue to add flesh to the bones of Shakespeare's text as conditions continue to change. Importantly, as in *Braschi v. Stahl*, the text is served and so is the audience who wishes to see a play with continued

DYNAMIC, *supra* note 21, at 58 ("[Hermeneutics recognizes that] the interpreter's understanding is also a historically situated event. . . . an interpreter of a different time or culture from the author's may have a vastly different interpretation of the same written text.").

210. *See, e.g.*, THE TEMPEST, *supra* note 26, at act 1, sc. 2 (Caliban to Prospero: " . . . here you sty me / In this hard rock, whiles you do keep from me / The rest o' the island.").

211. When Caliban first encounters Stephano, a drunken butler, he mistakes him for one of Prospero's spirits sent to torment him and begs and pleads pitifully for mercy. *See id.* at act 2, sc. 2. At the end, when Caliban realizes that Prospero knew of Caliban's murderous plot all along, Caliban says, "I shall be pinch'd to death." *Id.* at act 5, sc. 1.

relevance in the twenty-first century.

CONCLUSION

In the end, what the Shakespearean and the legal actor must share is intoxication for the plasticity of language. The lawyer arguing before a court must, like the Shakespearean actor, see the range of possibilities language and text present in order to determine the argument that will best serve the client's interest. The judge, like the Shakespearean actor, must make the final decision as to the statute's meaning that she will communicate to the public. The tools each interpretive actor uses are strikingly similar; one might even go so far as to say intuitive. We all go through a similar process when attempting to ascertain a text's meaning: plain meaning, context, dictionaries, evidence as to speaker's intent, etc. The differences between the two interpretive endeavors have less to do with the tools we use, and almost entirely to do with our feelings about judicial discretion. This is undoubtedly why so much ink has been spilled over the use of legislative history.

Until very recently, law firms and lawyers were not only experts in a given field, they were also one of the main repositories of the law. Lawyers benefitted from the mystique that surrounded this inaccessibility and could profit from the perception that legal training gave them specialized insight beyond the ken of the non-lawyer into how to the read the law. That perception will change.

With the explosion of the Internet, the law is increasingly available and free to all. Though the lay person may not have learned the legal terms we have given to the tools of statutory interpretation, he or she is certainly capable of coming to a reasonable conclusion as to their plain meaning. Further, the idea that context and authorial intent might play a role in what words mean is neither new nor exclusive to law. I do not suggest that legal training does not confer valuable expertise, but clients will soon discover that statutory interpretation is not as mysterious as lawyers might like to think. Rather than continue to try to convince the public and ourselves that what lawyers do is an inaccessible science, it may prove beneficial to understand that what we do is an interpretive art.

Statutory interpretation is not a science, whatever the defenders of new textualism may say.[212] Calling statutory interpretation a science rather than an art harkens back to the fiction that some objective, identifiable truth is discoverable in a piece of text. However, significant differences separate science and the interpretive act. Critically, in statutory interpretation, there are the facts, there is the law, and there is the judge's opinion or analysis regarding their interaction. A scientist, on the other hand, may interpret the results of an experiment. Those results may be flawed and disproven by subsequent experimental results, but the interpretation is not the result itself. Insofar as scientists are more highly regarded for intellectual rigor than artists, and this assertion may elevate the interpreter's status in the eyes of the public, it undermines the law's legitimacy when results reached by a "scientific" analysis are less than convincing.[213] At its most extreme, the new textualist approach is akin to asserting that acting Shakespeare can be reduced to a few mechanical rules that, if followed, will produce a moving performance. The argument that reduces art to a mathematical formula obfuscates the discretion inherent in textual interpretation and is contrary to the goals of legal transparency in decision making.

Shakespearean actors, like most judges, recognize text as the essential source of meaning. Like most judges, Shakespearean actors feel their search for textual meaning is

212. *See, e.g.*, SCALIA, *supra* note 5, at 3, 14. This is not to say a valid comparison cannot be made, but I maintain that statutory interpretation is far more art than science and calling it an art is less misleading. We may say that a law is tested in the laboratories of experience and the courts, but the actual process of that testing is an interpretive act rather than anything that takes place in a laboratory.

213. The "statutory interpreter as scientist" stance allows the interpreter to suggest that statutory interpretation requires the most sophisticated, rigorous, intellectual gaze to penetrate textual secrets, while simultaneously concealing this intimation behind the fiction that no judicial discretion is involved and that the judge simply calls balls and strikes. *Cf.* ROY M. MERSKY & TOBE LIEBERT, THE U.S. SUPREME COURT HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATION OF SUPREME COURT JUSTICIES BY THE SENATIVE JUDICIARY COMM. 20, 55 (2006) (using this metaphor as a way of stating that, as a judge, he has no agenda or platform, but simply applies the law to facts). This position may well be an ideal to aspire to, but I have questioned whether it is possible to achieve—at least in the hard cases. *Cf.* Jonathan Uffelman, Comment, *Hamlet Was a Law Student: A "Dramatic" Look at Emotion's Effect on Analogical Reasoning*, 96 GEO. L. REV. 1725, 1754–56 (2008) (discussing the difficulty of arriving at decisions dictated by pure logic in the common law context).

constrained by pragmatism. Because textualism can constrain judicial discretion, looking beyond the text has the added benefit of increasing the range of possibilities of meaning for the judge, thereby narrowing the range of potential conflict. The clearer the picture one has of the text to be interpreted, the more likely one is to affect the legislature's intent in a way that maintains consistency with the written text. Thus one may maintain a commitment to textualism without viewing it as a hammer.[214] At best, theories of interpretation provide a lens through which to view hard questions rather than any concrete determination thereof. Consequently, the tools legal actors use begin to look like those of a Shakespearean actor. The tools may reveal, limit, expand, and shade possible meanings, but in hard cases, they rarely yield a clearly authoritative answer or interpretation. In the end, the interpretation the public receives is the partly reasoned, partly intuitive, possibly artistic *choice* of a highly trained legal actor.

214. William Eskridge, speaking of his dynamic model for statutory interpretation, could be speaking of an actor struggling with Shakespearean text: "[T]he statutory interpreter's understanding of the plain meaning of a statutory text depends on her understanding the whole story of the statute, including its historical circumstances and its evolution, which themselves cannot be understood without reference to the statute's plain meaning." ESKRIDGE, DYNAMIC, *supra* note 21, at 64.