

## THE ART OF STATUTORY CONSTRUCTION: TEXAS STYLE

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## I. INTRODUCTION

### A. *An Art: The Nature of a Statute*

“Art” is defined as a “skill acquired by experience, study, or observation.”<sup>1</sup> Nothing better describes the act of lawyers and judges attempting to discern the legislative intent of a statute. For it is through the subordination of the judiciary to the legislature that our laws are assured their democratic pedigree.<sup>2</sup> Yet, many times the text may be unclear in the context of a particular fact pattern, and a statute’s meaning must be drawn from other sources. Thus, the court and lawyers must follow the legislative command by applying the statute’s language or referring to the legislative intent or purpose as discerned through the legislative history or canons of construction.<sup>3</sup>

So, there is an assumption of legislative supremacy but also the necessity of notice.<sup>4</sup> It is a fundamental basis of jurisprudence that a person cannot be bound by a law of which he or she has no notice.<sup>5</sup> Therefore, statutory law must be set forth in a determinative string of words of intelligible scope, communicable content, and finite length.<sup>6</sup> Yet, such words in the context of specific facts before the court may be elusive and in which judicial reference to legislative meaning is almost fictional. In all cases, the overwhelming principle is to not open the door to judicial lawmaking.<sup>7</sup>

However, such a goal is easier said than done. Among scholars, there is general agreement that there are three basic approaches that can be used by the judiciary to determine what a statute means: (1) by legislative intent,

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<sup>1</sup>MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 69 (11th ed. 2006).

<sup>2</sup>See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 113–14 (1990).

<sup>3</sup>ABNER J. MIKVA & ERIC LANE, *AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS* 4–5 (1997).

<sup>4</sup>MICHAEL SINCLAIR, *A GUIDE TO STATUTORY INTERPRETATION* 7 (2000).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 17.

<sup>7</sup>MIKVA & LANE, *supra* note 3, at 51.

i.e., intentionalist; (2) by textual meaning, i.e., textualists; or (3) by a more dynamic, pragmatic assessment of institutional, textual, and contextual factors, i.e., a dynamic approach.<sup>8</sup> Yet, these scholars identified the real problem with theories of how judges and lawyers should determine the meaning of a statute by pointing out:

This ignores the pragmatic insight that our intellectual framework is not single-minded, but consists of a “web of beliefs,” interconnected but reflecting different understandings and values. As a consequence, human decisionmaking tends to be polycentric, spiral, and inductive, not unidimensional, linear, and deductive. We consider several values, and the strength of each in the context at hand, before reaching a decision.<sup>9</sup>

Thus, understanding and engaging in statutory construction is an art and not a science. There is no “right” formula that will always yield one concrete and correct result. Thankfully, though, due to judicial experience and the preservation of judicial opinions within a particular judicial system, they can be analyzed by lawyers and judges alike to discern particular “canons” or “rules” of construction that have been utilized time and again by the judiciary to resolve particular types of statutory ambiguities.

It is critical to understand that these canons are not ends in themselves but rather serve as a means to get to the intent of the legislature.<sup>10</sup> They are merely guideposts in determining legislative intent.<sup>11</sup> Canons of construction are no more than rules of thumb in determining the meaning of the law;<sup>12</sup> they are simply a by-product of *stare decisis* and precedent. If a certain type of ambiguity arises in a statute, the supreme court resolves it by using “x” rational. If in another statute within which the same or similar

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<sup>8</sup>WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 219 (2d ed. 2006).

<sup>9</sup>*Id.* at 249.

<sup>10</sup>*Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 430 F. Supp. 2d 222, 246 (S.D.N.Y. 2006), *rev’d on other grounds*, 254 Fed. App’x 843 (2d Cir. 2007); *Haffner v. United States*, 585 F. Supp. 354, 358 (N.D. Ill. 1984), *aff’d*, 757 F.2d 920 (7th Cir. 1985), *but abrogated by United States v. Wells Fargo Bank*, 485 U.S. 351 (1988).

<sup>11</sup>*See* cases cited *supra* note 10.

<sup>12</sup>*Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992); *see Chickasaw Nation*, 534 U.S. at 94.

factual controversy arises, the doctrines demand that the same rationale be used. However, as the Texas Court of Criminal Appeals has stated, the canons are merely rules of logic in the interpretation of text.<sup>13</sup>

Yet, there is no hierarchy of the canons of construction, and multiple canons may apply to a particular ambiguity.<sup>14</sup> The lawyer or judge must thereby be ultimately guided by common sense, seeking simply to fulfill the constitutional right of the legislature to set forth the law while bearing in mind what interpretation most likely gives their notice to all as to what was prohibited or allowed. Once again, it is an art and not a science. Has the Texas Supreme Court recognized that its job of “interpretation” can have a dramatic impact on what a statute ultimately means? Yes! As early as 1864, the Texas Supreme Court stated, “There are two limitations imposed on the legislative power: the first arises from the power of construction, and is vested in the courts and applied to written law of all kinds, when the laws are ambiguous or contradictory; the second is, the restrictions imposed by the constitution, and which the judiciary must enforce.”<sup>15</sup>

Therefore, determining the meaning of a statute is done on a case-by-case basis with mere guides to aid the judge or lawyer in determining what the legislature meant to set forth as a standard of conduct. It cannot be achieved by a cursory, quick review of the words chosen, but it takes patience, time, thought, and deliberation to achieve a meaningful explanation of the legislative intent. It is simply a skill, i.e., “the ability to use one’s knowledge effectively and readily in execution or performance.”<sup>16</sup>

### *B. As Contrasted by the Common Law*

The Texas Supreme Court has held that the common law is not static, and the courts, whenever reason and equity demand, have been the primary instruments for changing the common law through a continual re-evaluation of common law concepts in light of current conditions.<sup>17</sup> For the common law is not frozen or stagnant, but evolving, and it is the duty of the court to

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<sup>13</sup> *Boykin v. State*, 818 S.W.2d 782, 785 n.3 (Tex. Crim. App. 1991) (en banc).

<sup>14</sup> See *Chickasaw Nation*, 534 U.S. at 94.

<sup>15</sup> *Ex parte Mayer*, 27 Tex. 715, 715 (1864) (emphasis added); see also *Boykin*, 818 S.W.2d at 785–86.

<sup>16</sup> See MERRIAM-WEBSTER, *supra* note 1, at 1168.

<sup>17</sup> *Horizon/CMS HealthCare Corp. v. Auld*, 34 S.W.3d 887, 899 (Tex. 2000); *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978).

recognize the evolution.<sup>18</sup> Indeed, it is well established that the adoption of the common law of England was intended to make effective provisions of the common law so far as they are not inconsistent with the conditions and the circumstances of the people.<sup>19</sup>

The common law thereof consists of those principles, usages, and rules of action applicable to the government and the security of persons and property that do not rest for their authority upon any express and positive declaration of the will of the legislature.<sup>20</sup> The common law is not expressible in any definitive string of words.<sup>21</sup> Particular decisions are expressed in a set of words, but those words only define the rights of the parties to that action.<sup>22</sup> Any generality the judge or lawyer may abstract from a decision is not a rule of law nor is any particular expression of it authoritative.<sup>23</sup>

The holding in a decision based on common law is legally binding but only to the parties in the case.<sup>24</sup> Judges or lawyers then construct legal theories to explain the basic statements of common of law, to collect and clarify them, and to make them intelligible.<sup>25</sup> Reasoning then flows upwards from the particular basic statements to general explanatory theories.<sup>26</sup> Yet, all judges and lawyers have the power and authority to contest the reasons given in an opinion and the theory produced.<sup>27</sup> One of the virtues of the common law is its encouragement of the production of alternate theories by advocates who must present theories to distinguish or

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<sup>18</sup>Reagan v. Vaughn, 804 S.W.2d 463, 465 (Tex. 1990); El Chico Corp. v. Poole, 732 S.W.2d 306, 310 (Tex. 1987), *superseded by statute on other grounds*, Act of June 1, 1987, 70th Leg., R.S., ch. 303, 1987 Tex. Gen. Laws 1673 (current version at TEX. ALCO. BEV. CODE ANN. § 2.03 (West 2011)), *as recognized in* F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 684 (Tex. 2007).

<sup>19</sup>*El Chico Corp.*, 732 S.W.2d at 310–11; Grigsby v. Reib, 153 S.W. 1124, 1125 (Tex. 1913); *see also* S. Pac. Co. v. Porter, 331 S.W.2d 42, 44–45 (Tex. 1960); Diversion Lake Club v. Heath, 86 S.W.2d 441, 444 (Tex. 1935).

<sup>20</sup>Bishop v. United States, 334 F. Supp. 415, 418 (S.D. Tex. 1971), *rev'd on other grounds*, 476 F.2d 977 (5th Cir. 1973).

<sup>21</sup>SINCLAIR, *supra* note 4, at 16.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 16–17.

<sup>24</sup>*Id.* at 16.

<sup>25</sup>*Id.* at 19.

<sup>26</sup>*Id.* at 18–20.

<sup>27</sup>*Id.* at 19.

rely on prior cases based on societal values in that particular domain.<sup>28</sup> Thus, prior cases are not binding on the court: they can be digested or rejected, or one can substitute another reason for it.<sup>29</sup>

On the other hand, the most commonly stated rule today is that the “plain meaning” of the statute is to control. There seems to be no dispute with this principle. The court’s job is to effectuate the legislative intent in applying a statute.<sup>30</sup> The plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, the court cannot base its interpretation on any other method or source.<sup>31</sup> Thus, it is critical that the lawyer and judge understand what context he or she is in when arguing what law should apply to a particular case. To argue what the law *should be* or *could be*, and that in its present form it is *wrong*, is a totally inappropriate argument in establishing the meaning of a statute. Conversely, to argue that a court is bound to follow its exact wording from a prior case, and the only question is the meaning and the breadth of those words, is also wholly inappropriate in regard to what the common law doctrine means. The reasoning of the two sets of laws is diametrically opposed. A statutory system is Euclidean and follows reasoning procedures to determine whether a statute is applicable to a particular set of facts.<sup>32</sup> The common law method is quasi-empirical, for reasoning flows upwards from the particular basic statements to general explanatory theories that can be described as “well-corroborated, but always conjectural.”<sup>33</sup>

### 1. Texas Common Law Development

The Texas Constitution retained the power of common law development in the courts.<sup>34</sup> Texas was never a British colony or an American territory, and the common law came to Texas by adoption rather than by inheritance.<sup>35</sup> The Congressional Act of January 20, 1840, simply adopted

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION § 4.2, at 38 (2002); *see also* Boykin v. State, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991) (en banc).

<sup>31</sup> BROWN & BROWN, *supra* note 30 at § 4.2, at 39.

<sup>32</sup> SINCLAIR, *supra* note 4, at 19.

<sup>33</sup> *Id.*

<sup>34</sup> TEX. CONST. art. XVI § 48; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (West 2002).

<sup>35</sup> S. Pac. Co. v. Porter, 331 S.W.2d 42, 45 (Tex. 1960).



the common law of England so far as it was consistent with the Texas Constitution and legislative enactments.<sup>36</sup> Although Texas was an independent republic in 1840, the Act was not construed as referring to the common law as applied in England in 1840, but rather to the English common law as declared by the courts of the various states of the United States.<sup>37</sup> Therefore, the common law of Texas is somewhat unique in origin, and its development has not in all respects coincided with the general course of evolution discernible throughout the United States.<sup>38</sup>

The Texas Supreme Court has held that the common law is not frozen or stagnant but evolving, and it is the duty of the court to recognize the evolution.<sup>39</sup> The judiciary has consistently made changes in the common law as the need arose in a changing society.<sup>40</sup> Courts act upon a belief that such changes in common law doctrine are required as a matter of public policy and should be based on the court's perception of the need to protect the public welfare.<sup>41</sup> It must be based on changing social standards or the increasing complexities of human relationships in today's changing society.<sup>42</sup> These policy choices made by the courts may even result in the abolishment of an established common law standard.<sup>43</sup>

However, the power of a court to mold or shape common law doctrine is not the act of legislation. In fact, a common law right is separate and distinct from a statutory provision. The Texas Constitution preserves the right to bring a common law cause of action, and a statute may not abolish or modify a common law cause of action if such a legislative decision is unreasonable or arbitrary when balanced against the purpose and basis of the statute.<sup>44</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 44–45.

<sup>39</sup> *El Chico Corp. v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987), *superseded by statute on other grounds*, Act of June 1, 1987, 70th Leg., R.S., ch. 303, 1987 Tex. Gen. Laws 1673 (current version at TEX. ALCO. BEV. CODE ANN. § 2.03 (West 2011)), *as recognized in* *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 684 (Tex. 2007); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 310 (Tex. 1983).

<sup>40</sup> *El Chico Corp.*, 732 S.W.2d at 311; *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex. 1983).

<sup>41</sup> *See* *Jacob E. Decker & Sons, Inc. v. Capps*, 164 S.W.2d 828, 829 (Tex. 1942).

<sup>42</sup> *Otis Eng'g Corp.*, 668 S.W.2d at 310.

<sup>43</sup> *See, e.g., Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 (Tex. 1978).

<sup>44</sup> *See* *Sax v. Votteler*, 648 S.W.2d 661, 664–67 (Tex. 1983).

The Texas Supreme Court is constitutionally conferred the power to make policy, to amend that policy, and if conditions require, to abolish a recognized common law policy.<sup>45</sup> Therefore, it is a proper argument before the court to argue what is “the better rule of law,” or that a policy is “outmoded and in need of reinterpretation,” or that it is necessary to “wholly reject a long standing policy of the State of Texas.” The key is that such policy arguments before a court are wholly appropriate within the province of the common law. However, if a statute constitutionally modifies the common law, the statute controls, and no argument will be entertained as to what the law *should* be.<sup>46</sup> Rather, the question simply becomes: what does the statute mean?<sup>47</sup>

### C. Legislative Power

The Texas Constitution divides the state government into three branches: legislative, executive, and judicial.<sup>48</sup> No branch may exercise the power properly invested in a coordinate branch unless the Constitution specifically provides for such sharing of power.<sup>49</sup> The power to make law is vested in the legislature, and the judiciary’s proper function is to enforce those laws as made by the legislature.<sup>50</sup>

The Texas Constitution fails to specifically define the extent of legislative power.<sup>51</sup> The first point of inquiry must be the United States Constitution to determine what, if any, restrictions were placed upon the states as sovereigns relating to the power to make law. As the United States Constitution plainly states, and as the United States Supreme Court held long ago, certain legislative powers were vested exclusively in the federal government or prohibited to be exercised by the states.<sup>52</sup> After it is determined what legislative power the states do not have at their disposal, the question remains as to what specific powers the states have in governing

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<sup>45</sup> See, e.g., *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 791 n.4 (Tex. 1967).

<sup>46</sup> See, e.g., *Tex. Workers’ Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 596 (Tex. 2000).

<sup>47</sup> See *id.*

<sup>48</sup> See generally TEX. CONST. art. III, IV, V.

<sup>49</sup> *Id.* art. II, § 1; *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2000); *Friedman v. Am. Sur. Co. of N.Y.*, 151 S.W.2d 570, 580 (Tex. 1941).

<sup>50</sup> *Cent. Educ. Agency v. Indep. Sch. Dist.*, 254 S.W.2d 357, 361 (Tex. 1953).

<sup>51</sup> See generally TEX. CONST. art. III.

<sup>52</sup> See U.S. CONST. art. VI, cl. 2, read in conjunction with art. I, §§ 8, 10; *Munn v. Illinois*, 94 U.S. 113, 123 (1876).

the lives and property of their citizens. The Tenth Amendment gives all other powers to the state or the people, but again, it does not define what power is left over for the states to exercise.<sup>53</sup> The United States Supreme Court generally answered that question in the 1876 decision of *Munn v. Illinois*.<sup>54</sup> The Court stated that when the colonies separated from Great Britain, they changed the form but not the substance of their government.<sup>55</sup> They retained for purposes of government all the powers of the British Parliament, and such power was initially vested in the state governments or retained by the people.<sup>56</sup> With the formation of a federal government, a portion of those powers previously vested in the states or the people was expressly granted to the new national government.<sup>57</sup> This grant operates as a major limitation on state powers, so that now the states possess all the powers of the Parliament of England, except those powers expressly given to the United States government or the people.<sup>58</sup>

This residual power is labeled Police Power. Police Power is defined as the ability of government to regulate the conduct of its citizens, one toward another, and the manner in which each shall use his or her own property, when such regulations become necessary for the common good.<sup>59</sup> The power is predicated on the theory that when one becomes a member of society, he or she necessarily parts with some rights and privileges that, as an individual not affected by his or her relations to others, one might retain.<sup>60</sup> Consistent with this holding, the general rule in Texas is that the legislature may exercise any power not denied it by the United States or Texas Constitutions.<sup>61</sup> The courts will not hold that the legislature has exceeded its powers unless it can point to some specific part of either constitution which denies the body the right to exercise the given power.<sup>62</sup> This power is not specific in nature but includes the general authority to

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<sup>53</sup> See generally U.S. CONST. amend. X.

<sup>54</sup> See 94 U.S. at 124.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *id.* at 125.

<sup>60</sup> See *id.* at 124–25; see also *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 465 (1937).

<sup>61</sup> *Day Land & Cattle Co. v. State*, 4 S.W. 865, 874 (Tex. 1887).

<sup>62</sup> See *Lytle v. Half*, 12 S.W. 610, 611 (Tex. 1889).

make law absent specific prohibitions.<sup>63</sup> There are limits to such power, and they are commensurate with, but not to exceed, the duty to provide for the real needs of the people and their health, safety, comfort, and convenience as consistently as may be with private rights.<sup>64</sup> As those needs of the people are extensive, various, and indefinite, the power to deal with them is likewise broad, indefinite, and impracticable of precise definition or limitation.<sup>65</sup>

Thus, the judiciary's role under the Texas Separation of Powers Provision should be one of restraint; the judiciary should not dictate to the legislature how to discharge its duty.<sup>66</sup> For when the legislature speaks on a subject not prohibited by the Constitution, the legislative action is binding on the courts.<sup>67</sup> The judiciary has held there is a strong presumption that (1) the legislature understands and correctly appreciates the needs of its own people, i.e., the factual basis for taking action and that its laws are directed to problems made manifest by experience, and (2) that the goal and its discriminations are made upon adequate grounds, i.e., the means chosen.<sup>68</sup> It is therefore not the function of the courts to judge the wisdom of a legislative enactment.<sup>69</sup>

The necessity or reasonableness of particular regulations imposed under the Police Power is a matter addressed to the legislature whose determination in the exercise of sound discretion is conclusive upon the courts.<sup>70</sup> A mere difference of opinion where reasonable minds could differ is not a sufficient basis for striking down legislation as arbitrary or unreasonable.<sup>71</sup> Absent a total lack of facts to substantiate the action taken, the only issue is whether there is a reasonable relation to a legitimate state purpose, which is presumed.<sup>72</sup> Even though one may indeed challenge the

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<sup>63</sup> *Shepherd v. San Jacinto Junior Coll. Dist.*, 363 S.W.2d 742, 743 (Tex. 1963); *Duncan v. Gabler*, 215 S.W.2d 155, 158 (Tex. 1948).

<sup>64</sup> *State v. Richards*, 301 S.W.2d 597, 602 (Tex. 1957).

<sup>65</sup> *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 943 (Tex. 1935).

<sup>66</sup> *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726 (Tex. 1995).

<sup>67</sup> *Castillo v. Canales*, 174 S.W.2d 251, 253 (Tex. 1943).

<sup>68</sup> *Tex. State Bd. of Barber Examiners v. Beaumont Barber Coll., Inc.*, 454 S.W.2d 729, 732 (Tex. 1970).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

<sup>72</sup> *State v. Spartan's Indus., Inc.*, 447 S.W.2d 407, 414 (Tex. 1969).

rationality of a statute, the burden is upon the one challenging the same.<sup>73</sup> The presumption of constitutionality causes this challenge to be very narrow in scope, and it places a heavy burden upon the contestant to show a total lack of factual basis or rationality with all presumptions directing the court to find to the contrary. Thus, the wisdom or expediency of the law is the legislature's prerogative and not the courts'.<sup>74</sup>

Simply put, the debate or issue of what the law should be is within the exclusive province of the Texas legislature absent any allegations that it violates a constitutional protection or prohibition. It is not the province of the judiciary to write the law or change the law. The proper context for such an argument is at the ballot box or by effectively lobbying the members of the Texas legislature.

#### *D. Now the Problems: Making and Raising the Baby*

The legislature gets to "make the baby," i.e., adopt the bill, with the cooperation or lack thereof of the governor.<sup>75</sup> Therefore, the legislature gets to set the "genetic code," i.e., a policy that will determine what abilities the baby will have at his or her disposal during his or her life. The only way that genetic code, i.e., the policy, can be set forth is by the use of words. Therefore, the critical focus in determining what a law requires is the determination of what the words mean. This becomes even more critical when the "father" and the "mother" will not be present as the "child" grows up. Why? Separation of powers comes into play again, for in general, issues of statutory construction are legal questions for the court to decide.<sup>76</sup>

Therefore, it is critical that the words of the statute be the focus of the inquiry, for this is the only manner in which the legislature may set forth the stated policy of the State of Texas. So why are the words so important?

[T]hey are what the legislature has voted upon and enacted. They are the standard according to which the legislators have coordinated their diverse opinions. The legislature's most straightforward authority, often prescribed in a written constitution, is to enact statutory language. A legislature

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<sup>73</sup>Robinson v. Hill, 507 S.W.2d 521, 524 (Tex. 1974); see Smith v. Davis, 426 S.W.2d 827, 831 (Tex. 1968).

<sup>74</sup>Smith, 426 S.W.2d at 831.

<sup>75</sup>TEX. CONST. art. IV § 14.

<sup>76</sup>Havlen v. McDougall, 22 S.W.3d 343, 345 (Tex. 2000).

does not have the capacity to implement its will in some other way. All this gives the statutory word a powerful claim to attention and priority. . . . [S]tatutory language is the most solid indication of what legislators were trying to do. If the mental-state intentions of legislators are important, they are most straightforwardly represented in the statutory words. This does not mean we can move easily from the words of the statute to the dominate intentions of most legislators. Because few legislators review statutory language carefully, and most may have little idea what it contains, the precise terms of any single provision may tell us rather little about what the legislature wanted; but it often remains true that no other guides to intentions are more reliable.”<sup>77</sup>

Thus, the words are our best “evidence” of what the policymakers were trying to do. For a legislature legislates by legislating, not by doing nothing, not by keeping silent.<sup>78</sup> The words used are critical. The *policy* derived must flow from those words. Unlike issues that arise at common law, it is not the function of the court to formulate the policy, to at any point question that policy, to possibly amend that policy, or even to abolish that policy. The court’s job is to discern the meaning of the policy, and again, unlike common law analysis, the focus must be exclusively or at least primarily on the words used.<sup>79</sup> Thereby, a proper, powerful, and persuasive argument as to the meaning of a statute starts with a discussion of the words used, continues with constant reference to the words chosen, and ends with an argument that interpretation is consistent with the policy as set forth in those words.<sup>80</sup>

Yet, just as a baby has tremendous potential based on abilities, talents, and raw brain power conferred upon him or her within his or her genetic code, what that baby ultimately achieves as an adult is also highly dependent upon the conditions present and the strength and wisdom of the caregivers present during his or her development. The “caregiver” aspect during the life of a statute is conferred upon the judiciary. Whether the

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<sup>77</sup> KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 36–37 (1999).

<sup>78</sup> Sanchez v. Schindler, 651 S.W.2d 249, 252 (Tex. 1983).

<sup>79</sup> See Boykin v. State, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991) (en banc).

<sup>80</sup> *Id.*

abilities, talents, and brain power of a child are recognized, cultivated, and allowed to flourish so depends upon those caregivers. Likewise, whether the policy chosen by the legislature is adequately recognized, cultivated by proper interpretation and application, and ultimately allowed to impact Texas citizenry in the manner so intended by the legislature is wholly dependent upon the judiciary's ability to recognize and properly apply the stated legislative intent.

## II. IS THE "LAW" WHAT IT PURPORTS TO BE?

### A. *Enrolled Bill Rule*

#### 1. Procedural Requirements

The Texas Constitution has a number of procedural requirements that the legislature must follow in order to adopt a valid bill,<sup>81</sup> which is then presented to the Governor.<sup>82</sup> The Texas Supreme Court has long held that a duly authenticated, approved, and enrolled bill (statute) imports absolute verity and is conclusive that the act was passed in every respect as designated by the Constitution, and no challenge may be had to invalidate the law.<sup>83</sup>

#### 2. Facial Requirements

The Texas Constitution also has a number of facial requirements in order for a bill to be lawfully enrolled.<sup>84</sup> Strict compliance is required as

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<sup>81</sup>TEX. CONST. art. III § 30 (stating that no law shall be passed except by bill and a bill cannot be amended as to change its original purpose); *id.* § 31 (stating that bills may originate in either house, except revenue bills must originate in the House of Representatives); *id.* § 37 (stating that each bill must go to committee and be reported on at least three days before adjournment); *id.* § 38 (stating that a majority of each house must adopt the bill and the bill must be signed by the presiding officer in the presence of the respective houses, publicly read, and entered into the journal); *id.* § 34 (stating that after a bill is defeated, no bill containing the same substance shall be passed).

<sup>82</sup>*Id.* art. IV § 15 (stating that every bill must be presented to the governor for his or her signature, or if vetoed, both houses must re-pass it by a two-third's vote of the members of each house).

<sup>83</sup>*Jackson v. Walker*, 49 S.W.2d 693, 694 (Tex. 1932); *Williams v. Taylor*, 19 S.W. 156, 157–58 (Tex. 1892).

<sup>84</sup>TEX. CONST. art. III, § 29 (requiring that all laws shall state: "Be it enacted by the Legislature of the State of Texas"); *id.* § 30 ("No law shall be passed, except by a bill . . ."); *id.*

demonstrated by a statute being declared void when the House Journal noted it had been signed by the presiding officer but his signature was absent from the bill itself.<sup>85</sup>

The most common facial error that was utilized by lawyers to void a law was the constitutional provision that required “the subject of each bill be expressed in the title in a manner that gives the legislature and the public reasonable notice of that subject.”<sup>86</sup> But in 1986, the people amended this section to further provide that the legislature was solely responsible for determining compliance with the rule and that a law may not be held void on the basis of an insufficient title.<sup>87</sup> The Texas Supreme Court and the Texas Court of Criminal Appeals are in agreement that this amendment prevents the judiciary from voiding a statute on the basis of an insufficient title.<sup>88</sup>

### 3. Exceptions to the General Rule

What if the facial requirements have been complied with, but one is asserting that the actual text was not the correct bill whose text was actually voted on by the legislature? The Texas Supreme Court noted that under the strict enrolled bill rule, the House and Senate Journals were not more reliable records of what occurred than the enrolled bill and no extrinsic evidence may be considered to contradict the enrolled version of the bill.<sup>89</sup>

However, the court went on to note that the enrolled bill rule was contrary to modern legal thinking which did not favor conclusive presumptions that may produce results which do not accord with fact.<sup>90</sup> The present tendency was to favor giving the enrolled version only prima facie presumptive validity, and thereby a rule must exist to avoid elevating clerical error over constitutional law.<sup>91</sup> Therefore, the court recognized a narrow exception to the enrolled bill rule that when the official legislative journals, undisputed testimony by the presiding officers of both houses, and

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§ 38 (requiring that each bill must be signed by the presiding officer).

<sup>85</sup> See *Ex parte Winslow*, 164 S.W.2d 682, 684–85 (Tex. Crim. App. 1942).

<sup>86</sup> TEX. CONST. art. III § 35(b).

<sup>87</sup> *Id.* § 35(c).

<sup>88</sup> Compare *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452 (Tex. 2000), with *Baggett v. State*, 722 S.W.2d 700, 702 (Tex. Crim. App. 1987).

<sup>89</sup> *Ass'n of Tex. Prof'l Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*



stipulations by the attorney general acting in his official capacity show that the enrolled bill signed by the governor was not the bill passed by the legislature, the law was not constitutionally enacted.<sup>92</sup>

The significance of this decision is obvious in that the “absolute verity” approach has been replaced by a prima facie proof standard for an enrolled bill. It appears that the legislative journals may be routinely viewed by the court, and most remarkably, the testimony of the presiding officers may be introduced. Will this apply to any other legislator or legislative official, and may such testimony be compelled, if not voluntary? The answers to these questions are not apparent from the court’s reasoning except that they chose to draw a “narrow exception” to the general rule.<sup>93</sup>

What is remarkable about this holding is that it allows the court to consider evidence beyond the four corners of an enrolled bill and goes far beyond the long-held minority view that has been labeled the “journal entry approach.” Under this view, the only other evidence a court should consider are the journals of the respective houses. Unless such journals contain clear and convincing evidence of constitutional non-compliance, the enrolled bill would be upheld.<sup>94</sup>

#### 4. Resolutions

It may seem unnecessary to analyze the legal effect of a resolution under the enrolled bill rule, but there has been enough confusion historically that clarity would aid us in determining what is the law that must be interpreted. The Texas Supreme Court held as early as 1851 that a resolution was not law but merely the expressed intention of the legislature.<sup>95</sup> That has been followed by two courts of appeals’ holdings that no law shall be constitutionally enacted except by bill,<sup>96</sup> and that a resolution simply is not a law, i.e., a statute.<sup>97</sup> Further, a lawfully enacted

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<sup>92</sup> *Id.* at 829–30; *see also* *Town of Fairview v. City of McKinney*, 271 S.W.3d 461, 467–68 (Tex. App.—Dallas 2008, pet. denied); *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist.*, 198 S.W.3d 300, 314 (Tex. App.—Texarkana 2006, pet. denied).

<sup>93</sup> *See Kirby*, 788 S.W.2d at 830.

<sup>94</sup> *Bezio v. Neville*, 305 A.2d 665, 668 (N.H. 1973).

<sup>95</sup> *State v. Delesdenier*, 7 Tex. 76, 96 (1851); *see also Caples v. Cole*, 102 S.W.2d 173, 176–77 (Tex. 1937).

<sup>96</sup> *Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W.2d 824, 826 (Tex. Civ. App.—San Antonio 1944, no writ).

<sup>97</sup> *Mosheim v. Rollins*, 79 S.W.2d 672, 674–75 (Tex. Civ. App.—San Antonio 1935, writ dismissed).

statute may not be amended by a resolution of the Texas legislature.<sup>98</sup> As the supreme court noted, resolutions play their part in our legislative history and are often resorted to for the purposes of expressing the will of the legislature, but they do not enact or amend the law.<sup>99</sup>

## *B. Texas Statutory Revision Program*

### 1. Its Creation and Purpose

In 1963, the Texas legislature empowered the Legislative Council<sup>100</sup> to plan and execute a permanent statutory revision program for the systematic and continuous study of the statutes of Texas and for the formal revision of statutes on a topical or code basis.<sup>101</sup> The purpose was to clarify and simplify the statutes in order to make them more accessible, understandable, and usable but not to alter the sense, meaning, or effect of those statutes.<sup>102</sup> The Legislative Council was charged with preparing and submitting to the legislature proposed “new” codes in bill form, so that they could be adopted by the legislature while simultaneously repealing each individual statute included with the new code.<sup>103</sup>

This charge was clearly a difficult one, for statutes are merely made up of words. When one adds or subtracts words in order to clarify, simplify, or reorganize various statutes, it is possible that such change, without the drafters intending to do so, would alter the sense, meaning, or effect of one or more of the previously separate, independent statutes. Yet, the legislature only vested them with the authority to organize and simplify and not change the substantive law.<sup>104</sup> So, what is the law if the deleted or added words within the new code cannot be interpreted to mean what the repealed statute clearly mandated?

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<sup>98</sup> *State Highway Dep't v. Gorham*, 162 S.W.2d 934, 937 (Tex. 1942); *Caples*, 102 S.W.2d at 176–77; *Buford v. State*, 322 S.W.2d 366, 370 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.); *Humble Oil & Ref. Co. v. State*, 104 S.W.2d 174, 185 (Tex. Civ. App.—Austin 1936, writ ref'd).

<sup>99</sup> *Caples*, 102 S.W.2d at 176.

<sup>100</sup> TEX. GOV'T CODE ANN. § 323.001 (West 2005).

<sup>101</sup> *Id.* § 323.007(a).

<sup>102</sup> *Id.* § 323.007(a)–(b).

<sup>103</sup> *Id.* § 323.007(c)(1)–(4).

<sup>104</sup> *Id.* § 323.007(a).

## 2. Its Impact on Statutory Construction

In 1999, the Texas Supreme Court held that the cardinal rule of statutory construction is that the judiciary is to give effect to the intent of the legislature.<sup>105</sup> But, general statements in enacting a code that “no substantive change in the law is intended” must be compared to the clear, specific language used in the specific sections of a statute.<sup>106</sup> If there are clear, specific words that change the prior law repealed within the code as enacted, the specific import of those words must be given effect.<sup>107</sup> Those specific, unambiguous provisions in the current code are the current law and should not be construed by a court to mean something other than what the plain words say unless there is an obvious error such as a typographical one that resulted in the omission of a word<sup>108</sup> or the application of the literal language would produce an absurd result.<sup>109</sup> This must be so, for the statutes that were repealed upon the enactment of the code simply ceased to exist, and the new law, not the old law, governs.<sup>110</sup>

The court concluded that when the specific provisions of a non-substantive codification and code as a whole were direct, unambiguous, and cannot be reconciled with prior law, the codification rather than the prior, repealed statute must be given effect.<sup>111</sup> In the final analysis, it is the legislature that adopts the codification, not the Legislative Council, and it is the legislature that specifically repeals prior enactments. The codifications enacted by the legislature are the laws of this state, not the prior repealed law.<sup>112</sup> When there is no room to interpret or construe the current law as embodying the old, the court must give full effect to the current law.<sup>113</sup> General statements of the legislative intent cannot revive repealed statutes to override the clear meaning of a new or specific codified statute.<sup>114</sup>

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<sup>105</sup> *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; see also *Tex. Workers' Comp. Comm'n v. City of Eagle Pass*, 14 S.W.3d 801, 805–06 (Tex. App.—Austin 2000, pet. denied).

<sup>108</sup> See *City of Amarillo v. Martin*, 971 S.W.2d 426, 428 n.1 (Tex. 1998).

<sup>109</sup> See *id.*; *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 135 (Tex. 1994) (Hecht, J., concurring).

<sup>110</sup> *Fleming Foods of Tex., Inc.*, 6 S.W.3d at 284.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 286 (distinguishing *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 654–55 (Tex. 1989) (per curiam), which held that a former law could trump a codification when the change of

It would appear that the strong language of the court's opinion has forever settled this issue,<sup>115</sup> but unfortunately, the very holding mandates that even though one may rely on the clear, unambiguous language of a codification or revised statute, it is necessary to (1) know of the prior law, and (2) know of the prior interpretation, if any, in order to determine if the current law is clear and unambiguous.<sup>116</sup> In 2007, the Texas Supreme Court held that when a codification contained additional language in a specific section and such words did not appear in the prior, now repealed statute, such words could be construed to not add or detract from the meaning of the prior repealed statute.<sup>117</sup> The court held absent any identifiable reason for a substantive change to have been made in the statutory provision or any extra-textual indication that one was intended or any resulting change in practice, the most reasonable construction of the new words were that they meant the same as the old, repealed words.<sup>118</sup> This caused the Third Court of Appeals to hold:

The change in the statute at issue here, however, is not the same sort of change that the court was faced with in *Fleming Foods*. Here, the change in the structure of the statute does not dictate a single construction that is so clear, unambiguous, and without absurd result that we are compelled to give it effect. Rather, the recodified statute, while conceivably subject to the construction advocated by the Plaintiffs, can be and is more reasonably construed in a

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law was non-substantive).

<sup>115</sup>In 2009, the legislature approved Senate Bill No. 2038, which expressly provided that the supreme court shall give the codification the same effect and meaning that was or would have been given a statute before its codification or revision, notwithstanding the repeal of the prior statute and regardless of any omission or change in the codified or revised statute that the Supreme Court would otherwise find to be direct, unambiguous, and irreconcilable with the prior version of the statute. *See* Tex. S.B. 2038, 81st Leg., R.S., § 2 (2009). However, Governor Perry vetoed the bill. Veto Message of Gov. Perry, Tex. S.B. 2038, 81st Leg., R.S. (2009). This was the second time a bill of such nature was passed by the legislature and vetoed by the Governor. *See* S. Comm. on State Affairs, Bill Analysis, Tex. S.B. 2038, 81st Leg., R.S. (2009). It is unclear if the legislature will continue to attempt to revert the Supreme Court's holding.

<sup>116</sup>*See Fleming Foods of Tex., Inc.*, 6 S.W.3d at 286.

<sup>117</sup>*See Energy Serv. Co. of Bowie v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 195 (Tex. 2007).

<sup>118</sup>*Id.*

more limited fashion when read as a whole with appropriate principles of statutory construction applied.<sup>119</sup>

Therefore, it is clear that to understand what the law is cannot be limited to the current, effective statute if it is reasonably subject to two or more reasonable interpretations. It is necessary for the lawyer and judge to be aware of the codification process thereby requiring one to locate the prior, now-repealed law and determine if it may have an effect on the ultimate meaning of the current law.

### III. STATUTORY CONSTRUCTION: DETERMINING THE MEANING OF A STATUTE

#### A. *The Role of the Judiciary Is To Solely Interpret the Law*

The Texas Supreme Court has made clear that the judiciary has no power to legislate.<sup>120</sup> The court must declare and enforce the law as made by the legislature without regard to the policy or wisdom thereof or the disastrous or mischievous result it may entail.<sup>121</sup> So long as the power is reasonably exercised, no other branch may interfere therewith. Ordinarily, the necessity or reasonableness of regulations or prohibitions is left to the discretion of the legislature whose determination is conclusive upon the courts.<sup>122</sup> The court may not suspend laws or supervise and direct the manner and method of enforcement by the appropriate officers of the

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<sup>119</sup>Farmers Tex. Cnty. Mut. Ins. Co. v. Romo, 250 S.W.3d 527, 539 (Tex. App.—Austin 2008, no pet.).

<sup>120</sup>Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 847 (Tex. 2009); Garcia v. Tex. Instruments, Inc., 610 S.W.2d 456, 462 (Tex. 1980); Simmons v. Arnim, 220 S.W. 66, 70 (Tex. 1920).

<sup>121</sup>TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011); *In re Smith*, 333 S.W.3d 582, 586 (Tex. 2011); Exxon Corp. v. Emerald Oil & Gas Co., 331 S.W.3d 419, 425 (Tex. 2010); MCI Sales & Serv., Inc. v. Hinton, 329 S.W.3d 475, 483 (Tex. 2010); Fresh Coat, Inc. v. K-2, Inc., 318 S.W.3d 893, 901 (Tex. 2010); City of Dallas v. Abbott, 304 S.W.3d 380, 387 (Tex. 2010); *Harris Cnty. Hosp. Dist.*, 283 S.W.3d at 847; Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc., 251 S.W.3d 481, 483 (Tex. 2008); 20801, Inc. v. Parker, 249 S.W.3d 392, 396 (Tex. 2008); City of Rockwall v. Hughes, 246 S.W.3d 621, 629 (Tex. 2008); Mid-Century Ins. Co. of Tex. v. Ademaj, 243 S.W.3d 618, 621 (Tex. 2007); Bd. of Ins. Comm'rs v. Guardian Life Ins. Co. of Tex., 180 S.W.2d 906, 909 (Tex. 1944).

<sup>122</sup>Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283, 292 (Tex. 2010); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 726 (Tex. 1995); State v. Sw. Bell Tel. Co., 526 S.W.2d 526, 529 (Tex. 1975); Castillo v. Canales, 174 S.W.2d 251, 253 (Tex. 1943); see *supra* note 67 and accompanying text.

executive department.<sup>123</sup> Finally, although a court is bound to read a statute as a whole, it is limited to the facts presented in the case. Any determination regarding an issue not directly before it will result in the court issuing an advisory opinion, which is prohibited.<sup>124</sup>

Statutory interpretation is a judicial power and is thereby a question of law which the judiciary determines *de novo* at every level of the judicial system.<sup>125</sup> However, the courts are not allowed to substitute their judgment for that of the legislature.<sup>126</sup> For it is solely the court's role to interpret the statute and not to legislate.<sup>127</sup>

## B. Canons of Statutory Construction

### 1. Judicial Canons of Statutory Construction

Most jurisdictions treat a “canon of construction” as a mere custom not having the force of law.<sup>128</sup> On the other hand, the definition of a “rule” in the law is “[g]enerally, an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.”<sup>129</sup> However, if one seeks the legal definition of a “rule of construction,” one is simply referred to the definition of a “canon of construction.”<sup>130</sup> The Texas judiciary use the terms interchangeably.<sup>131</sup> As established, *supra*, the judiciary views canons as not binding law but as

<sup>123</sup> *State v. Ferguson*, 125 S.W.2d 272, 276 (Tex. 1939).

<sup>124</sup> AEP Tex. N. Co. v. SPA Pipe, Inc., No. 03-06-00122-CV, 2008 WL 5210919, at \*9 n.8 (Tex. App.—Austin Dec. 12, 2008, pet. *dism'd*) (memo op.).

<sup>125</sup> *In re Smith*, 333 S.W.3d at 585; *MCI Sales & Serv., Inc.*, 329 S.W.3d at 500; HCBeck, Ltd. v. Rice, 284 S.W.3d 349, 352 (Tex. 2009); *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008); *City of Rockwall*, 246 S.W.3d at 625; *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007); *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *In re Forlenza*, 140 S.W.3d 373, 376 (Tex. 2004); *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 529 (Tex. 2002); *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002); *In re Canales*, 52 S.W.3d 698, 701 (Tex. 2001); *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

<sup>126</sup> *In re Dulin's Estate*, 244 S.W.2d 242, 244 (Tex. Civ. App.—Galveston 1951, no writ).

<sup>127</sup> *Ex parte Salter*, 452 S.W.2d 711, 712–13 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ *ref'd*).

<sup>128</sup> BLACK'S LAW DICTIONARY 234 (9th ed. 2009).

<sup>129</sup> *Id.* at 1446.

<sup>130</sup> *Id.* at 1448.

<sup>131</sup> *E.g., compare Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010), with *In re Canales*, 52 S.W.3d at 702.

merely guides or aids to determine the meaning of the law.<sup>132</sup> They are not ends in themselves, but they merely provide guideposts in determining legislative intent.<sup>133</sup> They are developed by the judiciary as simply a “by-product” of stare decisis and precedent, i.e., if the court holds a certain rationale or rule of thumb to resolve an ambiguity as to the legislative intent and in another statute the same issue arises, stare decisis and precedent hold; same issue equals same result and same rationale.<sup>134</sup> In other words, as the Texas judiciary has noted, the canons are created by a common law method.<sup>135</sup> Thus, to aid clarity of understanding, use of the phrase “canon of construction” more aptly describes the use of these principles.

## 2. Statutory Canons

However, not all canons have the same birthright, for the Texas legislature has seen fit to adopt two statutes that seemingly govern the judiciary when they construe a Texas statute: (1) the Code Construction Act,<sup>136</sup> and (2) the Construction of Laws Act.<sup>137</sup> The former applies to each code adopted under the state’s continuing statutory revision program;<sup>138</sup> the amendment, repeal, and reenactment of such a code; the repeal of a statute by a code; and each rule adopted under a code.<sup>139</sup> The latter applies to all civil statutes.<sup>140</sup>

The Texas Supreme Court has held specifically as to the Code Construction Act that even though it is a statute, by its own terms, it is simply an aid and a guide to construing codes.<sup>141</sup> Therefore, that Act is not designed and should not be construed to engraft substantive provisions onto subsequently enacted legislation when the language, meaning, and interpretation of such legislation are, standing alone, indisputably clear. Thereby, that Act does not provide rules of substantive law that become a

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<sup>132</sup> See *supra* notes 10–15 and accompanying text.

<sup>133</sup> *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992).

<sup>134</sup> See, e.g., *Neal v. United States*, 516 U.S. 284, 289–90 (1996).

<sup>135</sup> *United Servs. Auto. Ass’n v. Strayhorn*, 124 S.W.3d 722, 729 n.6 (Tex. App.—Austin 2003, pet. denied).

<sup>136</sup> TEX. GOV’T CODE ANN. § 311.001 (West 2005).

<sup>137</sup> *Id.* § 312.001.

<sup>138</sup> See *supra* notes 100–104 and accompanying text.

<sup>139</sup> TEX. GOV’T CODE ANN. § 311.002.

<sup>140</sup> *Id.* § 312.001.

<sup>141</sup> *Thiel v. Harris Cnty. Democratic Exec. Comm.*, 534 S.W.2d 891, 894 (Tex. 1976) (describing what is currently TEX. GOV’T CODE ANN. § 311.003).

part of the subsequently enacted legislation, but it is merely a set of principles of construction that are necessarily subordinate to the plain intent of the legislature as manifested by the clear wording of the statute.<sup>142</sup>

Even though the Construction of Laws Act merely states it “applies” to the construction of all civil laws,<sup>143</sup> there is no reason for the Texas Supreme Court to hold its binding nature to vary at all from the Code Construction Act. In fact, as will be established *infra*, most of the canons set forth in the statute are merely statutory codifications of long-established judicial canons. Thus, the legislature is merely indicating approval of and acknowledging the existence of judicial canons, which also implies the legislature understands that they are mere guides to determining the legislative intent by the judiciary. Thus, these statutes merely fulfill a canon that has been developed by the federal judiciary that a legislature is presumed to legislate with knowledge of the basic canons of construction.<sup>144</sup> It is anticipated that the Texas Supreme Court would so hold if it was ever asserted the Construction of Laws Act was binding upon the judiciary.

*a. Applicability of the Code Construction Act—Civil and Criminal Laws*

As was established *supra*, the Construction of Laws Act applies to all civil statutes.<sup>145</sup> However, the Code Construction Act only applies to codes, and the amendment or repeal thereof, enacted pursuant to the state’s Continuing Statutory Revision Program as explained *supra*.<sup>146</sup> Merely because a statute is entitled a “code,” however, does not render it subject to the Code Construction Act.<sup>147</sup> To aid the practitioner, a code enacted pursuant to the Revision Program includes a statement to that effect in the introduction to the code, and routinely, the codified statutes also include the section expressly providing for the applicability of the Code Construction Act to the entire code.<sup>148</sup>

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<sup>142</sup> *Thiel*, 534 S.W.2d at 894.

<sup>143</sup> See TEX. GOV’T CODE ANN. § 312.001.

<sup>144</sup> See *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991).

<sup>145</sup> TEX. GOV’T CODE ANN. § 312.001.

<sup>146</sup> See *supra* Part II.B.2.

<sup>147</sup> See *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 205 (Tex. 2002); *Knight v. Int’l Harvester Credit Corp.*, 627 S.W.2d 382, 385 (Tex. 1982); *Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198, 199 n.1 (Tex. 1981).

<sup>148</sup> *Robbins Chevrolet Co. v. Motor Vehicle Bd.*, 989 S.W.2d 865, 867 (Tex. App.—Austin 1999, pet. denied).



There appears to be one exception as to the applicability of the Code Construction Act being only applicable to codes adopted under the Statutory Revision Program.<sup>149</sup> In 1968, the Texas Court of Criminal Appeals held that even though the Code of Criminal Procedure was not a code adopted pursuant to the Statutory Revision Program, the Code Construction Act was held to be applicable to “each amendment, repeal, revision and reenactment of any provision of the Code of Criminal Procedure enacted by the 60th or any subsequent Legislature.”<sup>150</sup> The Austin Court of Appeals has noted that its applicability was not at issue on appeal in that case and that such order was dicta.<sup>151</sup> Yet, the Texas Supreme Court, citing the Texas Court of Criminal Appeals’ opinion, did in fact hold “[t]he Code Construction Act controls when interpreting the Code of Criminal Procedure.”<sup>152</sup>

The Texas Supreme Court generally follows the construction given by the Court of Criminal Appeals to a criminal statute.<sup>153</sup> In its most recent statements to that effect, the Texas Court of Criminal Appeals has held that the Code Construction Act applies to the Code of Criminal Procedure, at least to the extent it has been amended or reenacted by the 60th or subsequent legislature.<sup>154</sup>

### C. *The Statute Is Clear and Unambiguous*

It has been established that in order for the judiciary to uphold legislative supremacy in determining what the law of the jurisdiction will be and to uphold the concept of a rule of law jurisdiction, a law in order to be a valid law must give reasonable notice to its citizens of what is prohibited or allowed before they act, and the judiciary must be bound by the clear and unambiguous language of the statute.<sup>155</sup> In addition, regardless of what construction theory a judge or court utilizes to determine the legislative intent, the plain meaning of the statutory language is presumed to be what

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<sup>149</sup> See *Barbee v. State*, 432 S.W.2d 78, 82 (Tex. Crim. App. 1968).

<sup>150</sup> *Id.*

<sup>151</sup> *Robbins Chevrolet Co.*, 989 S.W.2d at 868.

<sup>152</sup> *Harris Cnty. Dist. Att’y’s Office v. J.T.S.*, 807 S.W.2d 572, 573 (Tex. 1991).

<sup>153</sup> *Shrader v. Ritchey*, 309 S.W.2d 812, 814 (Tex. 1958).

<sup>154</sup> *Ex parte Reynoso*, 257 S.W.3d 715, 724 n.7 (Tex. Crim. App. 2008); *Ex parte Ruthart*, 980 S.W.2d 469, 472 n.4 (Tex. Crim. App. 1998); *Ex parte Torres*, 943 S.W.2d 469, 473 n.5 (Tex. Crim. App. 1997); *Postell v. State*, 693 S.W.2d 462, 464 (Tex. Crim. App. 1985) (en banc).

<sup>155</sup> See *supra* note 77 and accompanying text.

the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source.<sup>156</sup>

The Texas judiciary wholeheartedly agrees with this analysis by stating that the resolution of an issue of statutory construction must begin with an analysis of the statute. If the disputed statute is clear and unambiguous, extrinsic aids and canons of construction are inappropriate, and the statute should be given its common, everyday meaning.<sup>157</sup> For it is the duty of the courts to construe a law as written and, if possible, ascertain its intention from the language used and not look for extraneous reasons to be used as a basis for reading into law an intention not expressed or intended to be expressed therein.<sup>158</sup>

However, is it not true that if the judges determine the words are clear and unambiguous, but not all words in the statute are defined, the court is actually “filling in” what they believe those words in fact mean? If they are, can they validate that meaning by referring to dictionaries? If so, are they not going beyond the actual statute itself?

The Texas Supreme Court and the United States Supreme Court have never directly discussed this issue within an opinion, but when holding a

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<sup>156</sup> See *supra* note 76 and accompanying text.

<sup>157</sup> *In re Smith*, 333 S.W.3d 582, 586 (Tex. 2011); *Swearingen v. State*, 303 S.W.3d 728, 732 (Tex. Crim. App. 2010); *Murray v. State*, 302 S.W.3d 874, 877 (Tex. Crim. App. 2009); *Energry Gulf State, Inc. v. Summers*, 282 S.W.3d 433, 437–38 (Tex. 2009); *Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, 251 S.W.3d 481, 483 (Tex. 2008); *Nationwide Ins. Co. v. Elchehimi*, 249 S.W.3d 430, 435 (Tex. 2008); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008); *In re Tex. Dep’t of Family & Protective Servs.*, 210 S.W.3d 609, 612 (Tex. 2006); *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex. 2006); *Blue Cross Blue Shield of Tex. v. Duenez*, 201 S.W.3d 674, 675–76 (Tex. 2006); *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *City of Houston v. Clark*, 197 S.W.3d 314, 318–19 (Tex. 2006); *Powell v. Stover*, 165 S.W.3d 322, 326 (Tex. 2005); *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001); *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001); *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 486–87 (Tex. 2001); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 479 (Tex. 2001); *Cail v. Serv. Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983); *Minton v. Frank*, 545 S.W.2d 442, 445 (Tex. 1976); *Calvert v. British-Am. Oil Producing Co.*, 397 S.W.2d 839, 842 (Tex. 1966).

<sup>158</sup> *In re Smith*, 333 S.W.3d at 586; *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 500–01 (Tex. 2010); *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010); *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009); *Harris Cnty. Hosp. Dist. v. Tomball Reg’l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009); *HCBeck Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex. 2009); *Energry Gulf States, Inc.*, 282 S.W.3d at 437; *First Am. Title Ins. Co. v. Combs*, 258 S.W. 3d 627, 631–32 (Tex. 2008); *FKM P’ship v. Bd. of Regents of the Univ. of Hous. Sys.*, 255 S.W.3d 619, 633 (Tex. 2008); *Owens & Minor, Inc.*, 251 S.W.3d at 483; *Hughes*, 246 S.W.3d at 626; *United Servs. Auto. Ass’n v. Brite*, 215 S.W.3d 400, 403 (Tex. 2007).

statute to be clear and unambiguous, both courts have defined the term by the use of a Webster's dictionary.<sup>159</sup> However, a very prominent circuit court, the Federal Circuit, has held that the plain meaning of a statute is to be ascertained by using standard dictionaries in effect at the time of the enactment.<sup>160</sup> In a series of cases, the Fourth, Seventh, Ninth, and Eleventh Circuits have held that the plain meaning of a statute controls and that it is determined by the common practice of consulting dictionary definitions to clarify their ordinary meaning.<sup>161</sup> Are the courts bound by the definitions or a particular one? As the Ninth Circuit has said, the answer is "no," for the court has said it does not read the dictionary literally, but will ignore "obviously" irrelevant definitions therein.<sup>162</sup>

The Texas Court of Criminal Appeals has weighed in on this issue as recently as 2009, stating that when the court is attempting to discern the fair, objective meaning of a statute, it may consult dictionaries.<sup>163</sup> The Court of Criminal Appeals has elaborated on the use of dictionaries by stating that dictionary definitions of words contained in statutory language are part of the plain meaning analysis that a court conducts to determine whether or not a statute is ambiguous.<sup>164</sup> The court has been challenged that the use of dictionaries is wrong due to the fact that virtually every word in the English language has more than one definition.<sup>165</sup> The court replied that argument was mistaken, for that presumed that a dictionary definition was the only tool utilized by the court in a plain meaning analysis.<sup>166</sup> The court stated that in addition to definitions, a plain meaning must include reading words or phrases in context and construing them in accordance with

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<sup>159</sup> See, e.g., *United States v. Rodgers*, 466 U.S. 475, 479 (1984); *Powell*, 165 S.W.3d at 326.

<sup>160</sup> *McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008); *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1353 (Fed. Cir. 2005).

<sup>161</sup> *United States v. Banks*, 556 F.3d 967, 978–79 (9th Cir. 2009); *United States v. TRW Rifle*, 447 F.3d 686, 690 (9th Cir. 2006); *Cler v. Ill. Educ. Ass'n*, 423 F.3d 726, 731 (7th Cir. 2005); *United States v. Carter*, 421 F.3d 909, 912–13 (9th Cir. 2005); *Cleveland v. City of Los Angeles*, 420 F.3d 981, 989 (9th Cir. 2005); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004); *United States v. Sherburne*, 249 F.3d 1121, 1126 (9th Cir. 2001); *In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000); *Sanders v. Jackson*, 209 F.3d 998, 1000 (7th Cir. 2000); *United States v. Gilbert*, 198 F.3d 1293, 1298–99 (11th Cir. 1999).

<sup>162</sup> See *TRW Rifle*, 447 F.3d at 690; *Carter*, 421 F.3d at 912–13.

<sup>163</sup> *Ramos v. State*, 303 S.W.3d 302, 306 (Tex. Crim. App. 2009); *Ex parte Rieck*, 144 S.W.3d 510, 512 (Tex. Crim. App. 2004).

<sup>164</sup> *Ex parte Rieck*, 144 S.W.3d at 512.

<sup>165</sup> *Lane v. State*, 933 S.W.2d 504, 515 n.12 (Tex. Crim. App. 1996) (en banc).

<sup>166</sup> *Id.*

the rules of grammar.<sup>167</sup> For to reject the use of dictionaries would relegate plain meaning analysis of statutory language to the subjective impression of appellate judges with no standards to guide interpretation.<sup>168</sup>

The Court of Criminal Appeals brings to the light of day what is rarely discussed by the judiciary in their analysis under the plain meaning rule. It is normally merely stated, as set forth *supra*,<sup>169</sup> that if the statute is clear and unambiguous, i.e., we understand its plain meaning, then the use of extrinsic aids and canons of construction are inappropriate. However, half of that statement is clearly wrong, and the judiciary should outright admit it and stop confusing practitioners making arguments before the various courts of the judiciary.

What all of these decisions are saying is that the court will use canons of construction that focus on the language of the statute that do not utilize extrinsic sources. The reason they do is that they are reading the statute to discern its meaning from the words used, and the canons applicable, for the most part, are a logical, common sense, everyday reading of the words chosen or not chosen by the legislature.<sup>170</sup> Thus, as indicated, the courts will always utilize the judicial canons and statutory canons to determine the ordinary meaning of the words utilized by the legislature.<sup>171</sup> In addition, if it is apparent from the text that the legislature intended a more precise or technical meaning, that meaning will be used.<sup>172</sup> Recently, the Texas Supreme Court held that the legislature clearly intended the ordinary legal meaning of a term in a plain meaning analysis.<sup>173</sup> In addition, the court has held that if the statutory text actually defines the term, the court is bound by that definition.<sup>174</sup>

As to the use of canons of construction, it does not stop with definitions and their dictionary meanings.<sup>175</sup> If the court is bound by the legislative

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *supra* notes 155–158 and accompanying text.

<sup>170</sup> *Boykin v. State*, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991) (en banc).

<sup>171</sup> *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011); see also TEX. GOV'T CODE ANN. §§ 311.011(a), 312.002(a) (West 2005).

<sup>172</sup> *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439; *In re Hall*, 286 S.W.3d 925, 929 (Tex. 2009); see also TEX. GOV'T CODE ANN. §§ 311.011(b), 312.002(b).

<sup>173</sup> *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437–38 (Tex. 2009).

<sup>174</sup> *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439; *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002).

<sup>175</sup> See *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439.

intent of the plain meaning of the whole statute, a fundamental canon applies that each word, phrase, sentence, section, etc., must be construed in light of the statute as a whole.<sup>176</sup> Consistent with the cardinal rule of relying on the words, the court must consider the canon that the entire statute is intended to be effective, and therefore the court should not read any language to be pointless or a nullity.<sup>177</sup> Further, in a statute dealing with words grouped together, all those words should be given a related meaning.<sup>178</sup> In addition, the express mention or enumeration of one person, thing, consequence, or class is the equivalent to an express exclusion of all others,<sup>179</sup> and when the legislature has carefully employed a term in one section of a statute and excluded it within another, it should not be implied where excluded.<sup>180</sup> All of these canons cannot but help to be used by the court when reading a statute and discerning the plain meaning of the statute.

Finally, the court will solely focus on the law as written if a just and reasonable and not an absurd result will be reached;<sup>181</sup> thereby, the court will read the statutes as adopted to be feasible in execution and not a useless act.<sup>182</sup> Therefore, the fundamental rule should be stated that a statute is clear and unambiguous or has a plain meaning when (1) all words have one reasonable, ordinary, technical, or legal meaning depending on the context and with the aid of and the use of relevant dictionaries; (2) when solely applying the canons of construction relating to the common sense use and meaning of the words, phrases, and sentences within the statute; and (3) there is only one reasonable interpretation of the statute's meaning that renders the entire statute to be effective, thereby only mandating rights,

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<sup>176</sup> *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439; *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010); *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009); *see also* TEX. GOV'T CODE ANN. § 311.021(2).

<sup>177</sup> *Leordeanu v. Am. Protection Ins. Co.*, 330 S.W.3d 239, 248 n.35 (Tex. 2010); *see also* TEX. GOV'T CODE ANN. § 311.021(2).

<sup>178</sup> *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003).

<sup>179</sup> *Johnson v. Second Injury Fund*, 688 S.W.2d 107, 108–09 (Tex. 1985).

<sup>180</sup> *Brown v. De La Cruz*, 156 S.W.3d 560, 568 (Tex. 2004).

<sup>181</sup> *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439; *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010); *Tex. Dep't of Prot. & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004); *Fleming Foods of Tex., Inc., v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999); *see also* TEX. GOV'T CODE ANN. § 311.021(3); *Boykin v. State*, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991) (en banc).

<sup>182</sup> TEX. GOV'T CODE ANN. § 311.021(4); *In re Mo. Pac. R.R. Co.*, 998 S.W.2d 212, 216 (Tex. 1999).

duties, obligations, and privileges that are feasible of execution.<sup>183</sup> Such a statement is a mouthful and is not easy to recite, but it actually reflects what the court is doing when finding that a statute is clear and unambiguous.

Understanding that the clear and unambiguous rule or the plain meaning rule is in fact a more tedious analysis than how it is stated has caused Justice Hecht of the Texas Supreme Court to possibly throw the baby out with the bath water.<sup>184</sup> He states:

I fear the phrase “plain language” has been overworked to the point of exhaustion. It has appeared in published Texas cases more often in the past decade than in the prior fifteen, usually as the basis for resolving a dispute over meaning, though it can hardly be said that such prevalence of plain language is increasing, let alone exponentially. I detect no warning in the power of the curse at Babel. To the contrary, more and more this Court is called upon to construe statutes which opposing parties insist are unambiguous and mean very different things. A dispute over meaning does not render a text ambiguous; many disputes lack substance. But when language is subject to more than one reasonable interpretation, it is ambiguous. That is the plain meaning of ambiguous. Of course, reasonable people will sometimes disagree about what reasonable people can disagree about, but even so, it is difficult to maintain that language is plain in the face of a substantial, legitimate dispute over its meaning.<sup>185</sup>

Justice Hecht hits at the heart of what makes the art of statutory construction so difficult and equally ambiguous in and of itself. Why so? It is the impossibility and inability of the judiciary to come up with a definition of what constitutes a “reasonable interpretation” of a specific statute based on specific facts related to the parties of the case. This is so critical; for if there is only one reasonable interpretation, we have a clear and unambiguous plain meaning statute and the court’s job is at an end.<sup>186</sup>

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<sup>183</sup> See *Boykin*, 818 S.W.2d at 785–86.

<sup>184</sup> *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 445–46 (Tex. 2009) (Hecht, J., concurring).

<sup>185</sup> *Id.*

<sup>186</sup> *Gonzalez v. Guilbot*, 315 S.W.3d 533, 540 (Tex. 2010).

If there is more than one reasonable interpretation, we have an ambiguity.<sup>187</sup> Oh, some say the definition is easy, and we should simply follow the advice of the Fourth Circuit that held that “the most fundamental guide to statutory construction [is] common sense.”<sup>188</sup> Justice Hecht seems to disagree in a limited fashion by asserting that sometimes reasonable people (justices) can disagree as to whether there are two or more reasonable interpretations.<sup>189</sup> However, he generally agrees that in most cases, common sense will clearly tell us if there is an ambiguity or not.<sup>190</sup>

That is when he goes to the second aspect of the heart of the “problem” with the plain meaning or clear and unambiguous rule. Per Justice Hecht, unless the justices are competent and neither prone to insincerity nor (at worst) seeking a result despite the language used, then labeling a statute or a part thereof as “plain” has no meaning.<sup>191</sup> For if “plain” has no meaning, then Justice Hecht warns, “To look beyond the plain language risks usurping authorship in the name of interpretation. Construing statutes is the judiciary’s prerogative; enacting them is the Legislature’s. To prevent trespass, this Court and others have repeatedly stressed that statutory construction must be faithful to the plain language of the text.”<sup>192</sup>

So, is the answer to simply hold that there is no such animal as an unambiguous statute? Justice Hecht states:

It seems nicer to call a statute unclear or better yet, just leave that implication. But the truth is that the meaning of statutory language is often reasonably disputed and therefore ambiguous to some extent, and resolving reasonable disputes with reason, rather than by denying

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<sup>187</sup> See, e.g., *In re Smith*, 333 S.W.3d 582, 586 (Tex. 2011); *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 356 (Tex. 2009).

<sup>188</sup> *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989).

<sup>189</sup> See *Entergy Gulf States, Inc.*, 282 S.W.3d at 446.

<sup>190</sup> See *id.*

<sup>191</sup> *Id.* at 445 (“To find plain meaning where it is missing suggests at best that the investigation is insincere or incompetent, at worst that the search is rigged, that the outcome, whatever it is, will always come out to be plain. Fidelity to plain meaning is important only if the word ‘plain’ has itself a plain meaning.”).

<sup>192</sup> *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 445 (Tex. 2009) (Hecht, J., concurring).

their reasonableness, would result in sounder jurisprudence.<sup>193</sup>

Justice Hecht then seems to outright reject the future use of the clear and unambiguous or plain meaning rule and opts to follow the legislature's suggestion in both construction statutes that it is always appropriate to go beyond the wording of the statute to examine the conditions in existence at the time of enactment, the evils intended to be used, and the good to be accomplished.<sup>194</sup>

In this Article's framework, in the academic world, Justice Hecht is arguing that the Texas judiciary should outright reject textualism by being tied down to the words alone and now seek clarity and become intentionalists by being more concerned in resolving the ambiguity by divining the overall legislative intent utilizing all available canons and external evidence of that intent.<sup>195</sup>

A valid response is to maintain faith in the judges and justices of our constitutional court system, but to better set forth a clear and unambiguous or plain meaning rule by acknowledging that the sources available are the text, dictionary definitions to reflect the meaning of the text, and the use of all canons of construction that divine the express or implied intent of the legislature as to the meaning of the statute. If this examination is done honestly and openly, it is asserted that when the analysis is complete, in 99% of the cases, it will be clear to all whether there is one or more reasonable interpretation and whether it is necessary to proceed to consider additional constructional aids beyond the language of the statute itself.

### 1. Use of the Code Construction Act and Construction of Laws Act

The analysis above demonstrates how difficult it is for the judiciary to analyze a statute simply from a strict textualist point of view. Another approach is to step back from solely discerning the intent of the legislature from the words used and to add additional considerations that may aid the court in determining if the presumed intent, as evidenced solely by the words, is in fact the true intent of the legislature.<sup>196</sup> This has been

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<sup>193</sup> *Id.* at 446.

<sup>194</sup> *See id.* at 447; *see also* TEX. GOV'T CODE ANN. §§ 311.023(1)–(7), 312.005 (West 2005).

<sup>195</sup> *See supra* notes 8–16 and accompanying text.

<sup>196</sup> *See BROWN & BROWN, supra* note 30, at § 4.4, at 42–43 (2002).



sometimes labeled a “soft plain meaning” approach to statutory construction.<sup>197</sup>

This appears to be the favored approach of none other than the Texas legislature itself. The Construction of Laws Act, applicable to all civil laws,<sup>198</sup> provides that a court shall at *all times* ascertain the legislative intent by considering the old law, the evil, and the remedy<sup>199</sup> and that all civil laws shall be liberally construed to achieve their purpose and to promote justice.<sup>200</sup> Clearly, a strict adherence to the choice of the words in the statute alone is insufficient in the lawmakers’ eyes to adequately discern the intent of the lawmakers.

The Texas legislature takes a step further as to the Code Construction Act for those codes adopted pursuant to the Statutory Revision Program.<sup>201</sup> The legislature provides:

In construing a statute, *whether or not the statute is considered ambiguous on its face*, a court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (caption), preamble and emergency provision.<sup>202</sup>

One could argue that this legislative suggestion goes beyond even a soft plain meaning approach and adopts an intentionalist approach whereby

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<sup>197</sup> *See id.*

<sup>198</sup> TEX. GOV’T CODE ANN. § 312.001.

<sup>199</sup> *Id.* § 312.005.

<sup>200</sup> *Id.* § 312.006(a).

<sup>201</sup> *See supra* notes 100–104 and accompanying text.

<sup>202</sup> TEX. GOV’T CODE ANN. § 311.023(1)–(7) (emphasis added).

discerning the legislative intent supersedes a mere plain meaning reading of the words of the statute. The Texas Supreme Court has followed the advice of the legislature and held, even when a statute is clear and unambiguous on its face, the factors set forth above will be considered.<sup>203</sup>

In contrast to Justice Hecht's concerns with the judicial manipulation of the plain meaning rule, Justice Willett has responded in kind to the use of the Code Construction Act when a text is clear and unambiguous by stating: "Mining legislative minutiae to divine legislative intent may be commonplace, but as we have held, relying on such materials is verboten where the statute itself is absolutely clear."<sup>204</sup> His concern focuses on if a court goes beyond the clear and unambiguous language everyday Texans use to guide their behavior, those words are vulnerable to challenge "by a stray comment entombed somewhere in the legislative record."<sup>205</sup> He will accept a "confined role for extra-textual aids when laws are nebulous and susceptible to varying interpretations. . . . But even then, and preferably only then, [the court should] proceed cautiously, mindful that such materials conflict as often as they converge, and that [the court's] goal is to solve, but not to create, an ambiguity."<sup>206</sup> Citing to the "clear and unambiguous or plain meaning" test discussed *supra*, Justice Willett quotes a previous decision whereby the court held:

The statute itself is what constitutes the law; it alone represents the Legislature's singular will, and it is perilous to equate an isolated remark or opinion with an authoritative, watertight index of the collective wishes of 181 individual legislators, who may have 181 different motives and reasons for voting the way they do.<sup>207</sup>

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<sup>203</sup>City of Marshall v. City of Uncertain, 206 S.W.3d 97, 105 (Tex. 2006); Marcus Cable Assocs., L.P. v. Krohn, 90 S.W.3d 697, 706–07 (Tex. 2002); *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001); Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001); Ken Petroleum Corp. v. Quantum Drilling Corp., 24 S.W.3d 344, 350 (Tex. 2000); Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 383 (Tex. 2000).

<sup>204</sup>Klein v. Hernandez, 315 S.W.3d 1, 9 (Tex. 2010) (Willett, J., concurring).

<sup>205</sup>*Id.* at 10.

<sup>206</sup>*Id.* (internal quotations omitted).

<sup>207</sup>*Id.* at 11 (quoting AIC Mgmt. v. Crews, 246 S.W.3d 640, 650 n.5 (Tex. 2008) (Willett, J., concurring)).

Justice Willett then concludes:

Materials beyond the statute matter little, actually not at all, when the statute itself decides the case. Boiled down, my view is less prudish than prudent: since it is not necessary to look further, it is necessary not to look further.<sup>208</sup>

Following the Code Construction Act's "advice" to always look at extraneous sources, even when the statute appears to be clear and unambiguous, can arguably not do great damage to the "clear and unambiguous or plain meaning" rule if it is done carefully and with the presumption that the plain meaning is the best evidence of the legislative intent that would necessarily only be rebutted by compelling "evidence" to the contrary. However, from the point of view of notice, meaning a reasonable person can rely on the plain language of the statute—there is an inherent problem in assuming the average person would know to or could consult the sources cited by the legislature. Since a judicial interpretation of a statute is an authoritative statement of what the statute meant before as well as after the issuance of such interpretation by the court,<sup>209</sup> freely consulting the sources cited by the legislature could clearly make a mockery of the concept that law must be sufficiently clear to allow a reasonable person to discern the meaning of the law before he/she/it acts. When there is a glaring ambiguity, a person is put on notice of the potential likelihood of an ultimate contest between reasonable interpretations. However, if even the court agrees the language has a plain meaning, but it is ultimately modified due to extra-statutory sources, there is clearly a notice problem.

#### *D. Canons Construing the Actual Language of the Statute*

##### 1. Introduction

As was discussed *supra*, even when reading and interpreting the actual language of a statute to discern if it is clear and unambiguous or has a plain meaning, the judiciary, without usually acknowledging such, utilizes a number of the canons of construction that focus solely on the language of a statute.<sup>210</sup> The most obvious of these canons is the use of the general

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<sup>208</sup> *Id.*; see also *Boykin v. State*, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991) (en banc).

<sup>209</sup> *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1971 n.5 (2009); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994).

<sup>210</sup> See *supra* notes 155–195 and accompanying text.

presumption that the legislature intended a word to be given its ordinary meaning.<sup>211</sup> It has been advocated that if the Texas Supreme Court decides to remain true to the “clear and unambiguous” or “plain meaning” canons, it should acknowledge that the canons related to the use of the actual language of the statute will be utilized in order to discern the exact meaning of the words in the statute. However, these canons are also clearly available when the court acknowledges that there are two possible and reasonable interpretations of the language used. When that is true, all canons of construction are available to the litigants and the court to use as guides in determining, if possible, the actual legislative intent, express or implied.<sup>212</sup>

## 2. Reading the Statute as a Whole

Many lawyers and jurists commence their analysis of a statute with this canon. As we all know, if there is an ambiguity in a statute, it will be in the form of a word, phrase, sentence, paragraph, or even a section or sections of a statute. Since all of the former are an integral part of the statute as a whole, each one must be ultimately interpreted in light of the overall purposes of the legislature in enacting the statute. Thus, a court very well begins, and most assuredly completes, its analysis of an ambiguity by making sure its resolution is consistent with or in context with the entire statute.<sup>213</sup> Stated another way, a court must always consider the statute as a whole rather than its isolated provisions<sup>214</sup> For a court should not give one

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<sup>211</sup> See *supra* notes 157–168 and accompanying text.

<sup>212</sup> *In re Smith*, 333 S.W.3d 582, 586 (Tex. 2011); *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex. 2009).

<sup>213</sup> *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011); *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010); *Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009); *20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008); *Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 19–20 (Tex. 2007); *Dall. Cnty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 872–73 (Tex. 2005); *Sultan v. Mathew*, 178 S.W.3d 747, 749 (Tex. 2005), *superseded by statute on other grounds*, Act of June 19, 2009, 81st Leg., R.S., ch. 1351, §§ 8–9, 2009 Tex. Gen. Laws 4274, 4274, *as recognized in In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 303 n.6 (Tex. 2010); *City of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442–43 (Tex. 2002); *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000); *Phillips v. Beaver*, 995 S.W.2d 655, 658 (Tex. 1999); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998); see also TEX. GOV'T CODE ANN. §§ 311.023(1), (7), 312.005 (West 2005).

<sup>214</sup> *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001); *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001); *Tex. Workers' Comp. Ins. Fund v. Del Indus.*,

provision a meaning that is out of harmony or inconsistent with the other provisions, although it might be susceptible to such a construction standing alone.<sup>215</sup> In the end, a provision must be construed in light of the entire act, its nature, its object, and its consequences.<sup>216</sup> And if there is truly an ambiguity, the provision must be construed with reference to its manifest objective, so if the language is susceptible of two constructions, one of which will carry out its objective and the other will defeat such manifest objective, it should receive the former construction.<sup>217</sup> It has been most succinctly stated by the Amarillo Court of Appeals: “But, we are prohibited from plucking words from the statute and reading them in a vacuum. Rather, authority obligates us to read and interpret the statute as a whole.”<sup>218</sup>

The court may discern this intent or manifest objective by simply reading the operative part of the statute and finding it implicitly.<sup>219</sup> In addition, the preamble may aid in ascertaining the intent of the framers.<sup>220</sup> The court is simply saying that viewing a portion of the statute in isolation or with blinders on as to the rest of its provisions, a word or phrase could mean many different things in the English language. Thus, the court must always ask if the resolution of a specific ambiguity is consistent with the overall legislative intent as evidenced by reading the statute as a whole.

### 3. Words May Not Be Interpreted as Useless or a Nullity

If one combines the fundamental principle that the judiciary is bound by the plain language of the statute and the resolution of a specific ambiguity

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Inc., 35 S.W.3d 591, 593 (Tex. 2000).

<sup>215</sup>City of Waco v. Kelley, 309 S.W.3d 536, 542 (Tex. 2010); City of Dallas v. Abbott, 304 S.W.3d 380, 384 (Tex. 2010); *In re Derzapf*, 219 S.W.3d 327, 331–32 (Tex. 2007); *Helena Chem. Co.*, 47 S.W.3d at 493; *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978).

<sup>216</sup>*HCB Beck, Ltd.*, 284 S.W.3d at 352; *Jones v. Fowler*, 969 S.W.2d 429, 432–33 (Tex. 1998); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 248–49 (Tex. 1991).

<sup>217</sup>*Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 347–48 (Tex. 1979); *Members Mut. Ins. Co. v. Hermann Hosp.*, 659 S.W.2d 132, 134 (Tex. App.—Houston [14th Dist.] 1983), *rev'd on other grounds*, 664 S.W.2d 325 (Tex. 1984).

<sup>218</sup>*Tenorio v. State*, 299 S.W.3d 461, 463 (Tex. App.—Amarillo 2009, pet. denied); *see also Ramos v. State*, 264 S.W.3d 743, 750 (Tex. App.—Houston [1st Dist.] 2008), *aff'd*, 303 S.W.3d 302 (Tex. Crim. App. 2009).

<sup>219</sup>*Citizens Bank of Bryan*, 580 S.W.2d at 347–48 (Tex. 1979).

<sup>220</sup>*Trawater v. Schaefer*, 179 S.W.2d 765, 767 (Tex. 1944); *City of Galveston v. Frederickson*, 174 S.W.2d 994, 995 (Tex. Civ. App.—Galveston 1943, no writ).

must be consistent with the statute read as a whole, these two canons are attempting to prevent a third similar canon: that it is presumed the entire statute is intended to be effective and therefore the court should not read a word, phrase, or sentence to be useless or a nullity.<sup>221</sup> For the court will give effect to all words of a statute and not treat any language as surplusage.<sup>222</sup>

The Texas Supreme Court has noted just how far they will go to uphold the sanctity of the words chosen by the legislature. The court acknowledged that it is theoretically possible that the legislature, like judges or anyone else, may make a mistake. However, they will not likely presume such occurrences, for they are bound to effectuate the language of the statute. Yet even when it appears the legislature may have made a mistake, the courts are not empowered to fix the mistake by disregarding direct and clear language that *does not create an absurdity*. Thus, it is up to the legislature to “fix” the error.<sup>223</sup> This holding makes entire sense, for if the court can in essence rewrite a statute when the legislature made a mistake in the minds of the court, neither lay persons nor lawyers can confidently rely on the words used.

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<sup>221</sup> See *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000); see also TEX. GOV'T CODE ANN. § 311.021(2) (West 2005); *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 248 (Tex. 2010); *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010); *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010); *Phillips v. Bramlett*, 288 S.W.3d 876, 880–81 (Tex. 2009); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006); *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006); *Cities of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442–43 (Tex. 2002); *City of La Porte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995), *superseded on other grounds*, Act of June 1, 2005, 79th Leg., R.S., ch. 265, § 3.322, 2005 Tex. Gen. Laws 469, 570, *as recognized in* *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54 (Tex. 2011).

<sup>222</sup> *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89–90 (Tex. 2001); *Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000); *Abrams v. Jones*, 35 S.W.3d 620, 625 (Tex. 2000); *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000); *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

<sup>223</sup> See *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637–38 (Tex. 2010); *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004).

#### 4. The Meaning of Words

##### *a. Statutory Definition*

If the legislature has specifically defined a word in the statute, the court is not concerned with the ordinary, legal, or technical meaning of the word; but it will simply apply it as defined, for those definitions are binding.<sup>224</sup> Even though it has been discussed that the canons of construction are mere guides and have no hierarchy,<sup>225</sup> this canon trumps all other canons in that it is a subset of the fundamental principle, discussed *supra*, that the court is bound by the clear and unambiguous language of the statute.<sup>226</sup> Finally, if it was not clear, when an act defines a term, the court must apply that meaning to all subsequent sections of the act, absent the legislature redefining the term in a subsequent section.<sup>227</sup> However, it would seem clear that if the legislature chose to restrict that definition to solely one or other identified sections of the statute, the court would uphold such a limitation absent an absurdity.

##### *i. Code Construction Act and Construction of Laws Act*

The Code Construction Act has sections on the general definition of words, such as what constitutes a quorum of a public body,<sup>228</sup> how to compute time,<sup>229</sup> and definitions related to key words such as may, shall, must, etc.<sup>230</sup> The Act also provides how to interpret tense, number, and gender of words,<sup>231</sup> as well as how to reference numbers and letters listed in

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<sup>224</sup>TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011); City of Waco v. Kelley, 309 S.W.3d 536, 542 (Tex. 2010); Entergy, 282 S.W.3d at 437; FKM P'ship v. Bd. of Regents, 255 S.W.3d 619, 633 (Tex. 2008); City of Rockwall v. Hughes, 246 S.W.3d 621, 625–26 (Tex. 2008); Sw. Bell Tel. Co., 92 S.W.3d at 442; Tex. Dep't of Transp. v. Needham, 82 S.W.3d 314, 318 (Tex. 2002); Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 273□74 (Tex. 1995); Tijerina v. City of Tyler, 846 S.W.2d 825, 827 (Tex. 1992); Day & Zimmerman, Inc. v. Calvert, 519 S.W.2d 106, 110 (Tex. 1975); Gifford-Hill & Co. v. State, 442 S.W.2d 320, 323 (Tex. 1969); Hurt v. Cooper, 110 S.W.2d 896, 904–05 (Tex. 1937); see also TEX. GOV'T CODE ANN. § 311.011(b).

<sup>225</sup>See *supra* notes 10–15 and accompanying text.

<sup>226</sup>See *supra* note 155 and accompanying text.

<sup>227</sup>See Hayak v. W. Steel Co., 478 S.W.2d 786, 793 (Tex. 1972).

<sup>228</sup>TEX. GOV'T CODE ANN. § 311.013.

<sup>229</sup>*Id.* § 311.014.

<sup>230</sup>*Id.* § 311.016.

<sup>231</sup>*Id.* § 311.012.

a series.<sup>232</sup> The Construction of Laws Act also provides for interpretation of tense, number, and gender of words,<sup>233</sup> a definition of a grant of authority to a board,<sup>234</sup> a general definitional section on key words,<sup>235</sup> grammar and punctuation,<sup>236</sup> what generally constitutes a quorum,<sup>237</sup> and how to calculate standard time.<sup>238</sup>

As analyzed *supra*, these Acts have been construed by the Texas Supreme Court as merely aids and guides to construing the relevant statutes.<sup>239</sup> The Acts were not designed and should not be construed to engraft substantive provisions onto subsequently enacted legislation when the language, meaning, and interpretation of such legislation is, standing alone, indisputably clear. The Acts are therefore subordinate to the plain intent of the legislature as manifested by the clear wording of the statute.<sup>240</sup>

Thus, these listed provisions of the acts do not have preclusive effect on the meaning of a word or phrase as compared to a statutory definition within the statute being interpreted. They are not binding but merely suggest the legislature's preferred understanding of the term if the particular statute's language does not provide otherwise, expressly or impliedly. The litigant should never assert that such provisions are binding on the court, as a litigant may do when the clear and unambiguous language of a statutory definition is within the specific statute.

#### *b. Ordinary or Common Meaning*

The Code Construction Act mandates that words and phrases shall be read in context and construed according to their common usage.<sup>241</sup> The Construction of Laws Act provides words shall be given their ordinary meaning.<sup>242</sup> The long-held judicial canon of construction guides the court to interpret the legislative intent, when it fails to define a word, to have its

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<sup>232</sup> *Id.* § 311.015.

<sup>233</sup> *Id.* § 312.003.

<sup>234</sup> *Id.* § 312.004.

<sup>235</sup> *Id.* § 312.011.

<sup>236</sup> *Id.* § 312.012.

<sup>237</sup> *Id.* § 312.015.

<sup>238</sup> *Id.* § 312.016.

<sup>239</sup> See *supra* notes 10–13 and accompanying text.

<sup>240</sup> Thiel v. Harris Cnty. Democratic Exec. Comm., 534 S.W.2d 891, 894. (Tex. 1976).

<sup>241</sup> TEX. GOV'T CODE ANN. § 311.011.

<sup>242</sup> *Id.* § 312.002.



ordinary meaning.<sup>243</sup> In addition, there is no constitutional requirement that a statute must define all terms used.<sup>244</sup>

These canons appear to be very straightforward, but as it was demonstrated in the analysis of how a court determines whether a statute is clear and unambiguous or has a plain meaning, the determination of the plain meaning of a word and how it is determined can be confusing, if not actually a complex task.<sup>245</sup> It has been established that if a statute defines a word or phrase, the clear legislative intent is for the courts to utilize that definition within the statute whether or not it is its ordinary meaning.<sup>246</sup> If the legislature did not define a term, the above cited canons instruct the court to use its ordinary, plain meaning and common usage.

What has rarely been discussed by the judiciary is how that determination should be made. There is no known case that actually admits that this determination, at least initially, is a finding of fact. The court has determined that the legislative intent is to utilize the ordinary, common meaning, but it did not supply within the statute actually what they believe that ordinary, common meaning to be. Thus, the burden is now placed upon the judiciary to determine what a reasonable person would consider that definition to be for someone living in the present within the United States of America (or arguably the State of Texas) who is fluent in the English language. There is no *law* that guides that determination, at least at the initial stage of the inquiry.

What this literally means is that if a single district court judge or a panel of judges on appeal hold that by merely reading the statute as a whole it is clear and unambiguous, the judges or justices have utilized their subjective knowledge of the English language to fill in the common, plain meaning of all the words in the statute that are not defined. In other words, this is not a fact-finding based on an exclusive record, where the rules of evidence apply subject to a stated burden of proof. It is the mere application of the judges' or justices' subjective knowledge of the English language.

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<sup>243</sup>TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011); FKM P'ship v. Bd. of Regents, 255 S.W.3d 619, 633 (Tex. 2008); City of Rockwall v. Hughes, 246 S.W.3d 621, 625 (Tex. 2008); Geters v. Eagle Ins. Co., 834 S.W.2d 49, 50 (Tex. 1992).

<sup>244</sup>Tex. Mut. Ins. Co. v. Vista Cmty. Med. Ctr., LLP, 275 S.W.3d 538, 554 (Tex. App.—Austin 2008, pet. denied); Rooms with a View, Inc. v. Private Nat'l Mortg. Ass'n, 7 S.W.3d 840, 845 (Tex. App.—Austin 1999, pet. denied).

<sup>245</sup>See *supra* notes 155–195 and accompanying text.

<sup>246</sup>See *supra* notes 221–227 and accompanying text.

As was explored under the plain meaning rule, the courts have in modern times admitted that a statute can be clear and unambiguous even after they utilized an evidentiary source outside the four corners of the statute—a dictionary.<sup>247</sup> In essence, the dictionary is utilized to confirm the court's use of its own personal knowledge of the English language and to establish that in fact it is the *objective* meaning of the word or phrase as used by a reasonable person. Interestingly, even though this is the use of an out-of-court statement offered to prove the truth of the matter asserted, since the issue being determined is one of law, the courts do not subject such hearsay statements to analysis under the rules of evidence to determine if it meets an exception to the hearsay rule. Nor do courts analyze whether the dictionary was created by these alleged out-of-court linguists for the purpose of demonstrating the plain, common usage of the term by reasonable persons or possibly to define terms as technically correct to properly reflect its meaning from Latin, Greek, or from whatever language the word was derived.

If there are competing dictionary definitions presented by the advocates, there are no common law decisions that inquire as to whether the definition proffered is the first, second, or third definition of the word or whether or not they are listed in decreasing percentage of general use or understanding by the reasonable person. Further, no case law inquires into the supposed accuracy of one dictionary versus another. Nor does the court consider if one advocate has only one dictionary that defines the term and the other advocate has six dictionaries supporting his or her position of the meaning of the word, as to whether the court should apply a preponderance of the evidence burden of proof to determine which evidence preponderates as to the meaning of the term. This would be required if the court handled the finding as a question of fact, but of course the determination of what a statute means is a question of law! However, *within* the question of law, the court is determining a question of fact: what does this word mean in its common usage by reasonable persons fluent in the English language within the State of Texas (or the United States) in the year \_\_\_\_?

This is further established by the fact that, as will be discussed *infra*,<sup>248</sup> if it is determined the legislature intended the medical, geological, or engineering meaning of a word, not only will the court accept "evidence" from relevant dictionaries to that effect, it will also allow expert testimony

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<sup>247</sup> See *supra* notes 155–195 and accompanying text.

<sup>248</sup> See *infra* notes 261–282 and accompanying text.

to “prove” its actual meaning.<sup>249</sup> If actual testimony is relevant in that context, there is no valid reason to deny a litigant the right to offer expert testimony by a linguist in this context as to the ordinary meaning of a word or its common usage. Further, it would be hard to find an objection to the “admissibility” of a scientifically sound poll or survey of Texas residents or United States citizens that was conducted on behalf of a litigant to establish what the reasonable person believed to be the ordinary meaning of a word or its common usage. The simple point is the ordinary meaning of an English word is clearly, at least at the initial analysis, a question of fact, and the practitioner, as well as the judge or justice, should view it from that perspective. The litigant should see it as a point of advocacy to prove one’s definition and to do so by the greatest weight of the evidence. Arguably, the judge or justice should make his or her decision as to its meaning based on the relative weight of the “evidence” before him or her.

The critical point is that at this stage of the analysis, when looking at the word in isolation, all the litigant has to prove is that such definition is a *reasonable interpretation* of the ordinary or common usage of the term. For if the court agrees that there are at least two reasonable interpretations of the word or phrase, then it has been established that there is an ambiguity in the statute, which allows the litigant and the court to go beyond the plain meaning and use all available canons of construction—including extrinsic evidence beyond the face of the statute—to ultimately determine if the legislature intended a certain ordinary meaning to apply within the statute.<sup>250</sup> As the Texas Court of Criminal Appeals acknowledged, it is not just the dictionaries that control the outcome of what the legislature intended, even when a plain meaning analysis is being done; the court must determine the appropriate meaning in light of the word or phrase in context with the remaining words in the statute and construing those words in accordance with the rules of grammar.<sup>251</sup> In addition, that court has also emphasized that whether a judge or justice is determining whether a word has a plain meaning or is truly ambiguous, absent allowing this other evidence of its common or ordinary meaning, the appellate judge would be left with his or her own subjective impression of what the word or phrase

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<sup>249</sup> State v. Laird, 38 S.W.3d 707, 712 (Tex. App.—Austin 2000, pet. ref’d); Lawyers Sur. Corp. v. Riverbend Bank, 966 S.W.2d 182, 185 (Tex. App.—Fort Worth 1998, no pet.); Lloyd A. Fry Roofing Co. v. State, 541 S.W.2d 639, 642 (Tex. Civ. App.—Dallas 1976, writ ref’d n.r.e.).

<sup>250</sup> See *supra* notes 155–156 and accompanying text.

<sup>251</sup> Ramos v. State, 303 S.W.3d 302, 306–07 (Tex. Crim. App. 2009).

meant, and this, in essence, is not a standard to guide judges or justices in their interpretation.<sup>252</sup>

The litigant should also be aware that he or she has the ability to “testify” as to a word’s or phrase’s meaning, or one could analyze it as the litigant has the right to request the court to take judicial notice of the meaning of the term. A litigant can argue, “Judge, if one intends to get home on their bicycle, no one would say, ‘I am taking my vehicle home,’” or “Judge, if one was demoted at work, they would not come home and say ‘I was fired’.” In other words, the lawyer may argue (or testify as one living in the United States and fluent in English) that a word does or does not have a certain meaning without citation to an evidentiary source.<sup>253</sup> Again however, realizing that the issue is one of fact, relying solely on an individual’s own subjective impression of what the word or phrase meant is not a standard to guide the court in its interpretation.<sup>254</sup>

Another issue may arise, but from a thorough review of the case law, it is a rare occurrence. The question may arise as to whether the legislature intended the meaning of a word as it was understood at the time of its enactment or its meaning at the time of the litigation. From a review of the case law, this issue rarely occurs due to the lack of significant change in the meaning of words over time or to the fact that laws are amended or repealed or new ones adopted to reflect the change of times that is also reflected in the definition of the term.<sup>255</sup> However, if there is a material difference in the common, technical, or legal meaning of a term from the time of enactment and at the time of the statute’s interpretation, the Texas Supreme Court has held that its meaning at the time of enactment is controlling.<sup>256</sup> From the total lack of discussion of such issues in virtually decades of case decisions, there appears to be an implicit assumption that a word’s meaning has not changed unless a litigant brings it to the attention of the court, for countless cases allow use of a dictionary published many years after the enactment of a statute without objection.

Finally, as has been alluded to throughout this discussion, no canon of construction is by its nature dispositive; canons are merely guides to

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<sup>252</sup> *Lane v. State*, 933 S.W.2d 504, 515 n.12 (Tex. Crim. App. 1996) (en banc).

<sup>253</sup> *See, e.g., Hopkins v. Spring Indep.Sch. Dist.*, 736 S.W.2d 617, 619 (Tex. 1987).

<sup>254</sup> *Lane*, 933 S.W.2d at 515 n.12.

<sup>255</sup> *See, e.g., Taylor v. Firemen’s & Policemen’s Civil Serv. Comm’n*, 616 S.W.2d 187, 189 (Tex. 1981); *Manry v. Robison*, 56 S.W.2d 438, 447 (Tex. 1932).

<sup>256</sup> *Taylor*, 616 S.W.2d at 189; *Manry*, 56 S.W.2d at 447.

determine the legislative intent, and the meaning of a statute is always determined by viewing the statute as a whole.<sup>257</sup> Thus, it is possible and has been held that a court will reject the ordinary, common meaning of a term when a different meaning is apparent from the context or when the statute's purpose indicates a more specific meaning was intended.<sup>258</sup> As was indicated at the outset of this discussion, the court merely begins its analysis of the meaning of a word, absent a statutory definition, by presuming the legislature intended its ordinary meaning.<sup>259</sup> Its actual meaning will only be clear by applying all applicable canons of construction and reading the statute as a whole.<sup>260</sup>

i. The Use of the “Unordinary” Meaning of a Word

It would be hoped that the previous section on the analysis of the ordinary meaning of a word would make this section superfluous, but the Texas Supreme Court has had to expressly make the point several times. As it was established *supra*, it is presumed that the legislature intends the ordinary meaning of a word unless it has been set forth in a statutory definition.<sup>261</sup> However, it has been further established that the dictionary definitions are not binding upon the judiciary; the presumption of the ordinary meaning is merely a presumption, and the court's ultimate decision as to the legislature's intent for the meaning of a word will be based on reading the statute as a whole as well as the use of all applicable canons of construction.<sup>262</sup> Thus, it is clear that a court may reject the ordinary meaning of an undefined term and utilize an unordinary meaning when it is clearly required from the context of the statute or the statute's purpose indicates a more specific meaning was intended.<sup>263</sup>

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<sup>257</sup> See *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

<sup>258</sup> *In re Hall*, 286 S.W.3d 925, 928–29 (Tex. 2009); *Garrett v. Borden*, 283 S.W.3d 852, 853 (Tex. 2009) (per curiam); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008).

<sup>259</sup> *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439.

<sup>260</sup> See *id.*

<sup>261</sup> See *supra* Part III.D.4.b.

<sup>262</sup> *Lane v. State*, 933 S.W.2d 504, 515 n.12 (Tex. Crim. App. 1996) (en banc).

<sup>263</sup> *In re Hall*, 286 S.W.3d at 928–29; *Garrett*, 283 S.W.3d at 853; *Hughes*, 246 S.W.3d at 625–26.

### 5. Technical Meanings of Words

If the legislature desires to use a term as defined by some art, science, trade, or profession, it can simply define the term within the statute.<sup>264</sup> As has been discussed *supra*, that definition will be binding upon the regulated persons or entities and the judiciary in interpreting the statute.<sup>265</sup> Further, if the legislature does not define the term in that manner, as has been discussed *supra*, the court will presume the legislature intended its ordinary meaning.<sup>266</sup> Therefore, the burden is clearly upon the proponent to overcome the presumption of ordinary meaning.

It goes without saying that if the ordinary meaning is the same as the technical meaning propounded, it is irrelevant which definition is used in interpreting the statute. If they differ, it also goes without saying that even though a lawyer is allowed to simply argue what is the ordinary meaning of a term or a phrase,<sup>267</sup> he or she cannot do so with a technical meaning, for the lawyer would actually be testifying as to the meaning of a term outside of his or her expertise.<sup>268</sup> Thus, the lawyer must rely on dictionary definitions that propound to assert its technical meaning, the judiciary allowing expert testimony to establish that fact, or both.<sup>269</sup>

This brings up the issue that was discussed related to establishing the ordinary meaning of a word: this is an issue of fact within the confines of an issue of law to be determined by the judge as a judge and not as a factfinder.<sup>270</sup> Even though the rules of evidence do not apply and there is no stated burden of proof, the lawyer must view this issue as a fact question and try to marshal all the relevant evidence possible to prove the technical meaning of the word. For the issue is simply: within the expertise of engineering, medicine, geology, etc., what is the technical meaning of this word in the United States (or Texas) within that art, science, trade, or profession?<sup>271</sup>

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<sup>264</sup> See *supra* notes 224–227.

<sup>265</sup> See *supra* notes 224–227 and accompanying text.

<sup>266</sup> See *supra* notes 241–244 and accompanying text.

<sup>267</sup> See *supra* notes 241–256 and accompanying text.

<sup>268</sup> See, e.g., *Lawyers Sur. Corp. v. Riverbend Bank*, 966 S.W.2d 182, 185–87 (Tex. App.—Fort Worth 1998, no pet.).

<sup>269</sup> *State v. Laird*, 38 S.W.3d 707, 712 (Tex. App.—Austin 2000, pet. ref'd); *Lawyers Sur. Corp.*, 966 S.W.2d at 185–87; *Lloyd A. Fry Roofing Co. v. State*, 541 S.W.2d 639, 642 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

<sup>270</sup> See *supra* notes 251–253 and accompanying text.

<sup>271</sup> See *Lawyers Sur. Corp.*, 966 S.W.2d at 185.

However, merely proving the unique meaning of the word does not in and of itself establish that the legislature intended to use such a meaning.<sup>272</sup> It is solely within the discretion of the court to determine if in fact the legislature intended the technical meaning.<sup>273</sup> However, if a term has acquired a technical or particular meaning, it is generally to be considered as being used in the technical sense.<sup>274</sup> That approach is clearly bolstered when the statute applies to those within the art, science, trade, or profession.<sup>275</sup> Yet, this is only one canon of construction, and after the court becomes satisfied that there is a unique meaning of the term in the art, science, trade, or profession versus its plain and ordinary meaning, it will then utilize all other applicable canons of construction to determine if in fact the technical meaning was so intended by the legislature.<sup>276</sup> For a court will not blindly follow the canon as to a technical meaning but will examine its use within the context of the statute in order to avoid an absurd result, for the courts presume the legislature intended a just and reasonable result.<sup>277</sup>

The Code Construction Act<sup>278</sup> and the Construction of Laws Act<sup>279</sup> have in essence codified the judicial canon of construction. The Code Construction Act specifically instructs the court that all words shall be given a meaning in the context of the statute.<sup>280</sup> As the above case law demonstrates, the judiciary will not decide upon a technical meaning by viewing the word in isolation but in the context of the statute as a whole. Even though the Construction of Laws Act does not say this expressly, it does instruct the court in another section to determine the legislative intent from the statute as a whole.<sup>281</sup> Further, it has been established that the

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<sup>272</sup> *E.g.*, *City of Rockwall v. Hughes*, 246 S.W.3d 621, 629 (Tex. 2008).

<sup>273</sup> *FKM P'ship v. Bd. of Regents*, 255 S.W.3d 619, 633 (Tex. 2008); *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 421 (Tex. 1995).

<sup>274</sup> *Great Am. Ins. Co.*, 908 S.W.2d at 421 (Tex. 1995); *Lawyers Sur. Corp.*, 966 S.W.2d at 185; *L.B. Foster Co. v. State*, 106 S.W.3d 194, 203 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

<sup>275</sup> *See Lloyd A. Fry Roofing Co. v. State*, 541 S.W.2d 639, 642 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

<sup>276</sup> *Hughes*, 246 S.W.3d at 629.

<sup>277</sup> *FKM P'ship*, 255 S.W.3d at 633; *Hughes*, 246 S.W.3d at 626–29.

<sup>278</sup> TEX. GOV'T CODE ANN. § 311.001 (West 2005).

<sup>279</sup> *Id.* § 312.002(b).

<sup>280</sup> *Id.* § 311.011(a).

<sup>281</sup> *See id.* § 312.005.

construction statutes are merely a guide and not binding on the courts.<sup>282</sup> Therefore, there will be no different result by the judiciary relying on its own canons or by relying on those set forth in the construction acts.

## 6. Legal Meaning of a Term

To leave no stone unturned, it must be reiterated as it was related to technical meanings of a term. If the legal meaning of a word is identical in meaning as it is used by a reasonable person in common usage, it is irrelevant if the court uses its ordinary, common meaning or its legal meaning.<sup>283</sup> Also, as discussed *supra*, if there is a question as to the legal meaning of a term, such determination is a question of fact, i.e., what is the meaning under Texas jurisprudence?<sup>284</sup> Arguably, a lawyer or litigator is qualified to actually testify under oath as to the meaning of a legal term within the jurisdiction he or she is licensed, but the courts routinely rely upon legal dictionaries instead of the argument/testimony of the lawyers.<sup>285</sup>

The United States Supreme Court has adopted a canon that if Congress uses terms that have an accumulated, settled meaning under equity or common law, the court must infer, unless the statute dictates otherwise, that Congress meant to incorporate the established meanings of the term.<sup>286</sup> Further, if Congress codifies a judicially defined concept, it is presumed, absent express statements to the contrary, that Congress intended to adopt the interpretation placed on the concept by the courts.<sup>287</sup> The Texas Supreme Court has not adopted that actual canon, but it seems to reach the same result by the use of another canon.

The Texas Supreme Court has adopted a canon related to the knowledge of the legislature: all statutes are presumed to be enacted by the legislature with full knowledge of the existing conditions of the law and with reference to it.<sup>288</sup> That has resulted in decisions holding that the legislature's use of a

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<sup>282</sup> See *supra* notes 141–142 and accompanying text.

<sup>283</sup> See *supra* notes 133–138 and accompanying text.

<sup>284</sup> See *supra* notes 247–249 and accompanying text.

<sup>285</sup> See, e.g., *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 200 (Tex. 1994); *Big H Auto Auction, Inc. v. Saenz Motors*, 665 S.W.2d 756, 758 (Tex. 1984).

<sup>286</sup> See *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402–04 (2003); *Beck v. Prupis*, 529 U.S. 494, 504 (2000); *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

<sup>287</sup> *Clay v. United States*, 537 U.S. 522, 528–29 (2003); *Porter v. Nussle*, 534 U.S. 516, 528 (2002); *Williams v. Taylor*, 529 U.S. 420, 432–34 (2000); *United States v. Wells*, 519 U.S. 482, 497 (1997); *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 813 (1989).

<sup>288</sup> *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 677 (Tex. 2007); *Am. Transitional Care Ctrs.*



term with an accepted legal meaning without a statutory definition was intended by the legislature to be given its legal meaning.<sup>289</sup> This is consistent with the Code Construction Act and the Construction of Laws Act that provide for words to be construed “in context” and that have acquired a “particular meaning,” i.e., in the law, and if a word is “connected with and used with reference” to a “particular subject matter,” i.e., the legal meaning, respectively.<sup>290</sup> Thus, if in context, the legislature is clearly using a term with its legal meaning, the judiciary will assume the legislature knew that particular meaning and intended to utilize it.

This would arguably go beyond the normal use of a technical meaning. It was established that the most common basis to assert the legislature intended the use of a technical term within a statute is when that statute is directly regulating that particular art, science, trade, or profession.<sup>291</sup> That would also be true with a statute regulating lawyers or regulating the practice of law in a particular setting. However, it goes without citation if a statute affording a person a statutory cause of action that sounds in tort and the legislature uses terms such as duty, breach of duty, causation, and compensatory damages without defining those terms, the legislature clearly intended the legal meaning of those words to be utilized by the courts in interpreting the same. This conclusion would be bolstered by an additional canon of construction that if the terms are derived from common law, the judiciary presumes the legislature did not intend to modify those concepts unless it has done so clearly or that the statute and the common law have a clear repugnance.<sup>292</sup> Therefore, merely adopting the use of legal terms by the legislature without defining them indicates a clear intent upon the legislature to utilize their legal meaning.<sup>293</sup> Yet, once again, it must be emphasized that this would be the court’s initial conclusion that might be

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of *Tex. v. Palacios*, 46 S.W.3d 873, 877–78 (Tex. 2001); *Phillips v. Beaver*, 995 S.W.2d 655, 658 (Tex. 1999); *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990); *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942).

<sup>289</sup> *McBride*, 166 S.W.2d at 128–29; *Shook v. Walden*, 304 S.W.3d 910, 917 (Tex. App.—Austin 2010, no pet.); *Nw. Austin Mun. Util. Dist. No. 1 v. City of Austin*, 274 S.W.3d 820, 828 (Tex. App.—Austin 2008, pet. denied).

<sup>290</sup> TEX. GOV’T CODE ANN. §§ 311.011, 312.002(b) (West 2005).

<sup>291</sup> See *supra* notes 264–282 and accompanying text.

<sup>292</sup> See *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 802 (Tex. 2010); see also *Cash Am. Int’l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000); *Smith v. Sewell*, 858 S.W.2d 350, 354 (Tex. 1993); *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969).

<sup>293</sup> See cases cited *supra* note 285.

modified if the legislative intent becomes clearer utilizing other canons of construction and reading the statute as a whole.<sup>294</sup>

### 7. Common, Technical, and Legal Meanings Used Throughout the Statute

It has been established that if the legislature defines a word or phrase within the statute, that definition controls throughout the statute unless the statute otherwise provides.<sup>295</sup> If the court determines the legislature intended that an undefined word or phrase has either a common, technical, or legal meaning, it is presumed that that word or phrase has the same meaning throughout the statute.<sup>296</sup> However, that is only a presumption, and if another section establishes by its context that the legislature had a clear legislative intent to the contrary, the specific legislative intent will rebut the presumption.<sup>297</sup> This analysis will be statute-specific and based upon the particular language of the various sections within the statute.<sup>298</sup> This establishes once again that it is critical that the litigant analyze the entire statute and the use of undefined words throughout it in order to understand the meaning of a term within a specific section of that statute.<sup>299</sup>

### 8. Particular Words and Phrases; Grammar

#### a. “Or” and “And”

In 1944, the Texas Supreme Court clarified the use and construction of “or” and “and” by adopting the following analysis:

Ordinarily, the words “and” and “or,” are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant, the former being strictly of a conjunctive, the latter, of a

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<sup>294</sup>Tex. Dep’t of Transp. v. Needham, 82 S.W.3d 314, 318 (Tex. 2002).

<sup>295</sup>See *supra* note 224–227 and accompanying text.

<sup>296</sup>Hayek v. W. Steel Co., 478 S.W.2d 786, 793 (Tex. 1972).

<sup>297</sup>Needham, 82 S.W.3d at 318; Paddock v. Siemoneit, 218 S.W.2d 428, 435 (Tex. 1949).

<sup>298</sup>See Beedy v. State, 194 S.W.3d 595, 601 (Tex. App.—Houston [1st Dist.] 2006), *aff’d* 250 S.W.3d 107 (Tex. Crim. App. 2008); Sheshunoff v. Sheshunoff, 172 S.W.3d 686, 696 (Tex. App.—Austin 2005, pet. denied); Cortez v. Progressive Cnty. Mut. Ins. Co., 61 S.W.3d 68, 72–74 (Tex. App.—Austin 2001, pet. granted, judgm’t vacated w.r.m.).

<sup>299</sup>See *supra* note 213 and accompanying text.

disjunctive, nature. Nevertheless, in order to effectuate the intention of the parties to an instrument, a testator, or a legislature, as the case may be, the word “and” is sometimes construed to mean “or.” This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake.<sup>300</sup>

It is clear that the burden on the proponent of an argument that “and” and “or” are interchangeable is very heavy, and the likelihood of a court so holding will be rare.<sup>301</sup> However, the San Antonio Court of Appeals felt bound to construe “and” to be an “or,” for otherwise the effect would be to wholly thwart the purpose of the statute.<sup>302</sup>

*b. “May,” “Shall,” and “Must”*

The Code Construction Act provides that: “(1) ‘[m]ay’ creates discretionary authority or grants permission or a power[;] (2) ‘[s]hall’ imposes a duty[; and] (3) ‘[m]ust’ creates or recognizes a condition precedent.”<sup>303</sup> The Texas Supreme Court has recognized that the judiciary has “not interpreted ‘must’ as often as ‘shall,’ [but that] both terms are generally recognized as mandatory, creating a duty or obligation.”<sup>304</sup> In contrast, “may” is normally interpreted to be directory in nature.<sup>305</sup>

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<sup>300</sup>Bd. of Ins. Comm’rs v. Guardian Life Ins. Co. of Tex., 180 S.W.2d 906, 908 (Tex. 1944); see *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 69 (Tex. 2008) (citing *Guardian Life Ins. Co.*, 180 S.W.2d at 908); *Robinson v. Reliable Life Ins. Co.*, 569 S.W.2d 28, 29–30 (Tex. 1978); *Bayou Pipeline Corp. v. R.R. Comm’n*, 568 S.W.2d 122, 125 (Tex. 1978).

<sup>301</sup>See *In re Brookshire Grocery Co.*, 250 S.W.3d at 69–70 (rejecting the use of “or” for “and”); *Robinson*, 569 S.W.2d at 30; *Bayou Pipeline Corp.*, 568 S.W.2d at 125 (rejecting the use of “or” for “and”); *Guardian Life Ins. Co.*, 180 S.W.2d at 908–09 (rejecting the use of “or” for “and”).

<sup>302</sup>*Bustillos v. Jacobs*, 190 S.W.3d 728, 735 (Tex. App.—San Antonio 2005, no pet.).

<sup>303</sup>TEX. GOV’T CODE ANN. § 311.016(1)–(3) (West 2005).

<sup>304</sup>*Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (citing *Wright v. Ector Cnty. Indep. Sch. Dist.*, 867 S.W.2d 863, 868 (Tex. App.—El Paso 1993, no writ)); see, e.g., *Inwood N. Homeowners’ Ass’n v. Meier*, 625 S.W.2d 742, 743 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); see also *Mitchell v. Hancock*, 196 S.W. 694, 700 (Tex. Civ. App.—Fort

The test as to whether these terms will be given their ordinary meaning was set forth in 1956 by the Texas Supreme Court, holding:

There is no absolute test by which it may be determined whether a statutory provision is mandatory or directory. The fundamental rule is to ascertain and give effect to the legislative intent. Although the word “shall” is generally construed to be mandatory, it may be and frequently is held to be merely directory. In determining whether the Legislature intended the particular provision to be mandatory or merely directory, consideration should be given to the entire act, its nature and object, and the consequences that would follow from each construction. Provisions which are not of the essence of the thing to be done, but which are included for the purpose of promoting the proper, orderly and prompt conduct of business, are not generally regarded as mandatory. If the statute directs, authorizes or commands an act to be done within a certain time, the absence of words restraining the doing thereof afterwards or stating the consequences of failure to act within the time specified, may be considered as a circumstance tending to support a directory construction.<sup>306</sup>

Thus, “shall” or “must” will be given a mandatory meaning when followed by a non-compliance penalty.<sup>307</sup> However, as stated above, the judiciary has followed the approach that the requirement of a thing to be done simply with a deadline, and no penalty stated, normally results in a determination that it is directory in nature.<sup>308</sup> Yet, one must realize that

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Worth 1917, no writ).

<sup>305</sup> See *Thomas v. Groebl*, 212 S.W.2d 625, 630–31 (Tex. 1948); see *Wright v. Ector Cnty. Indep. Sch. Dist.*, 867 S.W.2d 863, 868 (Tex. App.—1993, no writ); *Inwood N. Homeowners’ Ass’n*, 625 S.W.2d at 743.

<sup>306</sup> *Chisholm v. Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956); see *Helena Chem. Co.*, 47 S.W.3d at 494 (citing *Chisholm* with approval); *Albertson’s, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) (per curiam); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996); *Schepps v. Presbyterian Hosp. of Dall.*, 652 S.W.2d 934, 936 (Tex. 1983) (quoting *Chisholm*, 287 S.W.2d at 945).

<sup>307</sup> See *Helena Chem. Co.*, 47 S.W.3d at 493 (citing *Harris Cnty. Appraisal Dist. v. Consol. Capital Props. IV*, 795 S.W.2d 39, 41 (Tex. App.—Amarillo 1990, writ denied)).

<sup>308</sup> *Id.* at 495; *Barshop*, 925 S.W.2d at 629–30; *Schepps*, 652 S.W.2d at 936–38; *Lewis v. Jacksonville Bldg. & Loan Ass’n*, 540 S.W.2d 307, 310–11 (Tex. 1976); *Thomas*, 212 S.W.2d at

such a conclusion is not automatic, for the judiciary begins its analysis with the assumption that the ordinary meaning of “must” and “shall” is to create a duty or obligation that is mandatory.<sup>309</sup>

Finally, it should be noted that the Code Construction Act provides that “may not” imposes a prohibition and is synonymous with “shall not.”<sup>310</sup> This carries with it the restriction that the Act is not binding on the judiciary but is merely a legislative guide as to how to determine the legislature’s specific intent in a particular statute.<sup>311</sup>

*c. Tense, Number, and Gender; Reference to a Series; and Computation of Time*

The Code Construction Act<sup>312</sup> and the Construction of Laws Act<sup>313</sup> provide that the present tense includes the future tense,<sup>314</sup> as well as the singular includes the plural and vice-versa,<sup>315</sup> and the words of one gender include the other gender.<sup>316</sup> As discussed, these provisions are qualified such that these provisions are merely a guide to interpreting a specific statute and express or implied, the particular statute may be found to reject the principles based on the content and reading of that statute as a whole.<sup>317</sup>

The Code Construction Act also provides that if a statute has a series of numbers or letters, it is the general intent of the legislature to include the first and last numbers or letters within the series.<sup>318</sup> In addition, if there is a required time limit to act within a statute, the Code Construction Act provides a suggested manner of counting for days and months.<sup>319</sup>

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630–31.

<sup>309</sup> See *Helena Chem. Co.*, 47 S.W.3d at 493.

<sup>310</sup> See TEX. GOV’T CODE ANN. § 311.016(5) (West 2005).

<sup>311</sup> See *supra* notes 136–144 and accompanying text.

<sup>312</sup> TEX. GOV’T CODE ANN. §§ 311.001–.034.

<sup>313</sup> *Id.* §§ 312.001–.016.

<sup>314</sup> *Id.* §§ 311.012(a), 312.003(a) (stating in the Construction of Laws Act that the same also applies to the past tense).

<sup>315</sup> *Id.* §§ 311.012(b), 312.003(b).

<sup>316</sup> *Id.* §§ 311.012(c), 312.003(c) (stating in the Construction of Laws Act that the same also applies to neuter genders).

<sup>317</sup> See *supra* notes 136–144 and accompanying text.

<sup>318</sup> TEX. GOV’T CODE ANN. § 311.015.

<sup>319</sup> *Id.* § 311.014.

*d. Rules of Grammar and the Doctrine of Last Antecedent*

The Code Construction Act<sup>320</sup> and the Construction of Laws Act<sup>321</sup> both require that a statute be interpreted according to the rules of grammar. The Construction of Laws Act is more specific in providing that a grammatical error does not vitiate the law, for if a portion of a statute is meaningless because of a grammatical error, the words and clauses may be transposed to give the law meaning.<sup>322</sup> This Act also provides that punctuation does not control or affect the legislative intent.<sup>323</sup>

As to the use of the rules of grammar in modern times, many cases cite to the canon, but it is impossible to find a case that actually discusses a rule of grammar and its affect upon the meaning of the statute.<sup>324</sup> However, the Texas Supreme Court in 1944 held that it is often permissible to transpose words or phrases of an enactment in order to ascertain the legislative intent sought to be expressed therein.<sup>325</sup> Thereby, words and phrases may in fact be moved when it is reasonably plain the legislature inadvertently transposed a phrase in a way to isolate it from portions of the sentence that it was intended to refer.<sup>326</sup>

As to punctuation, the Texas Supreme Court, as long ago as 1888, was willing to add a comma to a statutory sentence and stated: “There is no comma after the word ‘representation’ in the [A]ct, but to so read it would render it utterly senseless. Reading it with a comma, it becomes perfectly clear and intelligible. . . .”<sup>327</sup> Likewise, the Texas Court of Criminal Appeals has held that even though punctuation in a given statute should be

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<sup>320</sup>*Id.* § 311.011(a).

<sup>321</sup>*Id.* § 312.012(a).

<sup>322</sup>*Id.*

<sup>323</sup>*Id.* § 312.012(b).

<sup>324</sup>*See* LTTTS Charter Sch., Inc. v. Palasota, 293 S.W.3d 830, 835 (Tex. App.—Dallas 2009), *rev'd*, 344 S.W.3d 378 (Tex. 2011) (per curiam); Krupa v. State, 286 S.W.3d 74, 75 (Tex. App.—Waco 2009, pet. ref'd); Roberts v. State, 278 S.W.3d 778, 790 (Tex. App.—San Antonio 2008, pet. ref'd); Stanford v. City of Lubbock, 279 S.W.3d 795, 800 (Tex. App.—Amarillo 2007, no pet.); Duncantell v. State, 230 S.W.3d 835, 843 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); Hartman v. Harris Cnty. Appraisal Dist., 251 S.W.3d 595, 599 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); King v. State, 174 S.W.3d 796, 816–17 (Tex. App.—Corpus Christi 2005, pet. ref'd); L.B. Foster Co. v. State, 106 S.W.3d 194, 203 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd); Tanner v. State, 838 S.W.2d 302, 304 (Tex. App.—El Paso 1992, no writ).

<sup>325</sup>Harris v. City of Fort Worth, 180 S.W.2d 131, 133 (Tex. 1944).

<sup>326</sup>*See id.* at 134; *see also* State v. Pioneer Oil & Ref. Co., 292 S.W. 869, 873 (Tex. Comm'n App. 1927, judgm't adopted).

<sup>327</sup>Bradstreet Co. v. Gill, 9 S.W. 753, 755 (Tex. 1888).

given effect, it should not control against the plain meaning of the language used.<sup>328</sup> This is particularly true when there is no punctuation at all.<sup>329</sup>

Consistent with considering punctuation or the lack thereof, the judiciary's canon of "the doctrine of last antecedent" provides that a qualifying phrase must be confined to the words or phrase immediately preceding it to which it may be applied without impairing the meaning of the sentence.<sup>330</sup> However, the rule is neither controlling nor inflexible, for it may be rebutted by reading the statute as a whole.<sup>331</sup> The Texas Court of Criminal Appeals has additionally noted that if a comma separates a modifying clause in a statute from the clause immediately preceding it, it is an indication that the modifying clause was intended to modify all of the preceding clauses and not only the last antecedent one.<sup>332</sup> However, another rule of construction states that "generally, a comma should precede a conjunction connecting two coordinate clauses . . . to prevent the following qualifying phrase from modifying the clause preceding the conjunction."<sup>333</sup> Yet, in the end, determining the overall intent of the legislature will supersede these canons.<sup>334</sup>

### 9. *Noscitur a Sociis* or the Associated Word Doctrine

As has been set forth *supra*, words or phrases should not be viewed or interpreted in isolation but by viewing the statute as a whole.<sup>335</sup> After viewing the word or phrase in isolation to determine its meaning, the judiciary has created a number of canons to direct the lawyer to consider other aspects of the statute. The first is the doctrine of *noscitur a sociis*, or "it is known by its associates,"<sup>336</sup> and also goes by the label of the Associated Word Doctrine; the doctrine states "that words grouped in a list should be given related meaning."<sup>337</sup> Thus, the court will interpret similar

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<sup>328</sup>Overby v. State, 242 S.W. 213, 215 (Tex. Crim. App. 1922).

<sup>329</sup>See Ludwig v. State, 931 S.W.2d 239, 241–42, 244 (Tex. Crim. App. 1996) (en banc).

<sup>330</sup>Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578, 580–81 (Tex. 2000).

<sup>331</sup>*Id.* at 580; City of Corsicana v. Willmann, 216 S.W.2d 175, 176–77 (Tex. 1949).

<sup>332</sup>*Ludwig*, 931 S.W.2d at 241.

<sup>333</sup>*Id.* at 242.

<sup>334</sup>See *id.*

<sup>335</sup>See *supra* notes 213–220 and accompanying text.

<sup>336</sup>TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 441 (Tex. 2011); Fiess v. State Farm Lloyds, 202 S.W.3d 744, 750 n.29 (Tex. 2006), *aff'd*, 472 F.3d 383 (5th Cir. 2006).

<sup>337</sup>Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 174 n.2 (Tex. 1980); see also Third Nat'l Bank in Nashville v. Impac Ltd., 432 U.S. 312, 322 (1977).

terms in a similar manner.<sup>338</sup> This is to prevent “ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.”<sup>339</sup>

This canon is only available when one or more of the words in the listing is unclear.<sup>340</sup> Each word within the listing may have a clear character that is “not to be submerged by its association,” meaning all lateral words are clear and unambiguous.<sup>341</sup> For when the meaning of words considered severally is not in doubt, and the meaning is perfectly plain, the court should simply “apply them distributively.”<sup>342</sup>

The petitioner should realize that the relationship or similarity between a group of listed words is a point of advocacy, meaning that it is up to the lawyer to argue just what are the common characteristics of the terms.<sup>343</sup> This should be guided by looking at the statute as a whole to determine the overall goal of the legislature and, specifically, what the section where the list is located is trying to achieve.<sup>344</sup> In most cases, if there is a true ambiguity in the meaning of a listed word, the court will tend to find that the legislature intended a more narrow meaning of the term rather than its broadest reasonable meaning.<sup>345</sup>

### 10. *Ejusdem Generis*

A sister or cousin to the Associated Word Doctrine is that of *ejusdem generis*.<sup>346</sup> The *ejusdem generis* canon provides that “when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation,” and thereby the general words are confined to the class and may not be used to enlarge it.<sup>347</sup>

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<sup>338</sup> See *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 441, 443–44; *Riverside Nat’l Bank*, 603 S.W.2d at 174–75.

<sup>339</sup> *Fiess*, 202 S.W.3d at 750 n.29; see *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003).

<sup>340</sup> See *Fiess*, 202 S.W.3d at 750 n.29.

<sup>341</sup> *Doyle v. State*, 148 S.W.3d 611, 614 (Tex. App.—Austin 2004, pet. ref’d).

<sup>342</sup> *Id.* at 614; see also *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519–20 (1923).

<sup>343</sup> See *Fiess*, 202 S.W.3d at 750–51; *City of San Antonio*, 111 S.W.3d at 28–30; *Riverside Nat’l Bank*, 603 S.W.2d at 174–75.

<sup>344</sup> See *Trawalter v. Schaefer*, 179 S.W.2d 765, 767 (Tex. 1944).

<sup>345</sup> See *Fiess*, 202 S.W.3d at 750–51; *City of San Antonio*, 111 S.W.3d at 28–30; *Riverside Nat’l Bank*, 603 S.W.2d at 174–75.

<sup>346</sup> See *Doyle*, 148 S.W.3d at 614.

<sup>347</sup> *State v. Fid. & Deposit Co. of Md.*, 223 S.W.3d 309, 312 (Tex. 2007) (per curiam); *Hilco*



Thereby, the specific lists are not an exclusive, exhaustive class, but the central inquiry as to the meaning of the general words is to determine what falls within the same class as those specifically listed.<sup>348</sup> So the general words should be confined to things of the same kind.<sup>349</sup> Otherwise, the legislature would have merely stated, “any building,” “any service,” “any vehicle,” or the like.<sup>350</sup> By setting forth specific examples immediately preceding this general word or phrase, it is clear that the legislature did not intend its broadest meaning.<sup>351</sup> Further, it should be obvious that the general words are not limited to the identical things listed, but to those additional persons, things, or activities of the same general kind.<sup>352</sup>

The general words following a specific listing of terms is commonly called a catchall or a more generalized description of what has preceded it in the statute.<sup>353</sup> As discussed related to the Associated Word Doctrine, it is a point of advocacy as to what are the similar characteristics of the specifically listed terms in order to define the breadth of the catchall phrase.<sup>354</sup> This determination should be guided once again by viewing the statute as a whole as to the legislature’s overall purpose or objective and in light of the specific purpose or objective of the section of the statute wherein the catchall is located.<sup>355</sup> To distinguish the Associated Word Doctrine from *ejusdem generis*, *ejusdem generis* is simply inapplicable if there are no general words in the statutory phrase that could be characterized as a “catchall.”<sup>356</sup>

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Elec. Coop. v. Midlothian Butane Gas Co., 111 S.W.3d 75, 81 (Tex. 2003); Farmers’ & Mechs. Nat’l Bank v. Hanks, 137 S.W. 1120, 1123–24 (Tex. 1911); see also Tex. Dep’t of Transp. v. York, 284 S.W.3d 844, 847 (Tex. 2009) (per curiam); Cnty. of Harris v. Eaton, 573 S.W.2d 177, 179 (Tex. 1978); Stanford v. Butler, 181 S.W.2d 269, 272 (Tex. 1944).

<sup>348</sup> *Tex. Dep’t of Transp.*, 284 S.W.3d at 847.

<sup>349</sup> *Thomas v. State*, 65 S.W.3d 38, 41 (Tex. Crim. App. 2001).

<sup>350</sup> See *Thomas v. State*, 3 S.W.3d 89, 93 (Tex. App.—Dallas 1999), *aff’d*, 65 S.W.3d 38 (Tex. Crim. App. 2001); *Carbide Int’l, Ltd. v. State*, 695 S.W.2d 653, 658 (Tex. App.—Austin 1985, no writ).

<sup>351</sup> See *Tex. Dep’t of Transp.*, 284 S.W.3d at 847.

<sup>352</sup> *Thomas*, 3 S.W.3d at 93 n.6.

<sup>353</sup> *Carbide Int’l, Ltd.*, 695 S.W.2d at 657–58.

<sup>354</sup> See *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750–51 (Tex. 2006); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28–30 (Tex. 2003); *Riverside Nat’l Bank v. Lewis*, 603 S.W.2d 169, 174–75 (Tex. 1980).

<sup>355</sup> See *Trawalter v. Schaefer*, 179 S.W.2d 765, 767 (Tex. 1944).

<sup>356</sup> *Carbide Int’l, Ltd.*, 695 S.W.2d at 657–58.

However, even with the catchall, the application of *ejusdem generis* is not automatic.<sup>357</sup> If “there are elsewhere in the text words which fairly import a different meaning,”<sup>358</sup> particularly when such words are buttressed by the fact that no reason, logic, experience, or context suggested why the legislature might have intended to narrow the scope of the words, the canon will not apply.<sup>359</sup> It must also be noted that when a litigant is attempting to utilize the doctrine of *ejusdem generis*, he or she must first establish, according to the principles set forth *supra*, the ordinary, technical, or legal meaning, if appropriate, of the general words first.<sup>360</sup> *Ejusdem generis* will not be helpful if the litigant cannot in fact establish that the person, activity, or thing falls within the general meaning of the general terms viewed in isolation.<sup>361</sup> If a human powered bicycle does not fall within the general meaning of “other motor vehicle,” then the similar characteristics of the specifically listed vehicles will not be an aid in interpretation.<sup>362</sup> Likewise, if a tent is not within the ordinary meaning of “other building,” the specific characteristics of the specifically listed buildings will be of no aid in the interpretation of the statute.<sup>363</sup>

In addition, as was discussed *supra*, the judiciary must be concerned with how a statute applying to the general public would be understood by a reasonable person reading it which ties in with the fundamental need that statutes give notice to a reasonable person what is prohibited or allowed.<sup>364</sup> It must be admitted that by the legislature using a catchall, it is telling the reasonable person and the court that there may be other persons, activities, or things that also fall within this provision, but the legislature cannot foresee them or think of them at this time.<sup>365</sup> Thus, by the court filling in

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<sup>357</sup> See *Emp’rs’ Cas. Co. v. Stewart Abstract Co.*, 17 S.W.2d 781, 782 (Tex. Comm’n App. 1929, judgm’t adopted).

<sup>358</sup> *Id.* at 782.

<sup>359</sup> *Carbide Int’l, Ltd.*, 695 S.W.2d at 658; see also *Thomas v. State*, 3 S.W.3d 89, 93 n.6 (Tex. App.—Dallas 1999), *aff’d*, 65 S.W.3d 38 (Tex. Crim. App. 2001).

<sup>360</sup> See *supra* notes 241–294 and accompanying text.

<sup>361</sup> See *Ex parte Ellis*, 279 S.W.3d 1, 24–26 (Tex. App.—Austin 2008), *aff’d*, 309 S.W.3d 71 (Tex. Crim. App. 2010).

<sup>362</sup> See, e.g., *Williams v. State*, 725 S.W.2d 258, 261 (Tex. Crim. App. 1987) (en banc).

<sup>363</sup> See, e.g., *Martin v. State*, 57 S.W.2d 1104, 1104 (Tex. Crim. App. 1933).

<sup>364</sup> TEX. CONST. art. III, § 35(b); see *supra* notes 4–7 and accompanying text.

<sup>365</sup> Cf. RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE, § 2.1, at 2–4 (14th ed. 2011) (discussing the court’s recognition that it is impossible for the legislature to predict “every detail involved in carrying out its laws . . . in a complex society” in the context of delegating rulemaking authority to agencies via enabling legislation).

the catchall, it is exercising a power very akin to legislating or rulemaking.<sup>366</sup> However, arguably it is merely an interpretation of the like or similar characteristics of the specified terms in light of the general meaning of the catchall.<sup>367</sup> With that said, a court should use caution in interpreting such catchalls to not only finally ask if it is consistent with the legislative intent, but also if a reasonable person reading this phrase could honestly foresee the inclusion or exclusion of the particular person, activity, or thing.

#### 11. If the Statute Is Very Specific v. “Including . . .”

The Texas Supreme Court has held, “It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose.”<sup>368</sup> The court noted that there are two significant benefits to reading the statute’s language literally and not reading additional language into the statute: (1) they do not risk roving the line between the judicial and legislative powers of government; and (2) they “build upon the principle that ‘ordinary citizens [should be] able “to rely on the plain language of a statute to mean what it says.””<sup>369</sup>

Therefore, the inclusion in a statute of a specific limitation excludes all others.<sup>370</sup> In addition, when specific exclusions or exceptions are set forth in the statute, the legislative intent is usually clear that no others apply.<sup>371</sup>

In contrast, when a statute uses the term “including,” the court views the legislative intent in choosing that word prior to setting forth a requirement, duty, privilege, or exception to be one of enlargement rather than a term of

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<sup>366</sup> *Cf. id.*

<sup>367</sup> *See Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003).

<sup>368</sup> *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002); *see also Kappus v. Kappus*, 284 S.W.3d 831, 835 (Tex. 2009); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 629 (Tex. 2008); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006); *Old Am. Cnty. Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111, 115 (Tex. 2004); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

<sup>369</sup> *Hughes*, 246 S.W.3d at 628.

<sup>370</sup> *Brookshire v. Hous. Indep. Sch. Dist.*, 508 S.W.2d 675, 679 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *Harris Cnty. v. Crooker*, 248 S.W. 652, 655 (Tex. 1923).

<sup>371</sup> *Unigard Sec. Ins. Co. v. Schaefer*, 572 S.W.2d 303, 307 (Tex. 1978); *see also State v. Richards*, 301 S.W.2d 597, 600 (Tex. 1957).

limitation or restriction.<sup>372</sup> For the words “includes” or “including” are regarded as being the equivalent to one another, and unless the context requires, they are never regarded as being identical to “meant,” “meaning,” or “by which is meant.”<sup>373</sup> By saying it is a term of enlargement is simply to say that what follows it is merely illustrative of what is intended to be included or excluded from the statute as the case may be.<sup>374</sup>

### 12. *Expressio Unius Est Exclusio Alterius*

A related doctrine to the one above that specific words only mean what they say and nothing else is the doctrine of *expressio unius est exclusio alterius*, which indicates that a statute’s silence can be significant.<sup>375</sup> When the legislature includes a provision in one part of a statute, but omits it in another, that may be precisely what the legislature intended.<sup>376</sup> However, the Texas Supreme Court recognizes that the legislature does not always mean to say something by silence.<sup>377</sup> It may be due to mistake, oversight, lack of consensus, implied delegation to courts or agencies, or an intent to avoid unnecessary repetition.<sup>378</sup> However, the court will begin its analysis by presuming the omission was intentional.<sup>379</sup> In other words, the court will presume that the legislature had a reason for excluding it.<sup>380</sup>

As with all canons, the doctrine is simply an aid to determine legislative intent; it will not overcome the clear meaning of the statute as a whole, and it is not an absolute rule.<sup>381</sup> It should be used simply as a rule of reason and

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<sup>372</sup> See R.R. Comm’n v. Arco Oil & Gas Co., 876 S.W.2d 473, 492 (Tex. App.—Austin 1994, writ denied), *superseded by statute on other grounds*, Act of May 30, 1999, 76th Leg., R.S., ch. 1499, § 1.11(a), sec. 2001.039, 1999 Tex. Gen. Laws 5164, 5166-67; see also Republic Ins. Co. v. Silvertown Elevators, Inc., 493 S.W.2d 748, 752 (Tex. 1973).

<sup>373</sup> Peerless Carbon Black Co. v. Sheppard, 113 S.W.2d 996, 997-98 (Tex. Civ. App.—Austin 1938, writ ref’d).

<sup>374</sup> *Id.*

<sup>375</sup> PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P’ship, 146 S.W.3d 79, 84 (Tex. 2004).

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*; see also Meritor Auto., Inc. v. Ruan Leasing Co., 44 S.W.3d 86, 90 (Tex. 2001); Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980).

<sup>380</sup> Fireman’s Fund Cnty. Mut. Ins. Co. v. Hidi, 13 S.W.3d 767, 769 (Tex. 2000) (per curiam); Laidlaw Waste Sys. v. City of Wilmer, 904 S.W.2d 656, 659 (Tex. 1995); *Baldwin*, 611 S.W.2d at 616.

<sup>381</sup> Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 895 (Tex. 2000).

logic and it should not be mechanically applied to compel an unreasonable interpretation.<sup>382</sup>

### 13. Title, Caption, Heading, Preamble, and Emergency Clause

The Code Construction Act guides the judiciary by stating that the heading of a title, chapter, subchapter, or section does not limit the meaning of the statute.<sup>383</sup> It must be recalled as discussed *supra*, that until 1986, the Texas Constitution mandated that the subject of each bill expressed in the title must provide reasonable notice to legislators and to the public.<sup>384</sup> However, the Constitution was amended in 1986 to provide that each requirement was wholly enforceable by the legislature, and the judiciary has concluded that it is no longer able to enforce the provision due to the amendment.<sup>385</sup> Therefore, prior to the amendment, it was not simply that the Texas Supreme Court held that in construing the meaning of a statute, the court ascertains the legislative intent not only by the words in the operative part of the statute, but by the title as well as the preamble and emergency clause, if any.<sup>386</sup> It was critical that the Court determine if the title gave fair notice to all of what was contained therein.<sup>387</sup> This holding makes total sense, for if a statute could be declared unconstitutional for failure to give reasonable notice, if reasonable notice is given, it must be an integral part of any analysis to determine the meaning of the words in the operative part of the statute in order to ensure the resolution of a word or phrase's meaning is consistent with the general notice of the title.

Yet with demise of the importance of the title, the judiciary has not wholly ignored that provision as well as the preamble, subheadings, and emergency clauses. But, it must be clearly understood that these aspects of the statute are not an operative part of the statute itself; therefore, consistent

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<sup>382</sup>Mid-Century Ins. Co. of Tex. v. Kidd, 997 S.W.2d 265, 274 (Tex. 1999).

<sup>383</sup>TEX. GOV'T CODE ANN. § 311.024 (West 2005).

<sup>384</sup>TEX. CONST. art. III, § 35 (amended 1986). The 1876 version read: "SEC. 35. No bill (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof, as shall not be so expressed." Act of May 22, 1985, 69th Leg., R.S. S.J. Res. 33, § 1, 1985 Tex. Gen. Laws 3363.

<sup>385</sup>TEX. CONST. art. III, § 35(b).

<sup>386</sup>Trawalter v. Schaefer, 179 S.W.2d 765, 767 (Tex. 1944).

<sup>387</sup>See *id.*; see also Sw. Bell Tel. Co. v. Hous. Indep. Sch. Dist., 397 S.W.2d 419, 421–22 (Tex. 1965).

with the Code Construction Act, the Texas judiciary has adopted a canon that the title does not limit or expand the meaning of the statute.<sup>388</sup> A more direct manner of stating this principle is that “the title of a statute is not controlling over the unambiguous language which appears in the body of the statute.”<sup>389</sup> However, if the statute is ambiguous, the judiciary will consider the title, preamble, subtitles, and emergency provision to aid in determining the legislative intent in resolving the ambiguity.<sup>390</sup>

#### 14. Conflict Within a Statute

This canon deals with a conflict within a statute, and it does not concern the issue of when two separate statutes adopted by the same legislature conflict, which will be discussed *infra*.<sup>391</sup> The first and most obvious point is that a court should not interpret a provision of the statute in isolation to thereby cause a conflict with another provision within the same statute.<sup>392</sup> As set forth *supra*, the court should always resolve an ambiguity in a statute by reading the statute as a whole.<sup>393</sup> Therefore, the Texas Supreme Court has repeatedly held that a court should not assign a meaning to a provision that would be inconsistent with other provisions in the act.<sup>394</sup> In other words, a court “should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone.”<sup>395</sup> However, if two provisions’ plain meaning results in a conflict, the court should determine if one is general

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<sup>388</sup> See *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 809 (Tex. 2010); *Moore v. Treviño*, 94 S.W.3d 723, 726 (Tex. App.—San Antonio 2002, pet. denied); *High Plains Natural Gas Co. v. R.R. Comm’n.*, 467 S.W.2d 532, 539 (Tex. Civ. App.—Austin 1971, writ ref’d n.r.e.).

<sup>389</sup> *Hill v. Tex. Council Risk Mgmt. Fund*, 20 S.W.3d 209, 214 (Tex. App.—Texarkana 2000, pet. denied); see, e.g., *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 43–46 (2008); *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); see also *Woodruff v. City of Laredo*, 686 S.W.2d 692, 695 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.); *Byke v. City of Corpus Christi*, 569 S.W.2d 927, 931–32 (Tex. Civ. App.—Corpus Christi 1978, writ ref’d n.r.e.).

<sup>390</sup> *In re United Servs. Auto. Ass’n*, 307 S.W.3d 299, 307–08 (Tex. 2010); see also *Hartford Ins. Co. v. Crain*, 246 S.W.3d 374, 378 (Tex. App.—Austin 2008, pet. denied); *W. Coast Truck Lines, Inc. v. Arcata Cmty. Recycling Ctr., Inc.*, 846 F.2d 1239, 1243 (9th Cir. 1988).

<sup>391</sup> See *infra* notes 496–511 and accompanying text.

<sup>392</sup> See *Tex. Workers’ Comp. Ins. Fund v. Del Indus.*, 35 S.W.3d 591, 593 (Tex. 2000).

<sup>393</sup> See *supra* notes 213–220 and accompanying text.

<sup>394</sup> See *Bd. of Adjustment v. Wende*, 92 S.W.3d 424, 432 (Tex. 2002); *Clint Indep. Sch. Dist. v. Cash Invs., Inc.*, 970 S.W.2d 535, 539 (Tex. 1998); *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978).

<sup>395</sup> *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001); *Barr*, 562 S.W.2d at 849.

and one could be considered more specific in nature.<sup>396</sup> If such a construction upon the two sections can be made, then the conflict can be avoided by the specific provision controlling the general one.<sup>397</sup> Simply, the specific provision is viewed as an implied exception to the general provision allowing them to be read in harmony.<sup>398</sup>

### 15. Remedial and Penal Statutes: Liberal v. Strict Construction

A remedial statute is one which introduces a new regulation for the advancement of the public welfare or conducive to the public good, one enacted to afford a remedy, to improve and facilitate existing remedies, or one intended to correct defects, mistakes, and omissions in the laws of the State.<sup>399</sup>

If a statute is remedial, the general rule is that it will be given the most comprehensive and liberal construction possible.<sup>400</sup> Both the Code Construction Act<sup>401</sup> and the Construction of Laws Act are in accord.<sup>402</sup> Giving a statute a “liberal construction” means to give the language of a statutory provision, freely and consciously, its commonly, generally accepted meaning, to the end that the most comprehensive application thereof may be accorded, without doing violence to any of its terms.”<sup>403</sup>

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<sup>396</sup> See *Holmes v. Morales*, 924 S.W.2d 920, 923 (Tex. 1996).

<sup>397</sup> *Id.*; *Serv. Life & Cas. Ins. Co. v. Montemayor*, 150 S.W.3d 649, 651 (Tex. App.—Austin 2004, pet. denied).

<sup>398</sup> *In re A.A.G.*, 303 S.W.3d 739, 740 (Tex. App.—Waco 2009, no pet.); *Tex. Gen. Indem. Co. v. Tex. Workers’ Comp. Comm’n*, 36 S.W.3d 635, 641 (Tex. App.—Austin 2000, no pet.); see also *Trinity Universal Ins. Co. v. McLaughlin*, 373 S.W.2d 66, 69 (Tex. Civ. App.—Austin 1963, writ ref’d n.r.e.).

<sup>399</sup> *Lukes v. Emps. Ret. Sys.*, 59 S.W.3d 838, 842 (Tex. App.—Austin 2001, no pet.) (emphasis omitted) (quoting *Sims v. Adoption Alliance*, 922 S.W.2d 213, 217 (Tex. App.—San Antonio 1996, writ denied)); *Rey v. Acosta*, 860 S.W.2d 654, 657 (Tex. App.—El Paso 1993, no writ); see also *Bd. of Ins. Comm’rs v. Great S. Life Ins. Co.*, 239 S.W.2d 803, 809 (Tex. 1951).

<sup>400</sup> *Burch v. City of San Antonio*, 518 S.W.2d 540, 544 (Tex. 1975).

<sup>401</sup> See TEX. GOV’T CODE ANN. § 311.021 (West 2005) (presuming that the public interest is favored over any private interest); *Deep E. Tex. Reg’l Mental Health & Mental Retardation Servs. v. Kinnear*, 877 S.W.2d 550, 563 (Tex. App.—Beaumont 1994, no writ) (promoting public interest by construction of a statute in a liberal and humanitarian mode), *abrogated on other grounds by Kinnear v. Tex. Comm’n on Human Rights*, 14 S.W.3d 299 (Tex. 2000) (per curiam).

<sup>402</sup> See TEX. GOV’T CODE ANN. § 312.006.

<sup>403</sup> *Wesco Distribution, Inc. v. Westport Grp., Inc.*, 150 S.W.3d 553, 557 (Tex. App.—Austin 2004, no pet.) (quoting *Md. Cas. Co. v. Smith*, 40 S.W.2d 913, 914 (Tex. Civ. App.—Dallas 1931, no writ)).

However, a liberal construction does not allow the court to write into a statute a provision when one simply does not exist.<sup>404</sup> This canon is not an edict to substantively change the statute, such as adding an entirely new cause of action.<sup>405</sup> It remains the duty of the judiciary only to effectuate the legislative intent and not to seek other ends for the meaning of the statute.<sup>406</sup>

A penal statute is one that is criminal<sup>407</sup> or those civil statutes that authorize a penalty or infringe upon private property or liberty interest.<sup>408</sup> A criminal statute “must be construed strictly, with any doubt resolved in favor of the accused.”<sup>409</sup> A civil statute that is penal in nature must be couched in such explicit terms that the party upon whom the statute is to operate may, with reasonable certainty, ascertain what the statute requires to be done and when it must be done.<sup>410</sup> If such explicit terms are not present, there is no opportunity for a person charged with the duty to protect himself or herself by the performance of it according to the law.<sup>411</sup> Thus, the language and legal effect of a civil, penal statute require a strict construction.<sup>412</sup>

A strict construction of a criminal statute does not mean the court will ignore the plain language of the statute.<sup>413</sup> The court will always strive to give words and phrases meaning within the context of the larger provision.<sup>414</sup> It will not isolate terms or phrases from the context in which

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<sup>404</sup> See *Williams v. Cullen Ctr. Bank & Trust*, 685 S.W.2d 311, 314 (Tex. 1985); *Methodist Hosps. of Dall. v. Mid-Century Ins. Co. of Tex.*, 259 S.W.3d 358, 360 (Tex. App.—Dallas 2008, no pet.).

<sup>405</sup> *Doctors Hosp. 1997, L.P. v. Sambuca Hous., L.P.*, 154 S.W.3d 634, 638 (Tex. App.—Houston [14th Dist.] 2004, pet. abated).

<sup>406</sup> See *Nationwide Ins. Co. v. Elchehimi*, 249 S.W.3d 430, 435 (Tex. 2008); *City of Waco v. City of McGregor*, 523 S.W.2d 649, 653 (Tex. 1975).

<sup>407</sup> See, e.g., *State v. Johnson*, 219 S.W.3d 386, 387–88 (Tex. Crim. App. 2007).

<sup>408</sup> See *Brown v. De La Cruz*, 156 S.W.3d 560, 565 (Tex. 2004); *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (1958); *Thomas v. State*, 919 S.W.2d 427, 430 (Tex. Crim. App. 1996) (en banc); *In re Hecht*, 213 S.W.3d 547, 572 (Tex. Spec. Ct. Rev. 2006); *Cain v. State*, 882 S.W.2d 515, 519 (Tex. App.—Austin 1994, no writ); see also *City of Houston v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006) (stating that strict construction also applies to statutes waiving sovereign and governmental immunity).

<sup>409</sup> *Johnson*, 219 S.W.3d at 388; see *Thomas*, 919 S.W.2d at 430.

<sup>410</sup> *Mo., K. & T. Ry. Co. of Texas v. State*, 100 S.W. 766, 767 (Tex. 1907).

<sup>411</sup> *Id.*

<sup>412</sup> *In re Hecht*, 213 S.W.3d at 572.

<sup>413</sup> *Johnson*, 219 S.W.3d at 388.

<sup>414</sup> See *Moore v. Treviño*, 94 S.W.3d 723, 726 (Tex. App.—San Antonio 2002, pet. denied).



they appear.<sup>415</sup> Yet “[a] forbidden act must come clearly within the prohibition of the statute and any doubt as to whether an offense has been committed should be resolved in favor of the accused.”<sup>416</sup>

As to the strict construction of a civil, penal statute, it is not the exact converse of liberal construction, for it does not require the narrowest meaning of which the words are susceptible.<sup>417</sup> The words used “may be accorded a full meaning that will carry out its manifest purpose and intention in enacting the statute, but the operation of the law will then be confined to cases which plainly fall within its terms as well as its spirit and purpose.”<sup>418</sup> Yet, strict construction generally requires a limited, narrow, or inflexible reading and application of the statute.<sup>419</sup> However, such an interpretation diminishes considerably when the penal statute supplies procedures for preventing or circumscribing the charge of arbitrary action being taken.<sup>420</sup> Procedural safeguards may now be conceived as more suitable than the safeguards of strict construction to protect the interest of individuals.<sup>421</sup>

#### 16. General Legislative Intent: Feasible, Just, and Reasonable

The Construction of Laws Act suggests a court should diligently attempt to ascertain the legislative intent by considering “at all times the old law, the evil, and the remedy.”<sup>422</sup> The Code Construction Act suggests to the court to presume: (1) “the entire statute is intended to be effective;” (2) “a just and reasonable result is intended;” and (3) “a result feasible of execution is intended.”<sup>423</sup>

The judiciary has agreed with these suggestions by holding that a statute must be interpreted to reach a fair and reasonable, and not an absurd,

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<sup>415</sup> *Id.*

<sup>416</sup> *Thomas v. State*, 919 S.W.2d 427, 430 (Tex. Crim. App. 1996) (en banc) (quoting *Bruner v. State*, 463 S.W.2d 205, 215 (Tex. Crim. App. 1970)).

<sup>417</sup> *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (Tex. 1958).

<sup>418</sup> *Id.*; *Coastal Marine Serv. of Tex., Inc. v. City of Port Neches*, 11 S.W.3d 509, 511 (Tex. App.—Beaumont 2000, no pet.) (quoting *Coastal States Gas Producing Co.*, 309 S.W.2d at 831).

<sup>419</sup> *In re Hecht*, 213 S.W.3d 547, 572 (Tex. Spec. Ct. Rev. 2006); *Cain v. State*, 882 S.W.2d 515, 519 (Tex. App.—Austin 1994, no writ).

<sup>420</sup> *Cain*, 882 S.W.2d at 519.

<sup>421</sup> *Id.* at 519 (citing 3 SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 59.07, at 22 (4th ed. 1974)).

<sup>422</sup> TEX. GOV'T CODE ANN. § 312.005 (West 2005).

<sup>423</sup> *Id.* § 311.021(2)–(4).

result.<sup>424</sup> The statute should be feasible in execution<sup>425</sup> and not a useless act.<sup>426</sup> Nor should the statute be interpreted to cause great public inconvenience or unjust discrimination<sup>427</sup> or to cause inequity.<sup>428</sup> Thus, these general standards, presumptions, or principles should always guide the judiciary even when utilizing the other canons of construction. Simply put, at the end of the process, the judiciary has failed in its duty to faithfully execute the law if its resulting interpretation is not feasible, just, and reasonable in light of the language adopted by the legislature.

### 17. Facial Canons and the Plain Meaning Rule

It has been established that the Texas courts have repeatedly held throughout history, and they do presently, that if the disputed statute is clear and unambiguous, extrinsic aids and canons of construction are inappropriate and the statute should be given its ordinary meaning.<sup>429</sup> However, it has clearly been established that in reality a court will hold a statute as clear and unambiguous or that it has a plain meaning after the court has: (1) given all words a reasonable, ordinary, technical, or legal meaning depending upon the context of the statute and with the aid of relevant dictionaries; (2) solely applied the canons of construction relating to discerning the facial construction of the words used and the common sense use and meaning of the words, phrases, and sections within the statute; and (3) the court has concluded there is only one reasonable interpretation of the statute's meaning that renders the entire statute to be effective by mandating rights, duties, obligations, and privileges that are feasible in execution.<sup>430</sup>

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<sup>424</sup>TGS–NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011); City of Dallas v. Abbott, 304 S.W.3d 380, 384 (Tex. 2010); Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W.3d 170, 177 (Tex. 2004); Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001); Fleming Foods of Tex., Inc. v. Rylander, 6 S.W.3d 278, 284 (Tex. 1999); see also Boykin v. State, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991) (en banc).

<sup>425</sup>Lovell v. State, 525 S.W.2d 511, 515 (Tex. Crim. App. 1975); Linick v. Emp'rs Mut. Cas. Co., 822 S.W.2d 297, 301 (Tex. App.—San Antonio 1991, no writ).

<sup>426</sup>*In re* Mo. Pac. R.R. Co., 998 S.W.2d 212, 216 (Tex. 1999); see FKM P'ship v. Bd. of Regents of the Univ. of Hous. Sys., 255 S.W.3d 619, 635 (Tex. 2008).

<sup>427</sup>C & H Nationwide, Inc. v. Thompson, 903 S.W.2d 315, 322 (Tex. 1994), *overruled on other grounds* by Battaglia v. Polk, 177 S.W.3d 893, 909 (Tex. 2005).

<sup>428</sup>State v. Mauritz-Wells Co., 175 S.W.2d 238, 242 (Tex. 1943).

<sup>429</sup>See *supra* notes 157–158 and accompanying text.

<sup>430</sup>See *supra* notes 157–195 and accompanying text.

In review of the above-analyzed canons of construction that deal with interpreting the facial language of the statute, considering not only the words used but those words that were not chosen, the court is fulfilling the role of being bound by the legislative intent.<sup>431</sup> As established *supra*, the only act a legislature may lawfully exercise is the adoption of words on a piece of paper which become law.<sup>432</sup> If the judiciary solely focuses on those words and utilizes canons that determine the meaning of those words in light of the words that surround them, then the court is engaging in “plain meaning” construction.<sup>433</sup>

To recognize that this analysis utilizes dictionary definitions and canons of construction that apply to the facial meaning of the words not only legitimizes the task completed, but avoids the semantic nightmare of appearing to say one thing and doing another.<sup>434</sup> This would arguably also satisfy Justice Hecht’s concern that a “plain meaning” analysis is anything but solely and literally relying on the words used.<sup>435</sup> It would also support Justice Willett’s concerns that the court should not consult extrinsic sources to determine the clear meaning of words.<sup>436</sup> If all would agree that dictionaries and canons that aid an objective reading of the words used can be utilized by the judiciary, but not those canons that actually consult extrinsic sources to determine what the legislature really meant, the plain-meaning analysis would be understood by judges and practitioners alike, and the court would be pragmatically, not theoretically, determining that the statute is “clear and unambiguous as written.” Thus, the “ambiguity” of a plain meaning analysis would be resolved, allowing the court to clearly and expressly demonstrate why the statutory provisions at issue lack any ambiguous language.

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<sup>431</sup> See *supra* Part I.D.

<sup>432</sup> See *supra* notes 75–77 and accompanying text.

<sup>433</sup> See *supra* notes 156–182 and accompanying text.

<sup>434</sup> See *supra* note 169 and accompanying text.

<sup>435</sup> See *supra* notes 185–196 and accompanying text.

<sup>436</sup> See *supra* notes 204–208 and accompanying text.

*E. Canons Construing the Meaning of a Statutory Provision by the Use of Extrinsic Evidence*

1. Introduction: The Use of Extrinsic Evidence

It has been established that the judiciary, in order to allow statutes to give reasonable notice to the citizenry and to not violate separation of powers, commences statutory construction by determining whether the actual language is clear and unambiguous or has a “plain meaning.”<sup>437</sup> However, it has also been established that when the judiciary is construing the actual language of the statute, it will use the extrinsic source of dictionaries to verify it is defining the ordinary, technical, or legal meaning of a word correctly.<sup>438</sup> Further, the canons already discussed that aid in construing the actual language of the statute without the need to utilize extrinsic sources are also employed by the judiciary to determine if it is clear and unambiguous.<sup>439</sup>

This section of the article now delves into those canons of construction used when there appears to the litigants or the court that there are two or more reasonable interpretations of the statute or legislative intent, and thereby an ambiguity must be resolved if reasonably possible.<sup>440</sup> Yet, the judiciary and litigants must keep in mind whenever using these canons that a reasonable person would neither employ them nor have the knowledge of the extrinsic sources, and the question must always be asked if the meaning given to the statute by the court is realistically and honestly one that a reasonable person would have had some inclination that this is what the statute meant.

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<sup>437</sup> See *supra* notes 157–158 and accompanying text.

<sup>438</sup> See *supra* notes 156–196 and accompanying text.

<sup>439</sup> *In re Smith*, 333 S.W.3d 582, 588 (Tex. 2011); *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex. 2009).

<sup>440</sup> See *supra* notes 156–196 and accompanying text.

## 2. Deference, Stare Decisis, and Precedent: Interpretation by the Texas Supreme Court and Texas Court of Criminal Appeals

### a. *Stare Decisis and Precedent: Common Law*

As was discussed *supra*, the common law is a combination of custom and its successive adaptations.<sup>441</sup> The judiciary receives it and professes to treat it as authoritative.<sup>442</sup> “This flexibility and capacity for growth and adaptation is the . . . excellence of the common law.”<sup>443</sup> “[A]s life is always in flux, so the common law, which is merely life’s explanation as the lawyer and the judge, law’s spokesmen, are always making it, must also be.”<sup>444</sup> But, it is not the function of the court of appeals to abrogate or modify precedent.<sup>445</sup> That power lies solely in the Texas Supreme Court, and the nature of stare decisis dictates that once the Supreme Court announces a proposition of law, it is considered binding precedent.<sup>446</sup>

However, events and circumstances occasionally dictate reevaluating and modifying prior decisions.<sup>447</sup> The Supreme Court may modify judicially created doctrines,<sup>448</sup> for the doctrine of stare decisis is not “an insurmountable bar to overruling precedent. Stare decisis prevents change for the sake of change; it does not prevent any change at all.”<sup>449</sup> It creates a strong presumption in favor of existing law, but “does not render that law immutable.”<sup>450</sup> For the genius of the common law rests in its ability to

<sup>441</sup> See *supra* notes 17–47 and accompanying text.

<sup>442</sup> *Davis v. Davis*, 521 S.W.2d 603, 608 (Tex. 1975).

<sup>443</sup> *Id.* (quoting *Hurtado v. California*, 110 U.S. 516, 530 (1884)).

<sup>444</sup> Joseph C. Hutcheson, Jr., *The Common Law of the Constitution*, 15 TEX. L. REV. 317, 319 (1937); see also *Davis*, 521 S.W.2d at 608 (citing Hutcheson, *supra*, with approval).

<sup>445</sup> *Lubbock Cnty. v. Trammel’s Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002) *superseded by statute*, TEX. GOV’T CODE ANN. § 311.034 (West 2005), *as recognized in Dall. Cnty. v. C. Green Scaping, L.P.*, 301 S.W.3d 872 (Tex. App.—Dallas 2009, no pet.).

<sup>446</sup> *Id.*; *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964); see also *Stark v. Am. Nat’l Bank of Beaumont*, 100 S.W.2d 208, 212 (Tex. Civ. App.—Beaumont 1936, writ ref’d).

<sup>447</sup> See *supra* notes 39–43 and accompanying text.

<sup>448</sup> *Lubbock Cnty.*, 80 S.W.3d at 585; *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985).

<sup>449</sup> *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979).

<sup>450</sup> *Id.*

change, to recognize that a time-worn rule is no longer needed and the rule is modified accordingly.<sup>451</sup>

*b. Stare Decisis and Precedent: Statutes and Their Interpretations*

A statute is simply not a creature of the common law, but that of the legislature, thereby, in the area of statutory construction, the doctrine of stare decisis has its greatest force.<sup>452</sup> A statute is a creature of the legislature,<sup>453</sup> and should an interpretation of a statute by a court be unacceptable to the legislature, a simple remedy is available by the process of legislative amendment.<sup>454</sup> Therefore, prior decisions of the Supreme Court need not be reaffirmed periodically to retain their authority.<sup>455</sup> This is true even if another line of cases appears to reject the original holding.<sup>456</sup> It is not the district courts' or appellate courts' prerogative to overrule the decision, for this is wholly vested in the Texas Supreme Court.<sup>457</sup> However, even though stare decisis has its strongest force as to the interpretation of statutes, the Texas Supreme Court will overrule a prior decision if it is simply wrong or incorrect.<sup>458</sup> Finally, if there are questions that merely lurk in the record and are neither brought to the attention of the court nor ruled upon, they are simply not decided and do not constitute precedent.<sup>459</sup> For although a court is bound to read a statute as a whole, they are limited to the facts as they are presented in the case.<sup>460</sup> Any determination regarding an

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<sup>451</sup> *Id.*

<sup>452</sup> *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex. 1968); *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 749 (Tex. 2006).

<sup>453</sup> *Grapevine Excavation, Inc. v. Md. Lloyds*, 35 S.W.3d 1, 6 (Tex. 2000) (Gonzalez, J., concurring); *see also Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992).

<sup>454</sup> *Marmon*, 430 S.W.2d at 186; *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071, *as recognized in Partee v. Metro Sch. Dist. of Wash. Twp.*, 954 F.2d 454, 457 n.1 (7th Cir. 1992).

<sup>455</sup> *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex. 2004).

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*; *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997).

<sup>458</sup> *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006).

<sup>459</sup> *Ex parte Ellis*, 279 S.W.3d 1, 29 n.24 (Tex. App.—Austin 2008), *aff'd*, 309 S.W.3d 71 (Tex. Crim. App. 2010).

<sup>460</sup> *AEP Tex. N. Co. v. SPA Pipe, Inc.*, No. 03-06-00122-CV, 2008 WL 5210919, at \*5 n.8 (Tex. App.—Austin Dec. 12, 2008, pet. dism'd) (mem. op.).

issue not directly before them will result in the court issuing an advisory opinion, which is prohibited.<sup>461</sup>

*c. Stare Decisis Between the Texas Supreme Court and the Texas Court of Criminal Appeals*

The Texas Supreme Court will ordinarily follow the construction given by the Court of Criminal Appeals to a statute that is penal in nature.<sup>462</sup> When a refusal by the Texas Supreme Court to follow a decision of the Court of Criminal Appeals would create an intolerable situation, it is its duty not to do so, and it will follow the ruling of the court.<sup>463</sup> Likewise, the Texas Court of Criminal Appeals will follow the construction of a statute by the Texas Supreme Court if it has already so construed it.<sup>464</sup>

*d. Researching Opinions on Point*

It is obvious, but needs to be said, that after one deciphers the naked language of the statute to determine what is required, one should research any case law on point. It is advocated that this is step two instead of step one. As the Texas Supreme Court has admitted, sometimes they get it wrong.<sup>465</sup> By analyzing the language of the statute initially and then by doing the research, one can adequately critique the case law on point. It should also be mentioned that one should look beyond the statute itself and the judicial decisions interpreting the same. For example, if the statute deals with agencies and the practitioner has no specific knowledge of administrative law, there may be case-law decisions impacting the rendition of a case that were rendered under another statute or based on constitutional interpretations relating to the power of government. It is always necessary to have a general background knowledge of the law in the area that the statute impacts in order to interpret properly even the simplest of statutes.

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<sup>461</sup> *Id.*

<sup>462</sup> *Shrader v. Ritchey*, 309 S.W.2d 812, 814 (Tex. 1958).

<sup>463</sup> *Id.*

<sup>464</sup> *Johnson v. State*, 551 S.W.2d 379, 382 (Tex. Crim. App. 1977).

<sup>465</sup> *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006).

### 3. The Legislature Is Charged with Knowledge of the Law

The Texas Supreme Court set the standard for this canon in 1942.<sup>466</sup> The court stated that “[a]ll statutes are presumed to be enacted by the legislature with full knowledge of the existing condition[s] of the law and with reference to it.”<sup>467</sup> Thereby, they are:

to be construed in connection and in harmony with the existing law . . . their meaning and effect is to be determined in connection, not only with the common law and the [C]onstitution, but also with reference to other statutes and the decisions of the courts.<sup>468</sup>

It should be understood and it goes without citation that all of us know that this canon is a fiction if it is asserted as to general knowledge of the Constitution and all cases construing it, all statutes and cases construing them, and the entirety of the common law. Very few, if any, scholars of the law could make or prove such an assertion.

Therefore, it is incumbent upon the litigant and the court to show why they can so presume in the particular issue before the court. Using a term in the statute with an accepted legal meaning and not bothering to define the term, such as “insurable interest,” can justify a court charging the legislature with knowledge of that particular area of the law.<sup>469</sup> Dealing with private deliberations of an agency clearly demonstrates the legislature’s knowledge of the general applicability and meaning of the Open Meetings Act.<sup>470</sup> The use of the phrase “the party with custody” in the Family Law Code was recognition of knowledge of a statutory presumption the judiciary found to exist.<sup>471</sup> When the legislature speaks in a statute of “sanctions” and in such a determination being made as it “appears to the court,” would easily allow the court to presume the legislature knew such a determination would be reviewed on appeal under an abuse of discretion standard of review.<sup>472</sup> Finally, the legislature was

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<sup>466</sup> *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942).

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*; see *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 677 (Tex. 2007); *Am. Transitional Care Ctrs. of Tex. v. Palacios*, 46 S.W.3d 873, 877–78 (Tex. 2001); *Phillips v. Beaver*, 995 S.W.2d 655, 658 (Tex. 1999); *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990).

<sup>469</sup> See *McBride*, 166 S.W.2d at 128–29.

<sup>470</sup> See *Acker*, 790 S.W.2d at 300–01.

<sup>471</sup> See *Phillips*, 995 S.W.2d at 659–60.

<sup>472</sup> See *Am. Transitional Care Ctrs. of Tex.*, 46 S.W.3d at 877.



aware of the doctrine utilized by the judiciary when the statute utilized the language that the court could dismiss non-citizen suits “in the interest of justice.”<sup>473</sup> Therefore, it is necessary for the litigant and the court to show some express or implied recognition of the area of the law by the legislature as demonstrated in the statute and better yet, when the legislature used undefined words that have a specific legal meaning, within the statutes that clearly reference that area of the law.

#### 4. Statutes in Derogation of the Common Law

##### *a. A Statute Always Supersedes the Common Law? Not Always and Consult the Open Courts Provision of the Texas Constitution for the Answer*

The Texas Supreme Court clearly sets forth the general rule that many practitioners may believe is absolute:

In passing upon the constitutionality of a statute, we begin with a presumption of validity. It is to be presumed that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable. The wisdom or expediency of the law is the Legislature’s prerogative, not ours. As quoted in this Court’s opinion in *Texas National Guard Armory Board v. McGraw*, “There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.”<sup>474</sup>

Couple that holding with a Texas Supreme Court’s rendition in 1916:

That no one has a vested right in the continuance of present laws in relation to a particular subject, is a fundamental proposition; it is not open to challenge. The laws may be changed by the Legislature so long as they do not destroy or prevent an adequate enforcement of vested rights. There

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<sup>473</sup> See *In re Pirelli Tire, L.L.C.*, 247 S.W.3d at 677.

<sup>474</sup> *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968) (citation omitted).

cannot be a vested right, or a property right, in a mere rule of law.<sup>475</sup>

The result of these holdings in the minds of many lawyers is that if there is a conflict between a statute and the common law, the statute always prevails or wins.

The Texas Supreme Court's response is truly, "not so fast." The court has held that the Texas Constitution contains two separate due process provisions.<sup>476</sup> The first is the traditional due process guarantee which states that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."<sup>477</sup>

However, another provision of the same article provides in part that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."<sup>478</sup>

The court noted that even though this provision is known as the Open Courts Provision, it is quite simply a due process guarantee.<sup>479</sup> Thus, even though the presumptions apply to statutes as set forth above, the Court has expressly stated that the legislative action is not without bounds, for the Open Courts Provision ensures that all citizens having common law actions will not be unreasonably denied access to the courts.<sup>480</sup> Yet, as the court pointed out as early as 1955, the key word in this entire guarantee is the interpretation given the word arbitrarily.<sup>481</sup>

First, if the legislature acts arbitrarily the statute is void if the statute unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another.<sup>482</sup> Thus, the accurate test of arbitrarily in relation to modification of the common law is:

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<sup>475</sup> *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916).

<sup>476</sup> *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

<sup>477</sup> TEX. CONST. art. I, § 19.

<sup>478</sup> *Id.* § 13.

<sup>479</sup> *Hanks v. City of Port Arthur*, 48 S.W.2d 944, 946-47 (Tex. 1932).

<sup>480</sup> *Id.* at 946-48; *see Sax*, 648 S.W.2d at 664; *see also Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 227 (Tex. 2002); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993).

<sup>481</sup> *LeBohm v. City of Galveston*, 275 S.W.2d 951, 954 (Tex. 1955).

<sup>482</sup> *Sax*, 648 S.W.2d at 665; *Hanks*, 48 S.W.2d at 948; *see also Waites v. Sondock*, 561 S.W.2d 772, 775 (Tex. 1977); *LeBohm*, 275 S.W.2d at 953-55.

[T]he right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress. In applying this test, [the court will] consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected.<sup>483</sup>

In essence, there is a Texas two-step:

First, it must be shown that the litigant has a cognizable common law cause of action that is being restricted. Second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.<sup>484</sup>

It must be emphasized that this aspect of the Open Courts Provision only applies and “protects” the common law, not statutory causes of action.<sup>485</sup> Finally, the legislature may also avoid a finding that its action was arbitrary by providing a reasonable substitute for the legal rights and duties subscribed at common law.<sup>486</sup> Thus, the legislature may not easily modify or supersede the common law, but if it has a legitimate reason to do so, it is constitutional and mandatory, yet always subject to challenge and judicial review of its reasonableness.

*b. Construction of a Statute That Modifies the Common Law*

The judiciary will presume that a statutory provision is not intended to displace common law remedies.<sup>487</sup> To the contrary, abrogation of the common law claim is disfavored.<sup>488</sup> It is necessary for the express terms of the statute to so provide.<sup>489</sup> As to finding such intent implied by the

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<sup>483</sup> *Sax*, 648 S.W.2d at 665–66.

<sup>484</sup> *Id.* at 666; *see also Subaru of Am.*, 84 S.W.3d at 227; *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 209 (Tex. 2002); *Tex. Ass'n of Bus.*, 852 S.W.2d at 448.

<sup>485</sup> *Subaru of Am.*, 84 S.W.3d at 227; *Tex. Ass'n of Bus.*, 852 S.W.2d at 448–49.

<sup>486</sup> *LeBohm*, 275 S.W.2d at 955; *see Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 559 (Tex. 1916).

<sup>487</sup> *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 802 (Tex. 2010).

<sup>488</sup> *Id.*; *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000).

<sup>489</sup> *Bruce v. Jim Walters Homes, Inc.*, 943 S.W.2d 121, 122–23 (Tex. App.—San Antonio 1997, writ denied); *Cash Am. Int'l Inc.*, 35 S.W.3d at 16 (citing *Bruce*, 943 S.W.2d at 122–23

legislature, it will be determined that the common law is abrogated only upon a finding that “there exists a ‘clear repugnance’ between the two causes of action.”<sup>490</sup>

Upon finding express terms or a clear repugnance, Texas follows the canon that statutes in derogation of the common law are not to be strictly construed,<sup>491</sup> but “it is recognized that if a statute creates a liability unknown to the common law, or deprives a person of a common law right, the statute will be strictly construed in the sense that it will not be extended beyond its plain meaning or applied to cases not clearly within its purview.”<sup>492</sup> The Construction of Laws Act does set forth the rule that statutes in derogation of the common law are not to be strictly construed.<sup>493</sup> Nevertheless, the court will continue to strictly construe it in the sense that it will not be extended beyond its plain meaning or applied to cases not within its purview.<sup>494</sup> This holding further establishes that the Code Construction Act and Construction of Laws Act are merely legislative guides and not binding principles to be followed and applied by the judiciary.<sup>495</sup>

### 5. Two Statutes in Conflict: *In Pari Materia*

This issue only covers two statutes of the State of Texas that are both applicable and in conflict.<sup>496</sup> It does not apply to a statute and a court rule and an agency rule which are created by separate branches of the government, for that would be like comparing apples and oranges.<sup>497</sup> When

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with approval).

<sup>490</sup> *Waffle House, Inc.*, 313 S.W.3d at 802; *Cash Am. Int’l Inc.*, 35 S.W.3d at 16; *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 192 (Tex. App.—Fort. Worth 1995, writ denied); *Coppedge v. Colonial Sav. & Loan Ass’n*, 721 S.W.2d 933, 938 (Tex. App.—Dallas 1986, writ ref’d n.r.e.); see also *Juneman v. Franklin*, 3 S.W. 562, 563 (Tex. 1887); *Thouvenin v. Rodrigues*, 24 Tex. 468, 479 (1859); *Bruce*, 943 S.W.2d at 122–23.

<sup>491</sup> *Smith v. Sewell*, 858 S.W.2d 350, 354 (Tex. 1993); contra *supra* notes 407–412 and accompanying text.

<sup>492</sup> *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969); see also *Cash Am. Int’l Inc.*, 35 S.W.3d at 16–17; *Hickman v. Finlay*, 392 S.W.2d 147, 149 (Tex. Civ. App.—Austin 1965, writ ref’d).

<sup>493</sup> TEX. GOV’T CODE ANN. § 312.006(b) (West 2005).

<sup>494</sup> *Sewell*, 858 S.W.2d at 354; *Dutcher v. Owens*, 647 S.W.2d 948, 951 (Tex. 1983); *Satterfield*, 448 S.W.2d at 459; see also *Cash Am. Int’l Inc.*, 35 S.W.3d at 16.

<sup>495</sup> See *supra* notes 136–144 and accompanying text.

<sup>496</sup> *State v. Vasilas*, 253 S.W.3d 268, 271 (Tex. Crim. App. 2008).

<sup>497</sup> See *id.*

the legislature adopts a new law, it is presumed to have been enacted with complete knowledge of existing law and with reference to it.<sup>498</sup> “In the absence of an express repeal by statute, where there is no positive repugnance between the provisions of the old and new statutes, the old and new statutes will each be construed so as to give effect, if possible, to both statutes.”<sup>499</sup> The court will only find that the new statute impliedly repealed the old statute if there is a clear repugnance between them.<sup>500</sup>

Thus, a legislative enactment covering a subject dealt with in an older law, but not expressly repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both.<sup>501</sup> For when an apparent conflict exists, it is the duty of the court to resolve the inconsistencies and effectuate the dominant legislative intent.<sup>502</sup> The most common method utilized by the courts is to determine if one statute is more general and the other more specific, regardless of temporal sequence, and then hold that the specific statute controls over the more general one.<sup>503</sup> However, such construction is only necessary and will be utilized by the courts after they have first attempted to reconcile the two statutes by statutory interpretation.<sup>504</sup>

It is true that one session of the legislature has no power to construe or declare the intent of a past session.<sup>505</sup> However, any legislative session may adopt, amend, or repeal laws, so a present legislature may lawfully affect

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<sup>498</sup> *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990); see *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942).

<sup>499</sup> *Standard v. Sadler*, 383 S.W.2d 391, 395 (Tex. 1964) (quoting *Wintermann v. McDonald*, 102 S.W.2d 171, 167 (Tex. 1937)).

<sup>500</sup> *Id.* at 396; *Wintermann v. McDonald*, 102 S.W.2d 167, 171 (Tex. 1937); see *Gordon v. Lake*, 356 S.W.2d 138, 139 (Tex. 1962).

<sup>501</sup> *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Electric, LLC*, 324 S.W.3d 95, 107 (Tex. 2010); *Acker*, 790 S.W.2d at 301.

<sup>502</sup> *Tex. Dep’t of Pub. Safety v. Schaejbe*, 687 S.W.2d 727, 728 (Tex. 1985); *S. Canal Co. v. State Bd. of Water Eng’rs*, 318 S.W.2d 619, 624 (Tex. 1958); see *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 86–87 (Tex. 2006).

<sup>503</sup> See *Tex. Indus. Energy Consumers*, 324 S.W.3d at 107; *Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005), *superseded by statute*, Act of June 19, 2009, 81st Leg., R.S., ch. 1351, § 8, 2009 Tex. Gen. Laws 4274, 4274, *as recognized in In re U.S. Servs. Auto. Ass’n*, 307 S.W.3d 299, 303 n.6 (Tex. 2010); *Columbia Hosp. Corp. of Hous. v. Moore*, 92 S.W.3d 470, 473 (Tex. 2002); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000).

<sup>504</sup> *Lexington Ins. Co.*, 209 S.W.3d at 86.

<sup>505</sup> *Rowan Oil Co. v. Tex. Emp’t Comm’n*, 263 S.W.2d 140, 144 (Tex. 1953).

the declared intent of a prior legislature when adopting a new law.<sup>506</sup> So, all acts *in pari materia* are to be taken together as if they are one law, and if it can be garnered from a subsequent statute what meaning the legislature attached to the words of the former statute, this will amount to a legislative declaration of its meaning and will govern the construction of the first statute.<sup>507</sup>

The Code Construction Act and the Construction of Laws Act attempt to guide the courts if two laws cannot be harmonized or found to be able to co-exist.<sup>508</sup> If the statute enacted at the same or different sessions are irreconcilable, the statute latest in date of enactment controls.<sup>509</sup> If amendments to the same statute are irreconcilable, the latest date of enactment controls.<sup>510</sup> However, if any provision of a code adopted pursuant to the continuing revision program conflicts with a statute enacted by the same legislature that enacted the code, the statute controls.<sup>511</sup>

## 6. Amendments

In enacting an amendment to an existing statute, the legislature is presumed to have changed the law and a construction should be adopted that gives effect to the intended change rather than one that renders the amendment useless.<sup>512</sup> However, the court will seek out the legislative history and the purpose of the law to determine the intent of the legislature.<sup>513</sup> The general presumption is very persuasive, and the court should be particularly unwilling to revisit language that the legislature has elected to delete.<sup>514</sup> Also, the presumption is strong where the amendment

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<sup>506</sup> See *Standard v. Sadler*, 383 S.W.2d 391, 395–96 (Tex. 1964).

<sup>507</sup> See *id.*

<sup>508</sup> TEX. GOV'T CODE ANN. §§ 311.025, 312.014 (West 2005).

<sup>509</sup> *Id.* §§ 311.025(a), 312.014(a).

<sup>510</sup> *Id.* §§ 311.025(b), 312.014(b).

<sup>511</sup> *Id.* §§ 311.031(d), 312.014(c).

<sup>512</sup> *Ex parte Trahan*, 591 S.W.2d 837, 842 (Tex. Crim. App. 1979) (en banc); *Pub. Util. Comm'n v. City of Harlingen*, 311 S.W.3d 610, 620 n.7 (Tex. App.—Austin 2010, no pet.); *Lal v. Harris Methodist Fort Worth*, 230 S.W.3d 468, 473–74 (Tex. App.—Fort Worth 2007, no pet.); *Walker v. City of Georgetown*, 86 S.W.3d 249, 259 (Tex. App.—Austin 2002, pet. denied); *Am. Honda Motor Co. v. Tex. Dep't of Transp.—Motor Vehicle Div.*, 47 S.W.3d 614, 621 (Tex. App.—Austin 2001, pet. denied); see also *Jones v. Fowler*, 969 S.W.2d 429, 431–33 (Tex. 1998) (per curiam).

<sup>513</sup> See *Jones*, 969 S.W.2d at 431–32.

<sup>514</sup> See *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009).

fills an apparent void in the statutory scheme and does not modify long-standing interpretations that the court has given the statute.<sup>515</sup> However, a presumption is only a presumption and canons are merely guides, so the ultimate key for the court will be determining the legislative intent in context of the statute as a whole.<sup>516</sup>

### 7. A Re-enacted Statute: Prior Judicial Interpretation

If an ambiguous statute has been interpreted by a court of last resort and the statute is re-enacted without substantial change, the legislature is presumed to have been familiar with the court's interpretation and to have adopted it.<sup>517</sup> This is consistent with *stare decisis* and precedent.<sup>518</sup> It has its greatest force in statutory construction cases.<sup>519</sup> "Adhering to precedent fosters efficiency, fairness, and legitimacy. More practically, it results in predictability in the law, which allows people to rationally order their conduct and affairs."<sup>520</sup>

### 8. Laws Adopted from Another Jurisdiction and Uniform Codes

When the legislature adopts a statute modeled after another jurisdiction's law, that jurisdiction's interpretation before the legislature enacts the statute may be given weight.<sup>521</sup> When the legislature adopts a federal statute, the courts presume that it knows of the federal courts' construction of the federal statute and intended to adopt that construction.<sup>522</sup> However, when the legislature looks to another jurisdiction's statute, but modifies rather than adopts some of its provisions, it is deemed that the legislature did so purposefully.<sup>523</sup>

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<sup>515</sup>*Ford Motor Co. v. Motor Vehicle Bd. of the Tex. Dep't of Transp./Metro Ford Truck Sales, Inc.*, 21 S.W.3d 744, 763 (Tex. App.—Austin 2000, pet. denied).

<sup>516</sup>*Jones*, 969 S.W.2d at 432.

<sup>517</sup>*Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004); *Grapevine Excavation, Inc. v. Md. Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000); *Ector Cnty. v. Stringer*, 843 S.W.2d 477, 479 n.4 (Tex. 1992); *Robinson v. Cent. Tex. MHMR Ctr.*, 780 S.W.2d 169, 171 (Tex. 1989); *First Emps. Ins. Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983).

<sup>518</sup>See *supra* notes 441–451 and accompanying text.

<sup>519</sup>*Grapevine Excavation, Inc.*, 35 S.W.3d at 5.

<sup>520</sup>*Id.* (citation omitted).

<sup>521</sup>*Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 497 (Tex. 2001).

<sup>522</sup>*City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); *Blackmon v. Hansen*, 169 S.W.2d 962, 964–65 (Tex. 1943).

<sup>523</sup>*Helena Chem. Co.*, 47 S.W.3d at 497; see also *Sharifi v. Young Bros., Inc.*, 835 S.W.2d

The Code Construction Act provides that a uniform act “shall be construed to effect its general purpose to make uniform the law of those states that enact it.”<sup>524</sup> The Texas Supreme Court has adhered to this statutory canon and referenced the case decisional law of other state jurisdictions to determine the Texas legislature’s intent.<sup>525</sup> This has caused the appellate courts to consider the official comments to the uniform code to be persuasive but not binding authority as to a determination of the legislative intent.<sup>526</sup> In addition, when the Texas legislature has adopted a model act, it has found persuasive the consistent interpretation of a statutory phrase by its sister jurisdictions when the language was verbatim from the model code.<sup>527</sup>

### 9. Executive Agencies’ Construction of a Statute Which They Administer

The judiciary has the inherent power to substitute judgment for that of an agency when such interpretation contradicts the plain language of the statute.<sup>528</sup> Historically, the judiciary gave very little deference, if any, to an agency construction of a statute when the issue was the choice between two or more possible reasonable constructions of the statute.<sup>529</sup> The Texas Supreme Court has adopted a canon of construction dictating that the contemporaneous construction by an agency that is charged with the enforcement of the regulatory statute is entitled to great weight.<sup>530</sup> The court has indicated that such deference is appropriate when the agency

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221, 223 (Tex. App.—Waco 1992, writ denied).

<sup>524</sup>TEX. GOV’T CODE ANN. § 311.028 (West 2005).

<sup>525</sup>*See, e.g.,* MBank El Paso, N.A. v. Sanchez, 836 S.W.2d 151, 154 (Tex. 1992); *see also* Fetter v. Wells Fargo Bank Tex., N.A., 110 S.W.3d 683, 687 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

<sup>526</sup>*Fetter*, 110 S.W.3d at 687; *Lockhart Sav. & Loan Ass’n v. RepublicBank Austin*, 720 S.W.2d 193, 195 (Tex. App.—Austin 1986, writ ref’d n.r.e.).

<sup>527</sup>*See* Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W.3d 170, 185 n.11 (Tex. 2004).

<sup>528</sup>*See* Fiess v. State Farm Lloyds, 202 S.W.3d 744, 747–48 (Tex. 2006); *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994); *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

<sup>529</sup>*See* Bullock v. Ramada Tex., Inc., 609 S.W.2d 537, 539 (Tex. 1980); *see also* *Citizens Nat’l Bank of Paris, Ill. v. Calvert*, 527 S.W.2d 175, 180 (Tex. 1975).

<sup>530</sup>*First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008); *Tex. Mun. Power Agency v. Pub. Util. Comm’n*, 253 S.W.3d 184, 192 (Tex. 2007); *Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 623 (Tex. 2007); *State v. Pub. Util. Comm’n*, 883 S.W.2d 190, 196 (Tex. 1994).



construction is a reasonable one.<sup>531</sup> This judicial holding is consistent with the legislative desire as set forth in the Code Construction Act.<sup>532</sup> Yet this deference is tempered by the fact that it is the judiciary who ultimately decides the reasonableness of the agency interpretation.<sup>533</sup> In addition, such deference only “applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions in documents” such as an amicus brief.<sup>534</sup> Finally, if the issue of construction or interpretation deals with a non-technical question of law or a matter outside of the agency’s expertise, the court will not give as much deference to the agency’s reading of the statute.<sup>535</sup>

In a 1997 decision, the Third Court of Appeals in Austin held that if a statutory provision can reasonably be interpreted as the agency has ruled, and if the reading is in harmony with the remainder of the statute, “then the court is bound to accept that interpretation even if other reasonable interpretations exist.”<sup>536</sup> This holding was an extreme departure from the above noted judicial precedent and appears to be based on improper authority. The Third Court of Appeals relied on one of its own prior decisions as authority for this proposition.<sup>537</sup> However, that decision did not involve the mere interpretation of a statutory provision, but rather whether a substantive rule adopted by the agency was consistent with the statute.<sup>538</sup>

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<sup>531</sup> See *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC*, 324 S.W.3d 95, 106 (Tex. 2010); *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 531 (Tex. 2002); *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 283 (Tex. 1999); *Dodd*, 870 S.W.2d at 7.

<sup>532</sup> TEX. GOV’T CODE ANN. § 311.023(5) (West 2005).

<sup>533</sup> *Teleprofits of Tex., Inc. v. Sharp*, 875 S.W.2d 748, 752 (Tex. App.—Austin 1994, no writ); see *Pub. Util. Comm’n*, 883 S.W.2d at 196.

<sup>534</sup> *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006).

<sup>535</sup> See *Rogers v. Tex. State Bd. of Pub. Accountancy*, 310 S.W.3d 1, 6 (Tex. App.—Austin 2008, no pet.); *CenterPoint Energy Hous. Elec., LLC v. Gulf Coast Coal. of Cities*, 252 S.W.3d 1, 16 (Tex. App.—Austin 2008), *aff’d in part, rev’d in part on other grounds by State v. Pub. Util. Comm’n*, 344 S.W.3d 349 (Tex. 2011); *State v. Pub. Util. Comm’n*, 246 S.W.3d 324, 332 (Tex. App.—Austin 2008, pet. denied); *R.R. Comm’n v. Coppock*, 215 S.W.3d 559, 563 (Tex. App.—Austin 2007, pet. denied); *TXU Generation Co., L.P. v. Pub. Util. Comm’n*, 165 S.W.3d 821, 830 (Tex. App.—Austin 2005, pet. denied); *Strayhorn v. Willow Creek Res., Inc.*, 161 S.W.3d 716, 720 (Tex. App.—Austin 2005, no pet.).

<sup>536</sup> *City of Plano v. Pub. Util. Comm’n*, 953 S.W.2d 416, 421 (Tex. App.—Austin 1997, no writ).

<sup>537</sup> *Id.* (citing *Quorum Sales, Inc. v. Sharp*, 910 S.W.2d 59, 64 (Tex. App.—Austin 1995, writ denied)).

<sup>538</sup> See *Quorum Sales, Inc.*, 910 S.W.2d at 63–64.

The power of judicial construction of a statute in the rulemaking context has always been tempered by the recognition that the power of an agency is analogous to the power of the legislature to pass legislation;<sup>539</sup> therefore, the agency determination of what the law should be is accorded a presumption of validity.<sup>540</sup> This approach has never been utilized in the non-rulemaking context where the agency has merely declared the specific legislative intent.

The Austin Court of Appeals has inconsistently applied this precedent from *City of Plano* since its holding in 1997. It has ignored the holding in virtually every decision rendered since that time, indicating an agency interpretation is merely to be given substantial deference.<sup>541</sup> However, in a series of decisions, the court has recently held that if the statute can reasonably be read as the agency has ruled and the reading is in harmony with the rest of the statute, then the court is bound to accept that determination even if other reasonable interpretations exist.<sup>542</sup>

These holdings are bolstered by another recent Third Court of Appeals' decision where the court was confronted with the issue of whether an agency can modify its interpretation of a statute that had not been amended or modified by the legislature.<sup>543</sup> The court held that the agency had the authority to change a previous interpretation as long as the new interpretation did not contradict either the statutory language or a formally

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<sup>539</sup> See *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976).

<sup>540</sup> *Trapp v. Shell Oil Co.*, 198 S.W.2d 424, 449 (Tex. 1946) (Alexander, J., dissenting).

<sup>541</sup> See *Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc.*, 320 S.W.3d 912, 924–25 (Tex. App.—Austin 2010, no pet.); *SWEPI LP v. R.R. Comm'n.*, 314 S.W.3d 253, 266 (Tex. App.—Austin 2010, pet. denied); *Laredo Coca-Cola Bottling Co. v. Combs*, 317 S.W.3d 735, 740 (Tex. App.—Austin 2010, pet. denied); *Amaral-Whittenberg v. Alanis*, 123 S.W.3d 714, 720 (Tex. App.—Austin 2003, no pet.); *Sergeant Enters., Inc. v. Strayhorn*, 112 S.W.3d 241, 246 (Tex. App.—Austin 2003, no pet.); *GTE Sw., Inc. v. Pub. Util. Comm'n.*, 102 S.W.3d 282, 289 (Tex. App.—Austin 2003, pet. dismissed); *Equitable Trust Co. v. Fin. Comm'n.*, 99 S.W.3d 384, 387 (Tex. App.—Austin 2003, no pet.); *Hartford Underwriters Ins. Co. v. Hafley*, 96 S.W.3d 469, 474 (Tex. App.—Austin 2002, no pet.).

<sup>542</sup> *Am. Nat'l Ins. Co. v. Tex. Dep't of Ins.*, No. 03-08-00535-CV, 2010 WL 1633170, at \*3 (Tex. App.—Austin April 22, 2010, pet. granted) (memo op.); *State v. Pub. Util. Comm'n.*, 110 S.W.3d 580, 584–85 (Tex. App.—Austin 2003, no pet.); *Steering Comms. for the Cities Served by TXU Elec. v. Pub. Util. Comm'n.*, 42 S.W.3d 296, 300 (Tex. App.—Austin 2001, no pet.); *Berry v. State Farm Mut. Auto. Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App.—Austin 2000, no pet.); *Gene Hamon Ford, Inc. v. David McDavid Nissan, Inc.*, 997 S.W.2d 298, 305 (Tex. App.—Austin 1999, pet. denied).

<sup>543</sup> *First Am. Title Ins. Co. v. Strayhorn*, 169 S.W.3d 298, 306–07, 310 (Tex. App.—Austin 2005), *aff'd*, 258 S.W.3d 627 (Tex. 2008).

promulgated rule.<sup>544</sup> It merely cited to authority<sup>545</sup> that held an agency's interpretation of the law that it administers is entitled to substantial deference, and that decision did not so hold in light of an agency's reinterpretation of un-amended statutory language.<sup>546</sup> The Austin court also cited to authority that upheld an agency's reinterpretation of its own rule rather than an existing statute.<sup>547</sup> In addition, in that decision, the court upheld the reinterpretation of a rule on the basis that the agency had the power to modify such rule on an ad hoc basis in a particular contested case proceeding.<sup>548</sup> Subsequent to that holding, the Texas Supreme Court held that a rule adopted pursuant to notice and comment rulemaking could not be modified by an agency within a contested case proceeding in an ad hoc manner.<sup>549</sup>

However, the legitimacy of the court's holding can be justified by relying on a United States Supreme Court opinion, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, that upheld the power of a federal agency to modify its interpretation of an existing statute that had not been amended.<sup>550</sup> The Court held that the court of appeals committed a "basic legal error" of determining that an existing statute had a "static definition."<sup>551</sup> If the agency's construction of a statutory provision really centers on the wisdom of the agency policy, rather than whether it is a reasonable choice within a gap left open by the legislature, the Court held that the challenge must fail.<sup>552</sup> The Austin court simply held without citing *Chevron* that the agency's new interpretation was reasonable and consistent with the language of the statute.<sup>553</sup> What the Austin court did not answer is whether the court is bound to accept the agency's "reinterpretation" of the

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<sup>544</sup> *Id.* at 306.

<sup>545</sup> *Id.* at 304 (citing *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993)).

<sup>546</sup> See *Tarrant Appraisal Dist.*, 845 S.W.2d at 822–23.

<sup>547</sup> *Strayhorn*, 169 S.W.3d at 306 (citing *Grocers Supply Co. v. Sharp*, 978 S.W.2d 638, 642 (Tex. App.—Austin 1998, pet. denied)).

<sup>548</sup> See *Grocers Supply Co.*, 978 S.W.2d at 642–43 n.7.

<sup>549</sup> *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255–56 (Tex. 1999), *superseded by statute*, TEX. LAB. CODE ANN. §§ 410.255(a)–410.301 (West & Supp. 2011), *as recognized in* *Tex. Prop. & Cas. Guar. Ass'n v. Nat'l Am. Ins. Co.*, 208 S.W.3d 523 (Tex. Ct. App.—Austin 2006, pet. denied).

<sup>550</sup> See 467 U.S. 837, 840–42 (1984).

<sup>551</sup> *Id.* at 842.

<sup>552</sup> See *id.* at 845–47.

<sup>553</sup> *First Am. Title Ins. Co. v. Strayhorn*, 169 S.W.3d 298, 310 (Tex. App.—Austin 2005), *aff'd*, 258 S.W.3d 627 (Tex. 2008).

statute even if it is reasonable. In other words, what if the court believes the agency's initial, reasonable interpretation better reflects the legislative intent versus the agency's "reinterpretation" of the statute, even though it is found by the court to be reasonable?

This brings the issue back to the analysis set forth above of whether the Austin court will continue to hold it is not bound by an agency's choice between two reasonable constructions of a statute or not. This decision impliedly upholds the concept that the court is bound, as *Chevron* not only upheld an agency's reinterpretation of an existing, unamended law, but also held that the federal courts were bound by an agency's choice between competing reasonable interpretations of a statute.<sup>554</sup> Thus, confusion reigns supreme with whether or not the Austin court is in fact adopting the *Chevron* approach or not to initial interpretations or reinterpretations of a statutory ambiguity by an agency.

In 2011, the Texas Supreme Court did not directly respond to the conflicting case law of the Third Court of Appeals, but it did directly address the issue of whether the federal precedent of *Chevron* was applicable in Texas.<sup>555</sup> The court held it had never directly adopted the *Chevron* doctrine in its consideration of a state agency's construction of a statute, but the court agreed that the analysis in which the court engaged was similar.<sup>556</sup> In the court's "serious consideration" inquiry, the court will generally uphold an agency's interpretation of a statute it is charged by the legislature with enforcing, "so long as the construction is reasonable and does not contradict the plain language of the statute."<sup>557</sup> However, the court noted that this holding was tempered by several considerations:

It is true that courts give some deference to an agency regulation containing a reasonable interpretation of an ambiguous statute. But there are several qualifiers in that statement. First, it applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions [in a court brief]. Second, the language at issue must be ambiguous; an agency's opinion cannot change plain language. Third, the agency's construction

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<sup>554</sup> *Chevron*, 467 U.S. at 842–45 (1984).

<sup>555</sup> See R.R. Comm'n v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 625 (Tex. 2011) (quoting First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 632 (Tex. 2008)).

<sup>556</sup> *Id.*

<sup>557</sup> *Id.*

must be reasonable; alternative *unreasonable* constructions do not make a policy ambiguous.<sup>558</sup>

By the Texas Supreme Court only stating that its own test was “similar” to *Chevron*, the jury is still out as to whether it will actually follow the doctrine. A second decision rendered by the court in the same month merely cited to its own “serious consideration” test, and then the court substituted judgment for that of the agency.<sup>559</sup> In the same month, the court held that an agency interpretation is entitled to “great weight” but less deference would be given if the issue centered on legislative intent rather than the application of technical or regulatory matters within the agency’s expertise.<sup>560</sup> Two months later, the court stated: “If there is vagueness, ambiguity or room for policy determinations in a statute or regulation, as there is here, we normally defer to the agency’s interpretation unless it is plainly erroneous or inconsistent with the language of the statute regulation or rule.”<sup>561</sup> However, the court concluded by stating: “Deference to the agency’s interpretation, however, is not conclusive or unlimited.”<sup>562</sup> This final conclusion is clearly distinguishing the test of the court from that of *Chevron*. Only time will tell if the court is further willing to clarify its test, but currently it has not been willing to be bound by an agency’s reasonable resolution of an ambiguity in a statute that it administers.

## 10. Attorney General Opinions

The Attorney General is entrusted with the duty to give legal advice in writing to all executive officers as to the meaning of the law.<sup>563</sup> Such opinions are entitled to careful consideration by the courts and are generally regarded as highly persuasive,<sup>564</sup> but they are not binding on the judiciary as to determining the legislative intent.<sup>565</sup>

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<sup>558</sup> *Id.* (quoting *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747–48 (Tex. 2006)).

<sup>559</sup> *See State v. Pub. Util. Comm’n*, 344 S.W.3d 349, 356, 375, 377 (Tex. 2011).

<sup>560</sup> *In re Smith*, 333 S.W.3d 582, 588 (Tex. 2011).

<sup>561</sup> *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

<sup>562</sup> *Id.*

<sup>563</sup> TEX. CONST. art. IV, § 22.

<sup>564</sup> *In re Smith*, 333 S.W.3d at 588; *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 598 n.6 (Tex. 1975); *Eddins-Walcher Butane Co. v. Calvert*, 298 S.W.2d 93, 96 (Tex. 1957).

<sup>565</sup> *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010); *Comm’rs Court v. Agan*, 940 S.W.2d 77, 82 (Tex. 1997); *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996).

## 11. Legislative History

The approach of the practitioner and judges as to the use of legislative history should be guided by Justice Willett's concurrence wherein he stated:

The Legislature passes and the Governor signs bills, not bill analyses, and we are governed by laws, not by legislative histories. So long as judges resort to external materials even when statutes are clear, lawmakers and lobbyists will keep peppering the legislative record with their preferred interpretation, not to inform legislators enacting statutes but to influence judges interpreting them. And then, when litigation ensues, statutory construction devolves into statutory excavation. The legal scavenger hunt begins, and the often-contradictory tidbits are unearthed and cited—perhaps inaccurately, selectively, or misleadingly—in order to hoodwink earnest judges and enable willful ones to reach a decision foreclosed by the text itself.

Supplanting (or even supplementing) the clarity of what was passed by the legislative branch and signed by the executive branch with what an individual legislator thought, staffer wrote, witness testified, lobbyist assured, or interest group asserted invites jurisprudential kudzu. And once it takes hold, it threatens to choke off the surest guarantee of modest, no-favorites judging: taking the Legislature at its word.<sup>566</sup>

Justice Scalia of the United States Supreme Court chastises his own court on the use of legislative history by stating: “Their only mistake was failing to recognize how unreliable Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not.”<sup>567</sup> Justice Scalia concludes:

I decline to participate in this process. It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the

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<sup>566</sup> *Klein v. Hernandez*, 315 S.W.3d 1, 11 (Tex. 2010) (Willett, J., concurring); *see also* *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 649–50 (Tex. 2008) (Willett, J., concurring).

<sup>567</sup> *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring).

statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.<sup>568</sup>

Therefore, the practitioner and judges should be fully aware of the concept that legislative history is evidence of legislative intent, but not the equivalent of legislative intent.<sup>569</sup> Further, by definition, legislative history is some evidence of legislative intent not incorporated within the wording of the statute.<sup>570</sup> Even though the legislature in the Code Construction Act blesses the use by the courts of legislative history,<sup>571</sup> a legislature legislates by legislating and not by doing nothing,<sup>572</sup> or for that matter by holding hearings or writing Committee Reports.<sup>573</sup>

Despite these inherent problems, legislative history is considered by the courts in determining legislative intent.<sup>574</sup> Legislative history includes: (1) actions taken during the legislative session; (2) bill analysis and committee reports; (3) committee hearings; and (4) floor debates.<sup>575</sup> As to the statements of individual legislators, the intent of an individual legislator, even a statute's principal author, is not legislative history controlling the construction of the statute.<sup>576</sup> "It is at most persuasive authority as might be given the comments of any learned scholar of the subject."<sup>577</sup> However, post-enactment statements by individual legislators are not legislative

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<sup>568</sup> *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring).

<sup>569</sup> See *Mortier*, 501 U.S. at 620–21 (Scalia, J., concurring); *Klein*, 315 S.W.3d at 11 (Willett, J., concurring).

<sup>570</sup> See BLACK'S, *supra* note 128, at 983 (defining legislative history as the "background and events leading to the enactment of a statute," not the statute itself).

<sup>571</sup> See TEX. GOV'T CODE ANN. § 311.023(3) (West 2005).

<sup>572</sup> *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex. 1983).

<sup>573</sup> See *Mortier*, 501 U.S. at 621.

<sup>574</sup> See *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 644 (Tex. 2008); *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–55 (Tex. 2006); *In re Canales*, 52 S.W.3d 698, 702–03 (Tex. 2001); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997).

<sup>575</sup> See *Lee v. Mitchell*, 23 S.W.3d 209, 213 (Tex. App.—Dallas 2000, pet. denied); see also *In re Canales*, 52 S.W.3d at 703 nn.17 & 21; *Ashworth*, 943 S.W.2d at 439.

<sup>576</sup> *AT & T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528–29 (Tex. 2006); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993).

<sup>577</sup> *De La Lastra*, 852 S.W.2d at 923.

history and can provide little guidance, if any, to discerning the legislative intent.<sup>578</sup> Also, determining intent from failed bills would be mere inference that would be little more than conjecture.<sup>579</sup> However, the deletion of a provision in a pending bill discloses the legislative intent to reject the proposal.<sup>580</sup> “Courts should be slow to put back that which the legislature has rejected.”<sup>581</sup> Yet the courts attach no controlling significance to the legislature’s failure to enact legislation, for it is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.<sup>582</sup>

## 12. Spirit of the Law

It is appropriate near the end of our inquiry of the canons of statutory construction to consider one canon of construction that simply ignores all of the above-stated principles and canons: the spirit of the law canon. This canon, as stated, is as follows:

Courts will not follow the letter of [the law] when it leads away from the true intent and purpose of the legislature, and to conclusions inconsistent with the general purpose of the [statute]. A too literal [interpretation] of a statute, which would prevent the enforcement of it according to its true intent, should be avoided.<sup>583</sup>

How could it be that the courts would ignore the words of the statute, which is the “best evidence of the legislative intent”?<sup>584</sup> The key to understanding

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<sup>578</sup> *In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000); *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 328–29 (Tex. 1994) (Hecht, J., concurring & dissenting), *abrogated by* Carl J. Battaglia, M.D., P.A. v. Alexander, 177 S.W.3d 893 (Tex. 2008); *Welch v. McLean*, 191 S.W.3d 147, 170 (Tex. App.—Fort Worth 2005, no pet.), *declined to follow by* *Phillips v. Bramlett*, 288 S.W.3d 876 (Tex. 2009).

<sup>579</sup> *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009); *Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983).

<sup>580</sup> *Transp. Ins. Co. v. Maksyn*, 580 S.W.2d 334, 338 (Tex. 1979).

<sup>581</sup> *Id.*; *see also* *Smith v. Baldwin*, 611 S.W.2d 611, 616–17 (Tex. 1980).

<sup>582</sup> *See Entergy Gulf States, Inc.*, 282 S.W.3d at 443.

<sup>583</sup> *State v. Dyer*, 200 S.W.2d 813, 815 (Tex. 1947) (quoting *Edwards v. Morton*, 46 S.W. 792, 793 (Tex. 1898)); *see* *Kilday v. Germany*, 163 S.W.2d 184, 187 (Tex. 1942) (per curiam); *Wood v. State*, 126 S.W.2d 4, 7 (Tex. 1939).

<sup>584</sup> *See supra* notes 157–158 and accompanying text.



this principle is that the judiciary does not in fact ignore the wording of the statute.

First, this is not a tool or canon to argue the “better rule of law” or “what the law should be” as has been demonstrated a litigant may do when arguing a change in the common law.<sup>585</sup> The argument must be based on the assertion that the legislative intent, not the judicial intent, demands such a radical departure from following the plain meanings of the words of the statute.<sup>586</sup> Therefore, the argument must be predicated on the fact that the legislative intent is clearly disclosed by the remainder of the words in the statute.<sup>587</sup> Thus, the argument is that certain words are inconsistent with the legislative intent as evidenced by the remainder of the words in the statute. So, the courts can ignore the words if the legislative intent demands it.<sup>588</sup> However, as set forth above, separation of powers prohibits the judiciary from legislating, and this canon forces the court into a “zone of twilight” where it is unclear at exactly what point the act of interpretation ends and the act of legislation begins.<sup>589</sup> In other words, how often will a court be receptive to and be willing to add or subtract words from a statute to fulfill the legislative intent? It should be and is not very often. The Texas Supreme Court has held: “Only truly extraordinary circumstances showing unmistakable legislative intent should divert us from enforcing the statute as written.”<sup>590</sup> For as the court has also stated: “When the purpose of a legislative enactment is obvious from the language of the law itself . . . it is vain to ask the courts to attempt to liberate an invisible spirit, supposed to live concealed within the body of the law.”<sup>591</sup>

The spirit of a law canon is most often used as an argument to add words to the statute when the court concludes that something is missing that the legislature clearly intended to be included.<sup>592</sup> The judiciary’s typical response to omissions is as follows:

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<sup>585</sup> See *supra* notes 41–47 and accompanying text.

<sup>586</sup> See *Crimmins v. Lowry*, 691 S.W.2d 582, 584 (Tex. 1985); *State v. Terrell*, 588 S.W.2d 784, 786–87 (Tex. 1979); *Miers v. Brouse*, 271 S.W.2d 419, 421 (Tex. 1954); *City of Mason v. W. Tex. Utils. Co.*, 237 S.W.2d 273, 278 (Tex. 1951); *Huntsville Indep. Sch. Dist. v. McAdams*, 221 S.W.2d 546, 549 (Tex. 1949).

<sup>587</sup> See *Sweeny Hosp. Dist. v. Carr*, 378 S.W.2d 40, 47 (Tex. 1964).

<sup>588</sup> See *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

<sup>589</sup> See *supra* notes 48–50 and accompanying text.

<sup>590</sup> *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999).

<sup>591</sup> *Id.* at 866 (quoting *Dodson v. Bunton*, 17 S.W. 507, 508 (Tex. 1891)).

<sup>592</sup> See *id.* at 866–67.

Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language and not elsewhere. . . . They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law.<sup>593</sup>

Therefore, if one is asserting an argument solely on the basis that the court must somehow ignore wording, add wording, or omit wording, it is necessary to have compelling evidence as set forth in: (1) the remaining words of the statute; (2) the preamble; (3) the title; and (4) the legislative history; as well as (5) the context in which the statute was adopted to demonstrate to the court that this is an extraordinary situation calling for a court to ignore the fundamental canons of construction to apply the law as evidenced by the plain meaning of the words.

### 13. Avoidance of a Constitutional Issue

The Texas legislature provides in the Code Construction Act that all statutes should be presumed by the judiciary to be in compliance with the Texas and United States Constitutions.<sup>594</sup> The Texas Supreme Court has thereby held that when it is faced with multiple constructions of a statute, the court must interpret the statutory language in a manner that renders it constitutional, if possible to do so.<sup>595</sup> “Statutes are given a construction consistent with the constitutional requirements, when possible, because the legislature is presumed to have intended compliance with state and federal constitutions.”<sup>596</sup> An unconstitutional intent of the legislature will not be upheld unless compelled by some immutable law or some overriding public policy consideration.<sup>597</sup>

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<sup>593</sup> *St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997) (quoting *RepublicBank Dall., N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985)); see *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920); see also *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 358 (Tex. 2000).

<sup>594</sup> TEX. GOV’T CODE ANN. § 311.021(1) (West 2005).

<sup>595</sup> *City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006).

<sup>596</sup> *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990).

<sup>597</sup> *Greyhound Lines, Inc. v. Bd. of Equalization*, 419 S.W.2d 345, 349 (Tex. 1967).

#### 14. Severance

“By analogy to statutory construction, severability is a question of legislative intent.”<sup>598</sup> Absent an expression of legislative intent regarding severability, the valid remaining portions of a statute remain enforceable so long as the invalidity of one portion does not affect the other provisions or applications of the statute that can be given effect without the invalid provision or application.<sup>599</sup> This holding is based on the court’s willingness to abide by the legislature’s instructions, as they were adopted, in the Code Construction Act<sup>600</sup> and the Construction of Laws Act.<sup>601</sup> For if the constitutional provisions of the statute remain “complete in itself, and capable of being executed in accordance with the legislative intent, wholly independent of that which was rejected [as unconstitutional], it must stand.”<sup>602</sup> But, if the invalid portions are inextricably intertwined in the texture of the Act, the entire Act is invalid.<sup>603</sup>

#### F. Prospective v. Retrospective Application of the Law

##### 1. The General Rule: Prospective Application

The Code Construction Act expressly provides that a statute is presumed to be prospective in its operation unless expressly made retrospective.<sup>604</sup> This is in accord with the judicial construction that starts with the presumption of the prospective effect of statutes.<sup>605</sup> Further, the judiciary will not find a legislative intent to apply a law retrospectively unless it appears by fair implication from the language used that it was the

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<sup>598</sup>Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC, 324 S.W.3d 95, 103 (Tex. 2010).

<sup>599</sup>*Id.*

<sup>600</sup>TEX. GOV’T CODE ANN. § 311.032 (West 2005).

<sup>601</sup>*Id.* § 312.013.

<sup>602</sup>Horizons/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 902 (Tex. 2000); Rose v. Doctors Hosp., 801 S.W.2d 841, 844 (Tex. 1990); W. Union Tel. Co. v. State, 62 Tex. 630, 634 (1884).

<sup>603</sup>Fletcher v. State, 439 S.W.2d 656, 659 (Tex. 1969).

<sup>604</sup>TEX. GOV’T CODE ANN. § 311.022.

<sup>605</sup>Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia, 324 S.W.3d 544, 547 (Tex. 2010); Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 219 (Tex. 2002); *Ex parte* Abell, 613 S.W.2d 255, 258 (Tex. 1981); Merchs. Fast Motor Lines v. R.R. Comm’n, 573 S.W.2d 502, 504 (Tex. 1978); Coastal Indus. Water Auth. v. Trinity Portland Cement Div., Gen. Portland Cement Co., 563 S.W.2d 916, 918 (Tex. 1978).

intention of the legislature to make it applicable to both past and future transactions.<sup>606</sup> If there is any doubt, the intention will be resolved against the retroactive application of the statute.<sup>607</sup>

## 2. Statutory Cause of Action: Retrospective or Retroactive Effect

“The general rule is that when a statute is repealed without a savings clause limiting the effect of the repeal, the repeal of that statute is usually given immediate effect.”<sup>608</sup> When a right or remedy is dependent on a statute, the unqualified repeal of that statute will operate to deprive the party of all such rights that have not become vested or reduced to final judgment.<sup>609</sup> Generally, all suits previously filed in reliance on the statute must cease when the repeal becomes effective.<sup>610</sup> “[I]f final relief has not been granted before the repeal goes into effect, final relief cannot be granted thereafter, even if the cause is pending on appeal.”<sup>611</sup> The repeal of the statute in such instances deprives the court of subject matter jurisdiction over the cause.<sup>612</sup>

“This common-law rule of abatement may be modified by a specific savings clause in the repealing legislation or by a general savings statute limiting the effect of repeals.”<sup>613</sup> The Code Construction of Laws provides a general savings clause as follows:

- (a) Except as provided by Subsection (b), the reenactment, revision, amendment, or repeal of a statute does not affect:
  - (1) the prior operation of the statute or any prior action taken under it;
  - (2) any validation, cure, right, privilege, obligation,

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<sup>606</sup> See *In re M.C.C.*, 187 S.W.3d 383, 384 (Tex. 2006) (per curiam); *Coastal Indus. Water Auth.*, 563 S.W.2d at 918.

<sup>607</sup> *Ex parte Abell*, 613 S.W.2d at 258; see *Deacon v. City of Euless*, 405 S.W.2d 59, 61 (Tex. 1966).

<sup>608</sup> *Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex. 1998); *Knight v. Int'l Harvester Credit Corp.*, 627 S.W.2d 382, 384 (Tex. 1982).

<sup>609</sup> *Quick*, 7 S.W.3d at 128.

<sup>610</sup> *Id.*

<sup>611</sup> *Id.*; *Knight*, 627 S.W.2d at 384; *Nat'l Carloading Corp. v. Phoenix-El Paso Express, Inc.*, 176 S.W.2d 564, 568 (Tex. 1943); *Dickson v. Navarro Cnty. Levee Improvement Dist. No. 3*, 139 S.W.2d 257, 259 (Tex. 1940).

<sup>612</sup> *Quick*, 7 S.W.3d at 128; *Knight*, 627 S.W.2d at 384; *Dickson*, 139 S.W.2d at 259.

<sup>613</sup> *Quick*, 7 S.W.3d at 128.

or liability previously acquired, accrued, accorded, or incurred under it;

(3) any violation of the statute or any penalty, forfeiture, or punishment incurred under the statute before its amendment or repeal; or

(4) any investigation, proceeding, or remedy concerning any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(b) If the penalty, forfeiture or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.<sup>614</sup>

The Legislature's adoption of the general savings clause in the Code Construction Act indicates a general legislative policy that the repeal of any statute shall not affect the prior operation of that statute nor extinguish any liability incurred or affect any right accrued or claim arising before the repeal [took] effect.<sup>615</sup>

Given this general policy and the broad applicability of the Code Construction Act, the Court "will presume that the general savings clause applies unless a contrary legislative intent is shown by clear expression or necessary implication."<sup>616</sup> Based on these provisions, the general savings clause is "to be treated as incorporated in and as a part of the subsequent enactments . . . ."<sup>617</sup>

[T]herefore[,] under the general principles of construction

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<sup>614</sup>TEX. GOV'T CODE ANN. § 311.031(a)-(b) (West 2005).

<sup>615</sup>*Quick*, 7 S.W.3d at 129-30.

<sup>616</sup>*Id.* at 130; *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908).

<sup>617</sup>*Great N. Ry. Co.*, 208 U.S. at 465 (cited and quoted with approval by *Quick*, 7 S.W.3d at 130).

requiring, if possible, that effect be given to all the parts of the law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions . . . .<sup>618</sup>

### 3. Statutory Modification of the Common Law: Retrospective or Retroactive Effect

#### *a. Procedural, Remedial, or Jurisdictional Statutes*

Even if a law is prospective in effect, it may have retrospective effect due to a fundamental rule that a court is to apply the law in effect at the time it decides the case.<sup>619</sup> A statute does not operate retroactively merely because it is applied in a case arising from conduct predating the enactment. This is when the law is procedural, remedial, or jurisdictional.<sup>620</sup> Whether a law acts retroactively or retrospectively is not a simple or mechanical test:

A statute does not operate “retrospectively” merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates “retroactively” comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have “sound . . . instinct[s],” and familiar considerations of fair notice, reasonable reliance, and settled expectations offer

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<sup>618</sup> *Id.*

<sup>619</sup> *Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia*, 324 S.W.3d 544, 547 (Tex. 2010); *Tex. Mun. Power Agency v. Pub. Util. Comm’n*, 253 S.W.3d 184, 198 (Tex. 2007).

<sup>620</sup> *Tex. Mun. Power Agency*, 253 S.W.3d at 198.

sound guidance.<sup>621</sup>

*b. Affecting Vested Common Law Rights*

In a landmark case, the Texas Supreme Court thoroughly analyzed its prior decisions and set forth a new test that is as follows:

We think our cases establish that the constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power; it protects settled expectations that rules are to govern the play and not simply the score, and prevents the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment. No bright-line test for unconstitutional retroactivity is possible. Rather, in determining whether a statute violates the prohibition against retroactive laws in article I, section 16 of the Texas Constitution, courts must consider three factors in light of the prohibition's dual objectives: the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment. The perceived public advantage of a retroactive law is not simply to be balanced against its relatively small impact on private interests, or the prohibition would be deprived of most of its force. There must be a compelling public interest to overcome the heavy presumption against retroactive laws. To be sure, courts must be mindful that statutes are not to be set aside lightly. This Court has invalidated statutes as prohibitively retroactive in only three cases, all involving extensions of statutes of limitations. But courts must also be careful to enforce the constitutional prohibition to safeguard its objectives.

Under this test, changes in the law that merely affect remedies or procedure, or that otherwise have little impact

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<sup>621</sup> *Quick*, 7 S.W.3d at 132 (quoting with approval *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994) and noted with approval in *Estate of Arancibia*, 324 S.W.3d at 547–48.).

on prior rights, are usually not unconstitutionally retroactive. But these consequences of the proper application of the prohibition cannot substitute for the test itself. The results in all of our cases applying the constitutional provision would be the same under this test. The cases that considered only whether the challenged statute impaired vested rights implicitly concluded that any impairment did not upend settled expectations and was overcome by the public interest served by the enactment of the statute. And the cases that focused on the propriety of the Legislature's exercise of its police power implicitly concluded that the exercise was not merely reasonable but was compelling, notwithstanding the statute's effect on prior rights.<sup>622</sup>

Only time will tell how this new standard applies to retroactive or retrospective statutes.

#### IV. CONCLUSION

This paper has established that the judicial interpretation of the meaning of a statute is clearly not a science, but an art or skill. Only through intense study, experience, and observation can a jurist or practitioner be confident that he or she has discerned the legislative intent. Only through the use of the canons of construction can the practitioner create an argument as to the meaning of the law that will benefit his or her client. Only by the judiciary following such canons in good faith and upholding the power and right of the legislature to determine what the law shall be will the State of Texas adhere to the fundamental proposition that in a rule of law society, a person has a right to know and understand what the law means before he or she decides to act. This fundamental promise of our legal jurisprudence should prevail over all other canons and notions of common sense interpretation.

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<sup>622</sup>Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 145–46 (Tex. 2010).