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A Fixed Principle Approach to Statutory Construction: The Glass-Steagall Act as a Test Case

*Vincent Di Lorenzo**

I. INTRODUCTION

In recent years there has been a gradual expansion of the securities activities of banking institutions as the courts have redefined the meaning of prohibitions contained in the Glass-Steagall Act. These decisions highlight an issue which must be addressed in all future cases of statutory construction—not merely in cases involving banks' powers under the Glass-Steagall Act. These decisions highlight that the judiciary has consistently failed to adopt fixed rules of statutory construction to be uniformly applied. Instead, it has created numerous principles of statutory construction which are not given uniform meaning and which are arbitrarily employed by a court to justify a particular decision.

Two independent theses are advanced in this article. The first is that the present judicial approach to statutory construction allows abuse and should be changed. The second is that a fixed principle approach should be adopted; that it will better serve the accepted aims of statutory construction while minimizing judicial abuse. This article seeks to encourage discussion and evaluation, particularly of the second thesis advanced.

The test group for the theses presented in this article is the reported decisions of the United States Supreme Court, the federal circuit courts, and the federal district courts

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interpreting the Glass-Steagall Act.[1] These decisions are useful

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1. The decisions which form the test group are the following:
(A) United States Supreme Court rulings:

Securities Indus. Ass'n v. Board of Governors, 468 U.S. 207 (1984); Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984); Board of Governors v. Investment Co. Inst., 450 U.S. 46 (1981); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Board of Governors v. Agnew, 329 U.S. 441 (1947).

(B) Circuit Court rulings:

Securities Indus. Ass'n v. Clarke, 885 F.2d, 1034 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1113 (1990); Securities Indus. Ass'n v. Board of Governors, 847 F.2d 890 (D.C. Cir. 1988); Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988); Securities Indus. Ass'n v. Board of Governors, 821 F.2d 810 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); Investment Co. Inst. v. FDIC, 815 F.2d 1540 (D.C. Cir.), *cert. denied*, 484 U.S. 847 (1987); Securities Indus. Ass'n v. Board of Governors, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); Investment Co. Inst. v. Conover, 790 F.2d 925 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); Securities Indus. Ass'n v. Board of Governors, 716 F.2d 92 (2d Cir. 1983), *aff'd*, 468 U.S. 207 (1984); A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984); Investment Co. Inst. v. Board of Governors, 606 F.2d 1004 (D.C. Cir. 1979), *rev'd*, 450 U.S. 46 (1981); National Ass'n of Sec. Dealers, Inc. v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *vacated in part, rev'd in part sub nom.* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Port of New York Auth. v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968); Agnew v. Board of Governors, 153 F.2d 785 (D.C. Cir. 1946), *rev'd*, 329 U.S. 441 (1947).

(C) District Court rulings:

Securities Indus. Ass'n v. Clarke, 703 F. Supp. 256 (S.D.N.Y. 1988), *vacated*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1113 (1990); Investment Co. Inst. v. Clarke, 630 F. Supp. 593 (D. Conn.), *aff'd*, 789 F.2d 175 (2d Cir.), *cert. denied*, 479 U.S. 940 (1986); Securities Indus. Ass'n v. Board of Governors, 627 F. Supp. 695 (D.D.C.), *rev'd*, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); Investment Co. Inst. v. FDIC, 606 F. Supp. 683 (D.D.C. 1985), *aff'd*, 815 F.2d 1540 (D.C. Cir.), *cert. denied*, 484 U.S. 847 (1987); Investment Co. Inst. v. Conover, 596 F. Supp. 1496 (D.D.C. 1984), *aff'd*, 790 F.2d 925 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); Investment Co. Inst. v. Conover, 593 F. Supp. 846 (N.D. Cal. 1984), *rev'd sub nom.* Investment Co. Inst. v. Clarke, 793 F.2d 220 (9th Cir.), *cert. denied*, 479 U.S. 939 (1986); Securities Indus. Ass'n v. Federal Home Loan Bank Bd., 588 F. Supp. 749 (D.D.C. 1984); Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985), *aff'd in part, rev'd in part*, 479 U.S. 388 (1987); A.G. Becker, Inc. v. Board of Governors, 519 F. Supp. 602 (D.D.C. 1981), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984); New York Stock Exch. v. Smith, 404 F. Supp. 1091 (D.D.C. 1975), *vacated sub nom.* New York Stock Exch. v. Bloom, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied sub nom.* New York Stock Exch. v. Heinmann, 435 U.S. 942 (1978); Investment Co. Inst. v. Camp, 274 F. Supp. 624

as a test group because they evidence the current thinking of the courts, since most were issued in the 1980s. Analysis of these decisions reveals the abuses that arise due to the judiciary's current approach to statutory interpretation.

Section two of this article sets forth an overview of the provisions of the Glass-Steagall Act relevant to this article. Section two then examines the courts' current approach to issues of statutory interpretation and provides documentation of the extent of nonuniformity and arbitrariness in judicial decisionmaking. Using all reported case law under the Glass-Steagall Act as a sample population, this section draws the conclusion that there is currently no priority among the available principles of statutory construction, and that no fixed or uniform meaning is attached to these principles. Finally, section two examines the abuses which arise from this situation.

Section three of this article presents an alternative approach to statutory construction. The approach presented retains, in large part, the advantages resulting from the judiciary's present approach—i.e. it makes maximum use of information which will aid in decision-making—but it also imposes mandatory, fixed principles aimed at eliminating judicial abuses.

II. THE COURTS' CURRENT APPROACH TO STATUTORY CONSTRUCTION

A. *Overview: The Glass-Steagall Act*

The Glass-Steagall Act was enacted in 1933 and sought to eliminate banks' involvement in most securities activities. The

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(D.D.C. 1967), *rev'd sub nom.* National Ass'n of Sec. Dealers v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *vacated in part, rev'd in part sub nom.* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Baker, Watts & Co. v. Saxon, 261 F. Supp. 247 (D.D.C. 1966), *aff'd sub nom.* Port of New York Auth. v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968); Guaranty Trust Co. v. United States, 44 F. Supp. 417 (E.D. Wash. 1942), *aff'd*, 139 F.2d 69 (9th Cir. 1943).

In some cases several decisions are available growing out of one lawsuit, due to appeals pursued by the parties. Each decision independently evidences the judiciary's current approach to statutory interpretation and therefore is treated as a distinct member of our test group. Decisions merely applying the Glass-Steagall Act and not interpreting its provisions in any manner were not included in the test group.

Act's provisions on underwriting of corporate securities by banks, sections 16 and 21,[2] contain an absolute ban on any such activity. They do not even permit *de minimis* activity. These direct prohibitions have been deemed to apply solely to the bank itself and not to its parent, affiliate, or bona fide subsidiary.[3] The Glass-Steagall Act does not absolutely prohibit underwriting activities of affiliates of a bank. Section 20[4] prohibits affiliations between banks and entities which are "engaged principally" in securities underwriting activities. Similarly, section 32[5] forbids common officers and directors of banks and firms "primarily engaged" in securities underwriting. Thus, affiliations are permitted as long as the nonbank institutions' impermissible activities do not exceed the statutory threshold of "primarily engaged" or "engaged principally."

The unresolved issue in connection with section 20 is the precise meaning to be given to the term "engaged principally." The statute offers no definition. The legislative history offers almost no assistance in defining the term. Thus it is left to the courts to give meaning to the statute's operative term.

The importance of the courts' interpretation of this provision is heightened by the Federal Reserve Board's recent rulings authorizing bank affiliates to underwrite various categories of securities.[6] In January 1989, for example, the Federal

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2. Glass-Steagall Act, §§ 16, 21, 12 U.S.C. §§ 24, 378 (1988).

3. The decisions which discuss the applicability of sections 16 and 21 to affiliates of banking institutions are *Investment Co. Inst. v. FDIC*, 815 F.2d 1540, 1544-50 (D.C. Cir.), *cert. denied*, 484 U.S. 847 (1987); *Board of Governors v. Investment Co. Inst.*, 450 U.S. 46, 58 n.24 (1981).

The decisions which discuss their applicability to subsidiaries of banking institutions are *Investment Co. Inst. v. FDIC*, 815 F.2d at 1540; *Securities Indus. Ass'n. v. Federal Home Loan Bank Bd.*, 588 F. Supp. 749, 763 (D.D.C. 1984). *See also* FDIC Policy Statement, 47 Fed. Reg. 38,984 (1982), *reprinted in* 1 Fed. Banking L. Rep. (CCH) ¶ 11,305A (Sept. 3, 1982); Announcement Accompanying Final FDIC Rule, 49 Fed. Reg. 46,709 (1984), [1984-85 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 86,112 (Nov. 28, 1984).

4. 12 U.S.C. § 377 (1988); *see* Board of Governors v. Investment Co. Inst., 450 U.S. 46, 58 n.24 (1981); *see also* Securities Indus. Ass'n. v. Board of Governors, 716 F.2d 92, 99-100 (2d Cir. 1983), *aff'd*, 468 U.S. 207 (1984); *see generally* Harvey N. Bock, *The Glass-Steagall Act and the Acquisition of Member Banks by Unregulated Bank Holding Companies*, 100 BANKING L.J. 484 (1983).

5. 12 U.S.C. § 78 (1988).

6. In January 1989 the Federal Reserve Board concluded that bank affiliates had the authority, under the Glass-Steagall Act and the Bank Holding Company Act, to underwrite and deal in both debt and equity securities issued by corporations. *Order Conditionally Approving Applications to Engage, to a Limited Extent, in Underwriting and Dealing in Certain Securities*, 75 Fed. Res. Bull. 192 (1989).

Reserve Board concluded that bank affiliates may underwrite and deal (in this article referred to solely as "underwriting") in all forms of debt and equity securities (including corporate debt and equity securities).[7] The Board's decision permits bank involvement in securities underwriting in a form which has been impermissible for more than fifty years. The extent to which banks can enter this field depends, however, on issues of statutory interpretation which the United States Supreme Court has not addressed. As applied to the Glass-Steagall Act, the most significant question of statutory construction is the proper meaning to be given to the term "engaged principally" in section 20 of the Glass-Steagall Act. The meaning given to that term will determine whether bank affiliates become significant participants in the investment banking industry, perhaps approaching their involvement in the period prior to enactment of the Glass-Steagall Act in 1933.

Section 20 of the Glass-Steagall Act[8] serves as an ideal testing ground for clarification of the proper role of the judiciary in statutory construction because the terms of the statute are susceptible of varying interpretations and because its legislative history provides sparse guidance as to the intended meaning of the terms utilized. The jurisprudential issues which arise are (1) the precise meaning and correct application of each of the three approaches to statutory construction which have been utilized to date--i.e., the plain meaning rule, the specific intent approach, and the purposes approach, and (2) the controlling effect, if any, to be given to the conclusion reached

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However, the Board delayed authorization for underwriting of equity securities pending determination that applicants have established the managerial and operational infrastructure required by the Board. *Id.* at 213. In September 1990 the Board determined that J.P. Morgan & Co. and its securities subsidiary had demonstrated the existence of the necessary managerial and operational infrastructure and therefore that the securities subsidiary could commence underwriting and dealing in equity securities. *FRB Permits BHC Subsidiary to Underwrite Equity Securities*, [1990-91 Transfer Binder] Fed. Banking L. Rep. (CHH) ¶ 88,253 (Sept. 20, 1990). Earlier the Board had authorized bank affiliates' underwriting of municipal revenue bonds, mortgage-backed securities, and commercial paper, *Order Approving Application to Engage in Limited Underwriting and Dealing in Certain Securities*, 73 Fed. Res. Bull. 473 (1987) [hereinafter *Order Approving Application*]; as well as consumer-receivable securities, *Order Approving Applications to Engage in Limited Underwriting and Dealing in Consumer-Receivable-Related Securities*, 73 Fed. Res. Bull. 731 (1987).

7. *See supra* note 6.

8. 12 U.S.C. § 377 (1988).

under one of these approaches when it conflicts with the conclusion reached under another approach.

Litigation surrounding section 20, as well as the other sections of the Glass-Steagall Act, has highlighted the absence of any fixed, mandatory rules of statutory construction currently applied by the courts. Such decisions also serve as examples of the abuse and adverse repercussions that can result from this absence. Abuse takes the form of judicial usurpation of the power to legislate. Adverse repercussions include the uncertainty which the courts' current approach to statutory construction generates regarding the ultimate gloss which the judiciary will impose on legislated prohibitions.

B. Unrestrained Freedom of the Judiciary

The judiciary currently employs three approaches to statutory construction: (1) the plain meaning rule,[9] (2) a legislative intent approach in which specific intent regarding a statute's meaning is sought in legislative materials,[10] and (3) a purposes approach.[11] These are merely approaches available to a court. None of them is mandatory and their relative priority has never been settled should more than one be utilized by a court.[12] As a result, courts are free to use or ignore any of these approaches. Even the standards used in applying each individual approach are inconsistent. Thus the judiciary's approach to statutory construction is unpredictable. At times the approach employed by a court appears to serve merely as a

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9. Frederick J. DeSloovere, *The Equity and Reason of a Statute*, 21 CORNELL L.Q. 591, 598-99 (1936); Quinton Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 KAN. L. REV. 1, 2 (1954); Harry W. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2 (1939); Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 867 (1930).

10. Johnstone, *supra* note 9, at 3.

11. Radin, *supra* note 9, at 875-77.

12. *See, e.g.*, Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 91 (1984) (finding that the rules of statutory construction are a total jumble); Murphy, *supra* note 9, at 1315 (noting the lack of a coherent approach, so that courts seemingly decide first and then find evidence to support the result); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 892 (1982) ("[N]o broad overview of the [U.S. Supreme] Court's approach to statutory interpretation now exists.").

pretext for a decision the court would have issued in any event. The decisions of the federal courts construing the Glass-Steagall Act demonstrate this unrestrained freedom of the judiciary in statutory interpretation.

1. Inconsistencies within each approach

a. The plain meaning rule. In applying the plain meaning rule, many decisions contain no documentation to evidence the meaning adopted by the court.[13] Such a position permits the individual judge to subjectively determine meaning. Other decisions rely upon proof of a generally accepted public or industry meaning for a statutory term.[14]

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13. This is true in two of the five decisions of the United States Supreme Court in the test group, on at least one of the issues of statutory interpretation presented to the Court. *See* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 207, 218 n.18 (1984); Investment Co. Inst. v. Camp, 401 U.S. 617, 625 (1971) (addressing the application of § 21 to mutual fund activities).

This is true in six of the thirteen decisions of the federal circuit courts in the test group on at least one of the issues of statutory interpretation presented to the court. *See* Agnew v. Board of Governors, 153 F.2d 785, 791 (D.C. Cir. 1946), *rev'd*, 329 U.S. 441 (1947); *see generally* Investment Co. Inst. v. FDIC, 815 F.2d 1540, 1548 (D.C. Cir.), *cert. denied*, 484 U.S. 847 (1987); Securities Indus. Ass'n v. Board of Governors, 807 F.2d 1052, 1059-61 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); Investment Co. Inst. v. Conover, 790 F.2d 925, 930, 933-34 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); Investment Co. Inst. v. Board of Governors, 606 F.2d 1004, 1012 (D.C. Cir. 1979), *rev'd*, 450 U.S. 46 (1981); National Ass'n of Sec. Dealers v. SEC, 420 F.2d 83, 91 (D.C. Cir. 1969) (Bazelon, C.J., concurring), *vacated in part, rev'd in part sub nom.* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971).

This is also true in one of the twelve district court cases in the test group employing the plain meaning rule. *See* Securities Indus. Ass'n v. Federal Home Loan Bank Bd., 588 F. Supp. 749, 763 (D.D.C. 1984).

In three additional decisions no source was given for the court's construction of the Glass-Steagall Act. However, the court was considering whether a requirement not expressly contained in the statute should be inferred, in a context in which documentation for the court's conclusion might not be reasonably expected. *See* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 255 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985), *aff'd in part, rev'd in part*, 479 U.S. 388 (1987); New York Stock Exch. v. Smith, 404 F. Supp. 1091, 1097 (D.D.C. 1975), *vacated sub nom.* New York Stock Exch. v. Bloom, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied sub nom.* New York Stock Exch. v. Heinmann, 435 U.S. 942 (1978); Guaranty Trust Co. v. United States, 44 F. Supp. 417, 419-20 (E.D. Wash. 1942), *aff'd*, 139 F.2d 69 (9th Cir. 1943).

14. This is true in two of the five decisions of the United States Supreme Court in the test group. *See* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 207, 217 n.17 (1984); Board of Governors v. Agnew, 329 U.S. 441, 446-47 (1947).

Curiously, the United States Supreme Court in the former decision utilized

When a statutory term is found to be vague under the plain meaning rule, the consequences vary. Occasionally, courts admit that even a vague term does serve to confine the courts' discretion.[15] Just as often, however, courts completely ignore the terms of the statute as soon as it is determined that such terms are vague.[16]

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conflicting approaches to the plain meaning rule—utilizing evidence of generally accepted industry meaning as to the terms "public sale" and "distribution" but utilizing no evidence at all as to the meaning attached to the terms "broker" and "dealer."

This is true in seven of the thirteen decisions of the federal circuit courts in the test group. *See* Securities Indus. Ass'n v. Board of Governors, 847 F.2d 890, 894 (D.C. Cir. 1988); Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 64 (2d Cir. 1988), *cert. denied*, 486 U.S. 1059 (1988); Securities Indus. Ass'n v. Board of Governors, 821 F.2d 810, 814-15 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); Securities Indus. Ass'n v. Board of Governors, 807 F.2d 1052, 1062-64 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); Securities Indus. Ass'n v. Board of Governors, 716 F.2d 92, 96 (2d Cir. 1983), *aff'd*, 468 U.S. 207 (1984); A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136, 140-41, 143-44 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984); Port of New York Auth. v. Baker, Watts & Co., 392 F.2d 497, 499 (D.C. Cir. 1968); *see also* sources cited *supra* note 13.

The D.C. Circuit in Securities Indus. Ass'n v. Board of Governors, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987), utilized evidence of generally accepted industry meaning as to terms considered in the latter part of its opinion, but failed to use evidence of generally accepted meaning as to terms considered in the earlier part of its opinion.

This proposition is also true in six of the twelve federal district court opinions in the test group which employed the plain meaning rule. *See* Securities Indus. Ass'n v. Clarke, 703 F. Supp. 256, 259-60 (S.D.N.Y. 1988), *vacated*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1113 (1990); Securities Indus. Ass'n v. Board of Governors, 627 F. Supp. 695, 707 (D.D.C.), *rev'd*, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); Investment Co. Inst. v. Conover, 596 F. Supp. 1496, 1501 (D.D.C. 1984), *aff'd*, 790 F.2d 925 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); Investment Co. Inst. v. Conover, 593 F. Supp. 846, 853-55 (N.D. Cal. 1984), *rev'd sub nom.* Investment Co. Inst. v. Clarke, 793 F.2d 220 (9th Cir.), *cert. denied*, 479 U.S. 939 (1986); Investment Co. Inst. v. Camp, 274 F. Supp. 624, 639-42 (D.D.C. 1967), *rev'd sub nom.* National Ass'n of Sec. Dealers v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *vacated in part, rev'd in part sub nom.* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Baker, Watts & Co. v. Saxon, 261 F. Supp. 247, 250, 252 (D.D.C. 1966), *aff'd sub nom.* Port of New York Auth. v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968).

15. *See, e.g.*, Agnew v. Board of Governors, 153 F.2d 785, 787, 790-91 (D.C. Cir. 1946) ("[A] word used in a statute should not be construed to produce an absurd consequence if it is susceptible to another accord with the legislative intent"), *rev'd*, 329 U.S. 441 (1947).

16. *See, e.g.*, National Ass'n of Sec. Dealers, Inc. v. SEC, 420 F.2d 83, 88-91 (D.C. Cir. 1969) (Bazelon, C.J., concurring), *vacated in part, rev'd in part sub nom.* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971). The decisions in our test group do not adequately evidence the courts' willingness to ignore the terms of the stat-

b. The specific intent approach. One problem with specific intent is that courts employing a specific intent approach to statutory construction have conflicting views of the proper source of evidence of legislative intent. In most cases courts rely on committee reports[17] or explanations by the bill's spon-

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ute when they are deemed vague. That willingness surfaces when there is a conflict between a conclusion reached under a plain meaning rule and that reached under a purposes approach or a specific intent approach. However, almost all litigation involving the Glass-Steagall Act has not produced such conflicting conclusions. For example, in every decision handed down by the United States Supreme Court the decision was deemed to be supported by both the plain meaning of the statute and its purposes, as well as any evidence of legislative intent. *See* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 207 (1984); Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984); Board of Governors v. Investment Co. Inst., 450 U.S. 46 (1981); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Board of Governors v. Agnew, 329 U.S. 441 (1947); see also decisions of the federal circuit courts in *Securities Indus. Ass'n v. Board of Governors*, 839 F.2d 47 (2d Cir. 1988), *cert. denied*, 486 U.S. 1059 (1988); *Securities Indus. Ass'n v. Board of Governors*, 821 F.2d 810 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); *Investment Co. Inst. v. FDIC*, 815 F.2d 1540 (D.C. Cir.), *cert. denied*, 484 U.S. 847 (1987); *Port of New York Auth. v. Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968). This last decision's conclusion regarding the statute's plain meaning is criticized in this article, but the court itself deemed no conflict to arise.

That willingness surfaces not only when there is a conflict, but when, additionally, the court is not faced with a vague statutory term and a forced choice situation, as discussed in section three of this article. Absent such a scenario, one might conclude the court was not disregarding the plain meaning of the statute. Instead it could find nothing in the statute which led it to a conclusion. *See, e.g.*, Securities Indus. Ass'n v. Board of Governors, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); Investment Co. Inst. v. Conover, 790 F.2d 925, 934 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); A.G. Becker Inc. v. Board of Governors, 693 F.2d 136, 143 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984).

17. *See* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 207, 215 n.13 (1984).

In three of the ten circuit court decisions in the test group utilizing specific intent analysis the court utilized a committee report to evidence such intent. *See* Securities Indus. Ass'n v. Board of Governors, 807 F.2d 1052, 1057, 1059 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); Securities Indus. Ass'n v. Board of Governors, 716 F.2d 92, 98 (2d Cir. 1983) (also implying intent from the surrounding terms of the statute), *aff'd*, 468 U.S. 207 (1984); Agnew v. Board of Governors, 153 F.2d 785, 791-93 (D.C. Cir. 1946), *rev'd*, 329 U.S. 441 (1947).

In four of the eight district court decisions in the test group utilizing a specific intent approach, the court cited a committee report as evidence of that intent. *See* Investment Co. Inst. v. Clarke, 630 F. Supp. 593, 594-95 (D. Conn.), *aff'd*, 789 F.2d 175 (2d Cir.), *cert. denied*, 479 U.S. 940 (1986); Investment Co. Inst. v. Conover, 596 F. Supp. 1496, 1501 (D.D.C. 1984), *aff'd*, 790 F.2d 925 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 255 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985), *aff'd in part, rev'd in part*, 479 U.S. 388 (1987); New York Stock Exch. v. Smith, 404 F. Supp. 1091, 1097-98 (D.D.C. 1975), *vacated*

sor or drafter[18] to evidence legislative intent. Some courts have at times taken the position that other statements and reports, including statements not made to the entire Congress, do not properly evidence the intent of the legislature.[19] But many decisions rely on statements of nonlegislative individuals or remarks made in committee sessions alone, and not reported to the entire House or Senate, to evidence the intent of the legislature.[20] Occasionally, courts have even cited no source at all

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sub nom. New York Stock Exch. v. Bloom, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied sub nom.* New York Stock Exch. v. Heinmann, 435 U.S. 942 (1978).

18. *See* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137, 147, 157 (1984) (statements of Sen. Bulkley); Board of Governors v. Investment Co. Inst., 450 U.S. 46, 58 n.24 (1981) (statement of Sen. Glass).

In four of the ten circuit court decisions in the test group utilizing a specific intent approach the court utilized statements of a bill's sponsor to evidence such intent. *See* Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 58-60 (2d Cir. 1988) (yet court also cites committee hearings later in its opinion as evidence of legislative intent, *id.* at 61), *cert. denied*, 486 U.S. 1059 (1988); Investment Co. Inst. v. FDIC, 815 F.2d 1540, 1547 n.6 (D.C. Cir.) (exchange between Mr. Fesi and Mr. Walcott), *cert. denied*, 484 U.S. 847 (1987); Investment Co. Inst. v. Board of Governors, 606 F.2d 1004, 1012 n.19 (D.C. Cir. 1979) (statements of Sen. Glass and Sen. Robinson) (yet court also cites opinion of SEC, issued in 1939, later in its decision, *id.* at 1016 n.30), *rev'd*, 450 U.S. 46 (1981); Port of New York Auth. v. Baker, Watts & Co., 392 F.2d 497, 499-500 (D.C. Cir. 1968) (debate between Mr. Copeland, Mr. Cowens and Mr. Glass).

In one of the eight district court cases in the test group utilizing a specific intent approach the court evidenced such intent by utilizing the statement of a legislative sponsor. *See* Investment Co. Inst. v. FDIC, 606 F. Supp. 683, 685-86 (D.D.C. 1985), *aff'd*, 815 F.2d 1540 (D.C. Cir.), *cert. denied*, 484 U.S. 847 (1987).

19. *See, e.g.*, Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 407 (1987) (refusing to attach substantial weight to statement of Rep. McFadden placed into the Congressional Record after the passage of the McFadden Act); Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 372 (1986) (stating that an article entered into the Congressional Record is not legislative history in any meaningful sense of the term).

20. For example, in *Securities Indus. Ass'n v. Board of Governors*, 839 F.2d 47, 67 (2d Cir.), *cert. denied* 486 U.S. 1059 (1988), the Second Circuit concluded that the legislative history of the Glass-Steagall Act supported a 5 to 10% quantitative cutoff for the statutory term "engaged principally," yet the court cited the statements of Eugene Meyer, a governor of the Federal Reserve Board, for this conclusion and such statements were made in committee hearings. *See also* Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 67 (2d Cir. 1988) (citing committee hearings), *cert. denied*, 486 U.S. 1059 (1988); A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136, 145 (D.C. Cir. 1982) (citing a 1926 Federal Reserve Board interpretation of the term "investment securities" contained in the McFadden Act), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984); Investment Co. Inst. v. Board of Governors, 606 F.2d 1004, 1016 n.30 (D.C. Cir. 1979) (citing a 1939 opinion of the SEC), *rev'd*, 450 U.S. 46 (1981); Investment Co. Inst. v. Camp, 401 U.S. 617, 631, 635 (1971) (relying on testimony in committee hearings); Murphy, *supra* note 9, at 1316 (criticizing selective exclusion of leg-

for a conclusion which they state was specifically intended by the legislature.[21]

The inappropriate characterization and finding of specific intent is especially apparent in the decisions of the federal circuit courts construing the Glass-Steagall Act. These decisions cite, as evidence of *legislative* intent, statements made during committee hearings,[22] statements contained in decisions of administrative agencies made after the statute's enactment,[23] statements appearing in administrative agency interpretations of earlier versions of the banking laws,[24] and committee reports concerning later enacted legislation of the Congress.[25]

A second defect with the current approach to specific intent analysis is that some courts feel free to infer legislative intent. They infer it from the terms of the statute,[26] from known in-

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islative materials).

21. *See, e.g.*, Securities Indus. Ass'n v. Board of Governors, 627 F. Supp. 695, 704 (D.D.C.), *rev'd*, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); A.G. Becker, Inc. v. Board of Governors, 519 F. Supp. 602, 614 (D.D.C. 1981), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984).

22. *See* Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 67 (2d Cir. 1988), *cert. denied*, 486 U.S. 1059 (1988).

23. *See* Investment Co. Inst. v. Board of Governors, 606 F.2d 1004, 1016 n.30 (D.C. Cir. 1979) (1939 decision of the SEC), *rev'd*, 450 U.S. 46 (1981).

24. *See* A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136, 145 (D.C. Cir. 1982) (citing 1926 interpretation of the McFadden Act made by the Federal Reserve Board), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984).

25. *See* Securities Indus. Ass'n v. Clarke, 885 F.2d 1034, 1048 (2d Cir. 1989) (citing 1982 amendment to the banking law, which was not a part of the Glass-Steagall Act), *cert. denied*, 110 S. Ct. 1113 (1990). *But see* Investment Co. Inst. v. Conover, 790 F.2d 925, 933 (D.C. Cir.) (refusing to infer intent regarding the Glass-Steagall Act from legislative history of ERISA), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986).

26. *See* Investment Co. Inst. v. FDIC, 815 F.2d 1540, 1547 (D.C. Cir.), *cert. denied*, 484 U.S. 847 (1987); Securities Indus. Ass'n v. Board of Governors, 716 F.2d 92, 96-97 (2d Cir. 1983), *aff'd*, 468 U.S. 207 (1984); A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136, 143-44 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984); Board of Governors v. Investment Co. Inst., 450 U.S. 46, 58 n.24, 63 (1981); Investment Co. Inst. v. Board of Governors, 606 F.2d 1004, 1013 (D.C. Cir. 1979), *rev'd*, 450 U.S. 46 (1981); Board of Governors v. Agnew, 329 U.S. 441, 446-47 (1947); Agnew v. Board of Governors, 153 F.2d 785, 793-94 (D.C. Cir. 1946), *rev'd*, 329 U.S. 441 (1947).

In most decisions in which the court is inferring legislative intent it cites the legislative history of the statute as additional evidence for its conclusion. Nonetheless, the court is accepting the principle that it is proper to infer intent. In addition, some courts infer intent without any citation to the statute's legislative history. *See* A.G. Becker, Inc. v. Board of Governors, 693 F.2d at 136.

dustry conditions,[27] or from contemporaneous legislation.[28] The United States Supreme Court has even inferred legislative intent from Congressional inaction.[29] In such situations, there has been no clear intent voiced—not in the sense that the legislature considered the question and gave a clear answer to it. The courts are manufacturing intent based on their own conclusions regarding what the legislature would have said if it had considered the question. The same is true when courts infer intent from relatively weak or circumstantial evidence,[30]

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27. *See* Securities Indus. Ass'n v. Board of Governors, 627 F. Supp. 695, 704 (D.D.C.) (inferring intent that private placements are not within agency power granted in § 16 from the fact that banks did not conduct such activity prior to 1933, or enter the field after 1933), *rev'd*, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *see also* Investment Co. Inst. v. Clarke, 630 F. Supp. 593, 594 (D. Conn. 1986) (inferring intent that collective investment of IRA accounts is not prohibited by the Glass-Steagall Act from the fact that fiduciary assets were commingled since the 1920s) *aff'd*, 789 F.2d 175 (2d Cir.), *cert. denied*, 479 U.S. 940 (1986). In the former decision the court provides no other evidence or citation for its conclusion regarding legislative intent.

28. *See* A.G. Becker, Inc. v. Board of Governors, 519 F. Supp. 602, 615 (D.D.C. 1981) (inferring legislative intent from terms of 1933 Securities Act), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984).

29. *See* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137, 157 n.10 (1984) (inferring intent from failure to report bill out of committee, though also citing statement of Sen. Bulkley to support its conclusion). *But see* Port of New York Auth. v. Baker, Watts & Co., 392 F.2d 497, 503 (D.C. Cir. 1968) (refusing to infer intent from congressional inaction on proposed amendment).

30. Murphy, *supra* note 9, at 1317 (criticizing use of murky or fictitious evidence of intent). An example of court reliance on very weak (or perhaps nonexistent) evidence of legislative intent is found in *Securities Industries Ass'n v. Board of Governors*, 839 F.2d 47 (2d Cir.), *cert. denied* 486 U.S. 1059 (1988), in which the Second Circuit justified the imposition of a 5 to 10% cutoff for the statutory term "engaged principally" by relying on the statements made in 1932 by Eugene Meyer, a governor of the Federal Reserve Board. The Court explained:

> What became § 20 was proposed by Eugene Meyer, a governor of the Federal Reserve Board, as a *substitute* for the section which eventually became § 32, *see 1932 Hearings, supra*, at 387-88, because he believed that the language in the predecessor to § 32—in relevant respects identical to § 32—was overbroad and that it would therefore be ineffectual. *See id.* at 387. Meyer commented on the "difficulties in the way of accomplishing a complete divorce of member banks from their affiliates arising from the fact that a law intended for that purpose is likely to be susceptible of evasion or else to apply to many cases to which it is not intended to apply," *id.* at 388, and tentatively suggested substituting what is now § 20 for what is now § 32. It defies logic that § 20 should be interpreted *less* restrictively than § 32, based on Meyer's comments that § 20 was intended to be *more* restrictive than § 32.

Id. at 67.

However, an examination of Mr. Meyer's testimony reveals it sheds no light on the meaning of the term "engaged principally." Mr. Meyer's testimony was as follows:

> Section 18: The first part of this section would prohibit any director, officer, or employee of any member bank from acting as a director, officer, or employee of certain other specified classes of business enterprises. It would be capable of easy evasion and would become ineffective in many cases. The latter part of the section would prohibit any member bank from clearing checks or doing the ordinary banking business of a correspondent for any of the types of business enterprises mentioned in this section. The language of the section is so broad that it would include banks within the classes of business enterprises to which the prohibitions of the section would apply. For example, all interlocking bank directorates now expressly authorized by law or permitted under certain conditions would be prohibited, and one bank would be prohibited from acting as a correspondent of another bank. It is therefore recommended that this entire section be omitted.
>
> It has been clearly demonstrated that affiliations between member banks and security companies have contributed to undesirable banking developments. There are, however, difficulties in the way of accomplishing a complete divorce of member banks from their affiliates arising from the fact that a law intended for that purpose is likely to be susceptible of evasion or else to apply to many cases to which it is not intended to apply. Therefore, the board is not prepared at this time to make a definite recommendation, but submits, for the consideration of the Committee on Banking and Currency, a substitute for section 18 which is designed to provide for the divorce of security affiliates from member banks after three years:
>
> > Sec. 18. From and after three years from the date of the enactment of this act, no member bank shall be affiliated in any manner described in section 2 (b) hereof with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail, of stocks, bonds, debentures, notes, or other securities.
> >
> > For every violation of this section the member bank involved shall be subject to a penalty not exceeding $1,000 per day for each day during which such flotation continues. Such penalty may be assessed by the Federal Reserve Board, in its discretion, and, when so assessed, may be collected by the Federal reserve bank by suit or otherwise.
> >
> > If any such violation shall continue for six calendar months after the member bank shall have been warned by the Federal Reserve Board to discontinue the same, (a) in the case of a national bank, all the rights, privileges and franchises granted to it under the national bank act may be forfeited in the manner prescribed in section 5230 of the Revised Statutes, or, (b) in the case of a State member bank, all of its rights and privileges of membership in the Federal reserve system may be forfeited in the manner prescribed in section 9 of the Federal reserve act.
>
> It is fair to say that, while the board is in agreement on the views stated, there has been a good deal of discussion of the thought that the

> question of divorce of affiliates might perhaps be better deferred, instead of acting at this time to be effective three years from now, and in the meantime to get reports and make examinations and then enact a law later. However, the suggestion here was agreed upon as the best we could think of at the present time in the light of existing information, or I might say in the absence of full information on the subject. We do not feel, in the absence of more definite information, any too great confidence in any recommendation that we or anyone else could make. But this is a suggestion for your consideration, which was the best we could evolve in the board with the assistance of our experts.
>
> If the bill is enacted into law and reports flow to the Federal Reserve Board from affiliates, and information is developed that would throw new light on it, I hope the board and the committee would feel free to exchange views in the light of the information obtained and the Congress could make any amendment that seemed necessary in the provision offered at the present time for affiliate separation.

Operation of the National and Federal Reserve Banking Systems: Hearings on S. 4115 Before the Senate Comm. on Banking and Currency, 72d Cong., 1st Sess. 387-88 (1932).

Mr. Meyer made no reference to the meaning of the term "engaged principally." When he spoke of susceptibility of evasion he might well have been referring solely to the fact that § 32 was made inapplicable merely by eliminating common directors, officers and employees. His statements do not address directly, or even suggest, the proper quantitative cutoff to be utilized when defining the term "engaged principally."

Similarly, when the Second Circuit rejected the use of a market share standard it employed the following reasoning:

> We discern no support in § 20 for the Board's market share limitation. In the legislative history there is evidence that before the enactment of Glass-Steagall, banks and bank affiliates had acquired an increasingly large share of securities activity in relation to investment banks. *See* W. Peach, *The Security Affiliates of National Banks* 108-10 (1941). For example, between 1927 and 1930 the percentage share of commercial banks in origination of bond issues more than doubled. *Id.* at 109. This increasing market share of commercial banks in traditional investment banking activities was not unknown to Congress. *See 1931 Hearings*, *supra*, at 299 (testimony of C.E. Mitchell, Chairman, National City Bank of New York) (presenting data). But, the fact that this was brought to Congress's attention and that Congress did not directly address it is, if anything, a strong indication that Congress was not concerned about market share. Rather, by using the term "engaged principally," Congress indicated that its principal anxiety was over the perceived risk to bank solvency resulting from their over-involvement in securities activity. A market share limitation simply does not further reduce this congressional worry.

Securities Indus. Ass'n v. Board of Governor's, 839 F.2d at 68. In actuality, the court was begging the question. It would be more desirable for the court to admit there existed absolutely no evidence of specific legislative intent regarding the issue before it. *See also* Agnew v. Board of Governors, 153 F.2d 785, 791-93 (D.C. Cir. 1946) (relying on *S. Rep. No. 77*, 73d Cong., 1st Sess. (1933) for the conclusion that term "primarily engaged" in § 32 of the Glass-Steagall Act was intended to encompass chief or principal business as measured by a quantitative test), *rev'd*, 329 U.S. 441 (1947).

which the judiciary's current approach to statutory construction does not foreclose.

c. The purposes approach. Judicial decisions applying a purposes approach to statutory construction also evidence inconsistent or conflicting positions. One common defect is that courts rely solely on the general purposes behind the statute as a whole without inquiring if a statement of specific purpose is available for the particular clause being litigated.[31]

More importantly, the courts' determination of a proper source for a statement of purpose varies. At times courts rely solely on committee reports and statements of a bill's sponsors or drafters.[32] Yet more often, courts do not feel constrained

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31. See *supra* note 30 and accompanying text and *infra* note 59 and accompanying text concerning the use of general versus specific purpose(s) analysis in connection with interpretation of § 20 of the Glass-Steagall Act. Only two of the decisions in the test group did not merely employ a general purposes analysis. *See* Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 60 (2d Cir. 1988) (discussing the issue of whether bank ineligible securities are the only securities to be considered in determining violation of § 20's prohibition against affiliation with firms "engaged principally" in underwriting), *cert. denied*, 486 U.S. 1059 (1988); Port of New York Auth. v. Baker, Watts & Co., 392 F.2d 497, 501 (D.C. Cir. 1968) (involving the authorization to underwrite "general obligation" bonds). As to some of these decisions, it is possible, of course, that the legislative materials would contain no evidence of specific purposes.

32. *See* Board of Governors v. Investment Co. Inst., 450 U.S. 46, 61-63 (1981) (committee report and statements of sponsors). The Court also cites the purposes clause contained in the preamble to the statute. *Id.* at 53 n.14. Securities Indus. Ass'n v. Board of Governors, 468 U.S. 207, 219-21 (1984) (committee report).

Only two of the thirteen circuit court cases in the test group employing a purposes approach utilized only committee reports or statements of a bill's sponsor or drafters to evidence legislative purposes. *See* Securities Indus. Ass'n v. Board of Governors, 807 F.2d 1052, 1061, 1065-66 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); Securities Indus. Ass'n v. Board of Governors, 716 F.2d 92, 98 (2d Cir. 1983), *aff'd*, 468 U.S. 207 (1984). However, four of the thirteen decisions rely solely on citations to U.S. Supreme Court opinions to evidence legislative purposes, and it is not certain if such courts would have also limited their search for legislative purposes to committee reports and statements of a bill's sponsors. *See* Securities Indus. Ass'n v. Clarke, 885 F.2d 1034, 1042-43 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1113 (1990); Securities Indus. Ass'n v. Board of Governors, 847 F.2d 890, 896-97 (D.C. Cir. 1988); Securities Indus. Ass'n v. Board of Governors, 821 F.2d 810, 815-16 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); Investment Co. Inst. v. Conover, 790 F.2d 925, 930-31, 934 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986).

Only one of the eleven district court opinions in the test group employing a purposes approach cited either statements of a bill's sponsors or committee reports as evidence of legislative purposes. *See* Securities Indus. Ass'n v. Board of Governors, 627 F. Supp. 695, 702 (D.D.C.) (statement of Sen. Bulkley), *rev'd*, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987). However, four of the these eleven opinions rely upon decisions of the United States Supreme Court to

and instead rely on any statement of purpose brought to their attention—including those found in testimony at committee hearings.[33] This would permit a court to search for and recite whatever purposes suit its predetermined decision, even if the legislature was not aware of the statement in question. At times, legislative purposes are even inferred by the court from the terms of the statute.[34] This magnifies the possibilities for abuse since the court is making a subjective determination of the likely purpose behind the legislation. This magnified possibility for abuse is most apparent in court decisions which provide absolutely no citation for the purposes the court recites to justify its decision.[35] This leaves a court free to frame legislative purpose(s) in whatever manner justifies the decision the court wishes to issue.

The clearest example of a purposes approach to statutory interpretation based on sources which should be deemed unacceptable is the opinion of Justice Stewart in *Investment Co. Institute v. Camp*.[36] This is the opinion chiefly relied upon by

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evidence legislative purposes, and it is not certain if such courts would have also limited their search for legislative purposes to committee reports and statements of a bill's sponsors. *See* Securities Indus. Ass'n v. Clarke, 703 F. Supp. 256, 261 (S.D.N.Y. 1988), *vacated*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1113 (1990); Investment Co. Inst. v. Conover, 596 F. Supp. 1496, 1502-03 (D.D.C. 1984), *aff'd*, 790 F.2d 925 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); Investment Co. Inst. v. Conover, 593 F. Supp. 846, 851-52 (N.D. Cal. 1984), *rev'd sub nom.* Investment Co. Inst. v. Clarke, 793 F.2d 220 (9th Cir.), *cert. denied*, 479 U.S. 939 (1986); Securities Indus. Ass'n v. Federal Home Loan Bank Bd., 588 F. Supp. 749, 763 (D.D.C. 1984).

33. *See* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137, 144-46 (1984); Investment Co. Inst. v. Camp, 401 U.S. 617, 629-34 (1971); New York Stock Exch. v. Smith, 404 F. Supp. 1091, 1098-99 (D.D.C. 1975), *vacated sub nom.* New York Stock Exch. v. Bloom, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied sub nom.* New York Stock Exch. v. Heinmann, 435 U.S. 942 (1978); Investment Co. Inst. v. Camp, 274 F. Supp. 624, 645-46 (D.D.C. 1967), *rev'd sub nom.* National Ass'n of Sec. Dealers v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *vacated in part, rev'd in part sub nom.* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971).

34. *See* A.G. Becker, Inc. v. Board of Governors, 519 F. Supp. 602, 614 (D.D.C. 1981), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984).

35. *See, e.g.*, Board of Governors v. Agnew, 329 U.S. 441, 447 (1947); Port of New York Auth. v. Baker, Watts & Co., 392 F.2d 497, 498, 501 (D.C. Cir. 1968); Agnew v. Board of Governors, 153 F.2d 785, 794-95 (D.C. Cir. 1946), *rev'd*, 329 U.S. 441 (1947); Investment Co. Inst. v. Clarke, 630 F. Supp. 593, 596 (D. Conn.), *aff'd*, 789 F.2d 175 (2 Cir.), *cert. denied*, 479 U.S. 940 (1986); Baker, Watts & Co. v. Saxon, 261 F. Supp. 247, 249, 252 (D.D.C. 1966), *aff'd sub nom.* Port of New York Auth. v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968).

36. 401 U.S. 617 (1971).

the lower courts to determine the purposes behind the Glass-Steagall Act.[37] Justice Stewart recites the direct hazards[38] and the subtle hazards[39] of bank involvement in securities underwriting which the Glass-Steagall Act was designed to avoid. There are five citations in the decision documenting the direct hazards identified, and two of the five citations are to hearings conducted in 1931 by a subcommittee of the Senate Committee on Banking and Currency. There are twenty-one citations documenting the subtle hazards which Justice Stewart enumerates, but eleven of the twenty-one citations are to the same subcommittee hearings.

One may contrast this opinion with that of Justice Stevens in *Board of Governors* v. *Investment Co. Institute*.[40] Justice Stevens cites only the preamble to the statute,[41] the Committee Report on the bill,[42] and the statements of the bill's sponsors and drafters made to the entire Congress[43] to document

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37. *See* Securities Indus. Ass'n v. Clarke, 885 F.2d 1034, 1042-43 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1113 (1990); Securities Indus. Ass'n v. Board of Governors, 847 F.2d 890, 896-98 (D.C. Cir. 1988); Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 57 (2d Cir. 1988), *cert. denied*, 486 U.S. 1059 (1988); Securities Indus. Ass'n v. Board of Governors, 821 F.2d 810, 815-17 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); Investment Co. Inst. v. FDIC, 815 F.2d 1540, 1544-45, 1547 (D.C. Cir.), *cert. denied*, 484 U.S. 847 (1987); Securities Indus. Ass'n v. Board of Governors, 807 F.2d 1052, 1056, 1065 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); Investment Co. Inst. v. Conover, 790 F.2d 925, 930-31, 934 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); Securities Indus. Ass'n v. Board of Governors, 716 F.2d 92, 97 (2d Cir. 1983), *aff'd*, 468 U.S. 207 (1984); Investment Co. Inst. v. Board of Governors, 606 F.2d 1004, 1012 (D.C. Cir. 1979), *rev'd*, 450 U.S. 46 (1981); Securities Indus. Ass'n v. Clarke, 703 F. Supp. 256, 261 (S.D.N.Y. 1988), *vacated*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1113 (1990); Investment Co. Inst. v. Conover, 596 F. Supp. 1496, 1499-1503 (D.D.C. 1984), *aff'd*, 790 F.2d 925 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); Investment Co. Inst. v. Conover, 593 F. Supp. 846, 849-58 (N.D. Cal. 1984), *rev'd sub nom.* Investment Co. Inst. v. Clarke, 793 F.2d 220 (9th Cir.), *cert. denied*, 479 U.S. 939 (1986); Securities Indus. Ass'n v. Federal Home Loan Bank Bd., 588 F. Supp. 749, 763 (D.D.C. 1984); A.G. Becker, Inc. v. Board of Governors, 519 F. Supp. 602, 612-15 (D.D.C. 1981), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984); New York Stock Exch. v. Smith, 404 F. Supp. 1091, 1096, 1098-1101 (D.D.C. 1975), *vacated sub nom.* New York Stock Exch. v. Bloom, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied sub nom.* New York Stock Exch. v. Heinmann, 435 U.S. 942 (1978).

38. *See* Investment Co. Inst. v. Camp, 401 U.S. 617, 629-30 (1971).

39. *See id.* at 630-34.

40. 450 U.S. 46 (1981).

41. *Id.* at 53 n.14.

42. *Id.* at 61-62 nn.28-30.

43. *Id.* at 61-63 nn.27-30, 33.

the purposes behind the statute. On the issue of the proper sources to document legislative purposes, as well as specific intent or plain meaning, it is the opinion of Justice Stevens in *Investment Co. Institute* that exemplifies the approach advocated in this article.

Analysis of decisions in our test group demonstrates that the three approaches to statutory construction currently utilized have no fixed meaning and are not uniformly applied. Also, analysis of decisions in our test group demonstrates that there is a lack of priority among the approaches each court uses.

2. *Lack of priority among the approaches*

Courts have adopted no rule of priority among the three approaches to statutory construction. All five of the opinions of the United States Supreme Court construing the Glass-Steagall Act utilized all three approaches to statutory interpretation yet none of the opinions indicated or suggested any rule of priority among the approaches. Ten of the thirteen opinions of the circuit courts utilized all three approaches to statutory interpretation, with the remaining three opinions omitting the specific intent approach.[44] Of these thirteen opinions only two stated any rule of priority among the approaches to statutory construction, while two additional opinions implied a rule of priority.[45] Similarly only one of the thirteen opinions of the federal district courts stated any rule of priority among the approaches.[46] In many of the decisions in our test group a rule of

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44. The following cases omitted the specific intent approach: *Securities Indus. Ass'n v. Board of Governors*, 821 F.2d 810 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); *Investment Co. Inst. v. Conover*, 790 F.2d 925 (D.C. Cir.), *cert. denied sub nom.* Investment Co. Inst. v. Clarke, 479 U.S. 939 (1986); *National Ass'n of Sec. Dealers, Inc. v. SEC*, 420 F.2d 83 (D.C. Cir. 1969), *vacated in part, rev'd in part sub nom.* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971).

45. *See* Securities Indus. Ass'n v. Board of Governors, 847 F.2d 890, 897 (D.C. Cir. 1988) (clear language prevails over general purposes); A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136, 143 (D.C. Cir. 1982) (if the terms of the statute are clear the court's inquiry is at an end), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984); *see also* Investment Co. Inst. v. Board of Governors, 606 F.2d 1004, 1012 (D.C. Cir. 1979) (court infers that literal meaning controls even if purposes are not exactly met), *rev'd*, 450 U.S. 46 (1981); Agnew v. Board of Governors, 153 F.2d 785 (D.C. Cir. 1946) (conclusion reached under literal reading of statute given controlling weight even if purposes are not fully served), *rev'd*, 329 U.S. 441 (1947).

46. *See* A.G. Becker, Inc. v. Board of Governors, 519 F. Supp. 602, 612 (D.D.C.

priority was not absolutely essential because the court found the same conclusion supported by the plain meaning rule and one or both of the other two approaches. Yet the decisions consistently fail to *state* a rule of priority, or at least to note the relative importance of the conclusion reached under each approach to statutory construction.

Occasionally a rule of priority has been stated. But different opinions have stated different rules. At times courts have given priority to the literal terms of the statute when such terms are clear,[47] thus precluding any consideration of legislative purposes or specific intent analysis. Yet at other times they have ignored the literal terms of the statute when such terms disserve legislative purposes.[48] It is not suggested that these decisions could not be harmonized. All that is suggested is that the courts have offered no harmonization.

C. Abuse of the Judicial Function

The abuse created by the judiciary's unrestrained freedom in statutory construction occurs when courts assume a legislative posture. They create statutory prohibitions themselves rather than apply prohibitions enacted by the legislature. This occurs not merely because no particular approach to statutory construction is mandatory and no priority among approaches has been imposed. It also arises because the precise meaning and the terms of each approach is not settled. Thus, the courts are unrestrained not merely in choosing among approaches, but also in giving substance to whatever approach they choose to employ.

1981) (plain meaning is utilized, unless there has been a significant change of circumstances since enactment or a literal reading leads to an unreasonable or absurd result), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984).

47. *See* Securities Indus. Ass'n v. Board of Governors, 847 F.2d 890, 897 (D.C. Cir. 1988) (clear language prevails over general purposes); A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136, 143 (D.C. Cir. 1982) (if the terms of the statute are clear the court's inquiry is at an end), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984).

48. *See* A.G. Becker, Inc. v. Board of Governors, 519 F. Supp. 602, 612 (D.D.C. 1981) (plain meaning may be avoided if it leads to "unreasonable" results), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984).

1. Motivation of the judiciary

I am not suggesting that courts are searching for opportunities to usurp legislative power. Rather, the judiciary may at times feel it is forced to issue a ruling that crosses the line that separates the judicial and legislative function. This is because the judiciary is faced both with litigants who require an answer about the legality of their precise activities and with legislation which has vague terms and unclear legislative history.

Thus while judicial abuse might be understandable in certain cases, the point of contention is that it is rendered more likely to occur, and occur with greater frequency, due to the complete absence of constraints on statutory construction which currently exists. It is this likelihood which the suggested principles in section three seek to minimize.

Court decisions interpreting the Glass-Steagall Act—particularly sections 20 and 32 of the Act—illustrate the inducement for judicial abuse. The difficulty faced by the judiciary is that the legislature has utilized imprecise phrases in the Glass-Steagall Act to impose its statutory prohibitions. But as a practical matter the terms must be given a precise meaning in order to determine the legality of particular fact patterns presented for decisionmaking. Moreover, absent such exactness, commercial banks will be unwilling to commit the millions of dollars needed to enter the investment banking field.

The phrase "engaged principally" in section 20 of the Glass-Steagall Act seems to suggest a quantitative measure of activity. But in defining a similar phrase contained in section 32 the United States Supreme Court refused to give "primarily engaged" a fixed quantitative meaning. In *Board of Governors v. Agnew*[49] the Court instead employed a fluid and perhaps a qualitative standard, by defining the term "primarily" to mean "substantial."[50] The Court suggests that a fixed threshold is not required by the Act, nor does it serve the Act's purposes. Rather, in evaluating each proposed activity, courts must ask whether the purposes of the Glass-Steagall Act are being served.[51]

In 1988 the Second Circuit considered the meaning of "en-

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49. 329 U.S. 441 (1947).
50. *See id.* at 446.
51. *See id.* at 447.

gaged principally" in section 20,[52] which the Supreme Court has never determined. In its decision the Second Circuit endorsed the position that the term "engaged principally" should not have a fixed, quantitative meaning. The court explained its conclusion as follows:

> When Congress wanted to use a quantitative test in the Banking Act of 1933, it knew how to do it. *See* § 2(b), (c), 48 Stat. at 162-63 (definition of affiliate); § 13, 48 Stat. at 183 (collateral requirements for loans to affiliates); § 16 (Seventh), 48 Stat. at 185 (limitations on banks' purchase of securities for own account), § 19(b), 48 Stat. at 187 (level of assets for holding company affiliates to be maintained free of any liens); § 19(c), 48 Stat. at 187 (shareholders' liability determination). Because in § 20 Congress departed from a quantitative approach, the argument that a qualitative test should be controlling is all the more compelling.[53]

Curiously, the Second Circuit, in the same opinion, later sustained a fixed cutoff to define the term "engaged principally."

> Section 20 must be read to set down at some point a hard and fast limit on the amount of bank-ineligible securities activity, and we have determined that the Board's limit of five to ten percent of the gross revenue is reasonable. Beyond this limit, there is no room for adjustment in order to ameliorate competitive inequality.[54]

Perhaps the court was recognizing the practical problems created by employing solely an unfixed, fluid standard: (1) an inability to decide the case before it, in which the court was asked to determine if the Federal Reserve Board's rulings imposing a 5 to 10% cutoff should be sustained, and (2) creation of a great deal of industry uncertainty which would deter involvement.

The courts' approach to sections 20 and 32 evidence a reluctance to assume a legislative function, by attempting to avoid adoption of a fixed measurement or cutoff to define the statutory phrases "engaged principally" and "primarily engaged." However, the 1988 decision of the Second Circuit also

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52. *See* Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988).

53. *Id.* at 65.

54. *Id.* at 68.

illustrates that at times a court finds it necessary to stipulate a legislative prohibition, in the form of a fixed cutoff which is not stated in the statute.

2. *Nature of abuses*

Both the courts[55] and the commentators[56] have agreed on two guiding principles regarding statutory construction: (a) that the judiciary must not assume the act of legislating a rule of law, and (b) that the judiciary should apply the rule of law intended by the legislature. Yet the absence of any fixed or mandatory rules of statutory construction has led to abuses in judicial decisionmaking. Abuse is defined, for purposes of our discussion, as a decision contrary to these governing principles. Thus, some decisions are abusive in their effect—they create a rule of law that can be characterized as judicial usurpation of the legislative power. Other decisions can be characterized as abusive in approach—they fail to take due regard of legislative intent or they ascribe an intent which is nonexistent. These latter decisions abuse principles of statutory interpretation in the sense that the principles of interpretation become a mere pretext for the decision reached.

a. Decisions abusive in effect. The recent decisions of the Second Circuit[57] and the D.C. Circuit sustaining the Federal Reserve Board's interpretation of section 20 are examples of the first form of abuse. As discussed above, section 20 of the Glass-Steagall Act prohibits affiliations between commercial banks and firms "engaged principally" in securities underwriting.[58] It is true that the term "engaged principally" is ambigu-

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55. *See, e.g.*, Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986) ("If the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not . . . the courts, to address").

56. *See, e.g.*, Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533-35 (1947) (discussing the constraints imposed on the judicial function); John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 345-46 (1976) (discussing the supremacy of the legislature); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907).

57. *See* Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47 (2d Cir. 1988), *cert. denied*, 486 U.S. 1059 (1988). *Accord* Securities Indus. Ass'n v. Board of Governors, 847 F.2d 890 (D.C. Cir. 1988).

58. After one year from June 16, 1933, no member bank shall be affiliated in any manner described in subsection (b) of section 221a of this title with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or

ous. It is possible to conclude that the phrase does not encompass solely a firm a majority of whose business consists of underwriting.

The statute itself does not define the phrase, and the Act's legislative history gives little guidance as to its meaning. The congressional committee report concerning the statute merely states: "[T]he committee has . . . determined to present proposed legislation aimed at the following objects: (1) To separate as far as possible national and member banks from affiliates of all kinds."[59] Thus there exists no evidence of specific legislative intent with regard to the primary issue raised by the statute's operative term "engaged principally."

The decisions of the United States Supreme Court interpreting other sections of the Glass-Steagall Act have considered the meaning of section 20 in passing. However, the Court's discussion gives no certain answer to the question at hand. In *Board of Governors v. Agnew* the Court contrasted the term "primarily engaged," contained in section 32, with the term "engaged principally," contained in section 20. The Court suggested that the latter term denotes activity constituting a majority of a firm's business. The Court explained:

> It is true that "primary" when applied to a single subject often means first, chief, or principal. But that is not always the case. For other accepted and common meanings of "primarily" are "essentially" or "fundamentally." An activity or function may be "primary" in that sense if it is substantial . . . .
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> . . . .
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> There is other intrinsic evidence in the Banking Act of 1933 to support our conclusion. Section 20 of the Act outlaws affiliation of a member bank with an organization "engaged principally" in the underwriting business . . . . [W]ithin the same Act we find Congress dealing with several types of underwriting firms—those "engaged" in underwriting, those "primarily engaged" in underwriting, those "engaged principally" in underwriting. The inference seems reasonable to us

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distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities . . . .

12 U.S.C. § 377 (1988).

59. S. REP. NO. 77, 73d Cong., 1st Sess. 10 (1933). In addition, *H.R. Rep. No.* 150, 73d Cong., 1st Sess. 3-5 (1933), merely recites the proposed legislative changes but does not explain them or define the terms employed.

> that Congress by the words it chose marked a distinction which we should not obliterate by reading "primarily" to mean "principally."[60]

Yet the precise meaning of section 20 was not before the Court. The Court's words could also be construed as accepting the position that *a* principal activity need not be *the* principal activity of an affiliate.

Moreover, the Court's approach suggests that it might not define section 20 to require that a majority of a firm's business consist of proscribed forms of securities underwriting. In *Agnew* the Court defined section 32's prohibition guided by the evils which the Glass-Steagall Act was designed to avoid.[61] It is likely that the United States Supreme Court would take the same approach in defining section 20's prohibition. To define it as prohibiting affiliations only with firms a majority of whose business consists of securities underwriting would cripple the Act's purpose of separating commercial and investment banking firms. As the United States Supreme Court itself noted in *Agnew*, "Firms which do underwriting also engage in numerous other activities. The Board indeed observed that, if one was not 'primarily engaged' in underwriting unless by some quantitative test it was his principal activity, then § 32 would apply to no one."[62]

Thus while it is arguable that the United States Supreme Court would characterize the term "principally" as having only one possible meaning—i.e., a majority of a firm's business—this is not probable. Accepting this conclusion we are still left with the unresolved statutory question: What quantitative level of activity does cause a firm to be engaged principally in securities underwriting?

In *Securities Industries Ass'n v. Board of Governors*,[63] the Second Circuit accepted the position that the term "engaged principally" does not require that impermissible securities underwriting constitute a majority of an affiliate's business. The court deemed the phrase to be intrinsically ambiguous.[64] The

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60. Board of Governors v. Agnew, 329 U.S. 441, 446-48 (1947) (citations omitted).
61. *Id.* at 447.
62. *Id.*
63. 839 F.2d 47 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988).
64. *Id.* at 63.

Second Circuit then ruled that the Federal Reserve Board's construction of section 20—which defined "engaged principally" to mean any "substantial" activity[65]—was reasonable. The court focused on the purposes behind enactment of the Glass-Steagall Act to support its position.[66]

This aspect of the Second Circuit's decision is not subject to criticism. The term "principally" might mean *the* principal activity or *a* principal activity. Thus, it is ambiguous as to the precise quantitative cutoff that is to distinguish a permissible and an impermissible level of activity. What is subject to criticism is the court's acceptance of a 5 to 10% cutoff.

The Federal Reserve Board imposed a 5 to 10% cutoff to differentiate permissible from impermissible levels of securities underwriting. The Board explained its standard in the following terms:

> [A] member bank affiliate would not be substantially engaged in underwriting or dealing in ineligible securities if its gross revenue from that activity does not exceed a range of between five to ten percent of its total gross revenues . . . . This range was established by reference to the Board's interpretations of the "primarily engaged" standard in section 32 of the Glass-Steagall Act. As discussed below, under these interpretations, a company would not generally be considered engaged substantially in ineligible securities activity if its gross revenues from that activity did not exceed 5 percent of its total gross revenues. Where underwriting volume was not large in abso-

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65. *Order Approving Application*, *supra* note 6, at 475-76.

66. The worries envisioned by bank affiliation with securities firms do not disappear simply because the activity is less than fifty percent of a firm's business.

> An example illuminates how equating "principally" in § 20 with "chief" or "first" begets the dangers foreseen by Congress. Such an interpretation would allow a member bank to become affiliated with any large integrated securities firm. One commentator has pointed out that reading "principally" as "chief" would allow a bank to be affiliated with Merrill Lynch & Co., Inc., one of the nation's largest investment bankers. *See* Plotkin, *What Meaning Does Glass-Steagall Have for Today's Financial World?*, 95 BANKING L.J. 404, 414-16 (1977). It cannot be supposed that the Congress that enacted Glass-Steagall would have intended that § 20 not prohibit such affiliations. This is not to say that "principally" cannot in some contexts mean "chief" or "first," but rather that in § 20 the term must be given a definition that is both sensible and in harmony with legislative purpose.

Securities Indus. Ass'n v. Board of Governors, 839 F.2d at 64-65. *Accord* Securities Indus. Ass'n v. Board of Governors, 847 F.2d 890, 897-99 (D.C. Cir. 1988).

> lute terms, however, somewhat higher levels of revenue were permitted, but generally not greater than 10 percent of total gross revenues.[67]

Both the Second Circuit and the D.C. Circuit sustained this cutoff as a reasonable interpretation of the statute.[68]

The difficulty with this interpretation is that it usurps the legislative function. It is true that Congress has employed an ambiguous term to which the courts must give meaning. But this does not authorize the court to ignore the term completely. The term "engaged principally" establishes the outer limits of the court's discretion in giving precise meaning to the legislative prohibition. The court cannot define the term in a manner that reasonable persons would never expect to fall within the boundaries of the statutory phrase.[69]

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67. *Order Approving Application*, *supra* note 6, at 475-76. The Board applied this standard to the application in question and determined that a 5% level of activity should be allowed:

> Applying this framework to the current applications, the Board came to the conclusion that, in view of the fact that the volume of ineligible securities activity projected by Applicants would be very large in absolute terms, the lower end of the permissible range, 5 percent, should determine whether Applicants' gross income or market share from ineligible activity would be substantial. The board recognizes that this 5 percent threshold for measuring the concept of "engaged principally" is a conservative interpretation of the level of activity permitted by section 20. The Board believes that a conservative, step by step approach is merited in applying the provision of a statute that was intended to deal with a crisis in our banking system and that has not been extensively interpreted by the courts as applied to the applications now before the Board. In the light of experience, the Board will consider, not later than one year from the date of this Order, whether, under the framework established by the Board in this Order, somewhat higher levels of activity would be consistent with the Board's finding that underwriting and dealing in ineligible securities in an affiliate of a member bank is permissible so long as the level of this activity measured by gross revenue and market share is not substantial.

Id. at 476.

However, on September 21, 1989, the Board raised the level of activity which would be deemed permissible to 10%. *Order Approving Applications to Engage in Limited Underwriting and Dealing in Consumer-Receivable-Related Securities*, *supra* note 6; *Modifications to Section 20 Orders*, 75 Fed. Res. Bull. 751 (1989); *Underwriting and Dealing in Bank Ineligible Securities*, [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 87,803 (Sept. 21, 1989).

68. Securities Indus. Ass'n v. Board of Governors, 847 F.2d at 898-99; Securities Indus. Ass'n v. Board of Governors, 839 F.2d at 68.

69. *See* DeSloovere, *supra* note 9, at 599; Frankfurter, *supra* note 56, at 543; Harry W. Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 739

The court could not, for example, define "engaged principally" to mean activity constituting 100% of an affiliate's business. Such a high threshold is not within the expected realm of the statutory term. Similarly, it could not define the phrase to mean activity constituting 1% of an affiliate's business. Such a low threshold is similarly not within the expected realm of the statutory term. Even when a statutory phrase is vague, it does establish parameters for judicial discretion. Any meaning given to the phrase which falls outside of such parameters constitutes a rewriting of the statute and thus an abuse of judicial power. Defining the term "principally" to mean no more than 5% of an affiliate's business is so low as to be an unexpected and therefore unauthorized definition. The circuit courts' decisions suffer from the defect that they do not recognize this limitation on the judiciary's power.

The Second Circuit did attempt to rely on the purposes behind the Glass-Steagall Act to justify its ruling. The court noted:

> Further support for a stricter interpretation of § 20 than of § 32 is derived from the fact that the dangers resulting from affiliation are arguably greater than those resulting only from personnel interlocks. The public associates a member

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(1940); *see also* Kernochan, *supra* note 56, at 357.

Some evidence of what would be an expected threshold under the statutory term "engaged principally" is found in the conclusions drawn by the Comptroller of the Currency and by state banking departments. In a 1987 interpretive letter the Comptroller's Office opined that, in defining what level of activity causes a firm to be "engaged principally" in underwriting, a 25% figure could be deemed a safe harbor and, in fact, a higher level of activity might be permissible. *Securities Activities Permissible for Affiliates of National Banks* (Letter from Richard V. Fitzgerald, Chief Counsel, Interpretive Letter No. 383), [1988-89 Transfer Binder] Fed. Banking L. Rep. (C.C.H.) ¶ 85,607 (Jan. 29, 1987).

The New York State Banking Department has issued an interpretation of the state banking law which concludes that it permits state-chartered banks to underwrite and deal in securities through subsidiaries or affiliates, as long as such subsidiaries or affiliates are not "engaged principally" in underwriting or dealing. The Banking Department opined that if 25% of a subsidiary's or affiliate's business consisted of underwriting it would not be "engaged principally" in such activity. 19 Sec. Reg. & L. Rep. (B.N.A.) 107 (1987) (Letter of December 23, 1986). In fact, the New York Superintendent of Banks opined—although she did not need to decide—that § 20 could reasonably be construed to prohibit underwriting which constitutes the majority, or more than half, of an affiliate's business activities. The measure employed to ascertain if the proscribed level of underwriting had been reached was an average of assets acquired for underwriting when the only activity in which the affiliate is engaged is underwriting of eligible and ineligible securities.

> bank and its affiliate because of their common ownership and often similar names. The potential for the public to associate the misfortunes of the affiliate with the bank is far greater than the association of firms with personnel interlocks, which are generally unknown to the public.[70]

The defect in this analysis is that it presumes that the court is free to disregard the terms of the statute as long as its general purposes are served. As discussed in section three of this article, this constitutes judicial usurpation of the legislative function.

The defense could be advanced that a 5% cutoff is an expected level of activity to define the term "principally," as evidenced by the very fact the Federal Reserve Board drew this conclusion. The Board does have some discretion in giving a term a precise meaning, but not unbridled discretion. The Board's determination must be found to be consistent with the ordinary meaning of the term employed.

In addition to the ordinary meaning of the term, other available evidence contradicts the conclusion that a 5% cutoff is an expected cutoff. First, the Federal Reserve Board itself had previously taken the position that a higher cutoff was the reasonable cutoff for the phrase "engaged principally."[71] Second, other bank regulatory agencies have come to the conclusion that a higher cutoff was proper—and one might argue that their conclusions are equally reasonable. The Comptroller of the Currency, for example, has taken a position at odds with the Federal Reserve Board. In a 1987 interpretive letter the Comptroller's Office opined that, in defining what level of activity causes a firm to be "engaged principally" in underwriting, a 25% figure could be deemed a safe harbor and, in fact, a higher level of activity might be permissible.[72]

Thus, considering all the available evidence, 5% was not an expected cutoff. Instead it was imposed on policy grounds—to avoid excessive involvement in securities underwriting by bank affiliates. But this is a legislative decision. While the low 5%

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70. Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 67 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988).

71. *See, e.g.*, *Order Approving Acquisition of a Consumer Finance Company*, 63 Fed. Res. Bull. 948 n.2 (1977) (Glass-Steagall Act would not be violated if affiliate's outstanding "thrift notes" were reduced to 25% or less of its total consolidated *assets*).

72. *See supra* note 69.

threshold might be desirable to limit the risks inherent in securities activities,[73] it is not a threshold that the court can impose in disregard of the statute enacted by Congress.

b. Decisions abusive in approach. A second form of judicial abuse is an abuse related to the decisionmaking process, and frequently takes the form of creation of legislative intent that is, in fact, nonexistent. This abuse is made possible because both the meaning of each of the three principles of statutory construction and the identity of the proper source(s) of evidence to be utilized in each approach are not fixed. Judicial abuse has taken one of three forms: (1) characterizing a purposes analysis as an act of discovering legislative intent for the precise decision handed down by the court, (2) relying on statements of nonlegislative spokesmen to arrive at legislative intent, and (3) ascribing concrete intent to the legislature when the evidence is weak or circumstantial.

(1) Characterizing a purposes analysis as a discovery of legislative intent. In the first of these forms of decisionmaking abuse, the courts frequently fail to distinguish between specific legislative intent and a purposes analysis. For specific legislative intent, the precise question presented to the court must have been considered in the committee reports accompanying the legislation or the statements of the bill's sponsor, or drafter, or the debates surrounding its enactment *and* must have been answered. If this evidence exists one can validly conclude that the legislature specifically intended a vague statutory phrase to have a particular meaning. By contrast, when employing a purposes approach, the court is asking itself whether a particular decision or interpretation serves or disserves the purposes the legislation was enacted to accomplish.

There is nothing inherently abusive about a purposes approach. In fact, it is a necessary vehicle of statutory interpretation when the statutory term is ambiguous and there is no evidence of specific legislative intent. What should be avoided

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73. The Federal Reserve Board, for example, after endorsing a 5-10% cutoff for securities underwriting activities, noted:

> [T]he Board believes that gross revenue is the appropriate test to determine whether a subsidiary is "engaged principally" because it is an objective and meaningful measure of the importance of the activity to the subsidiary as a whole and also reflects the level of risk involved in the activity, a major consideration behind enactment of the Glass-Steagall Act.

Order Approving Application, supra note 6, at 484.

is characterizing the result as a result which Congress specifically intended.[74]

One reason this is abusive and should be avoided is that it is disingenuous. It fails to admit that the result reached by the court is one Congress never considered—that it is a result premised on the court's determination of the manner in which the statute's purposes are best served and not the legislature's determination. Admitting this conclusion allows other courts to evaluate for themselves whether a particular determination best serves the legislative purpose. A second reason it is abusive is that it opens the door to judicial usurpation of legislative power. By characterizing the result as one intended by the legislature, the court frees itself to ignore the parameters of the literal terms of the statute.

(2) Reliance on individual opinions as evidence of legislative intent. A second form of judicial abuse in the decisionmaking process takes the form of reliance on statements of nonlegislative spokesmen, and others presenting individual opinions, as evidence of specific legislative intent or as evidence of legislative purposes.[75]

The judiciary should rely on evidence of specific intent or utilize a purposes analysis only when that intent or those purposes can be ascribed to the legislature. Certainly, the legislature as a whole has spoken via the literal terms of the statute. Thus, purposes stated in the preamble to the legislation are validly utilized by the courts.[76] In no other way does the legislature clearly express the intent shared by the body as a whole. Nonetheless, for pragmatic reasons we can ascribe to the legis-

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74. Court decisions in which the distinction between a purposes analysis and a finding of specific intent is ignored are common. Such decisions characterize a conclusion reached by the court under a purposes approach as a conclusion intended by the legislature. *See, e.g.*, Investment Co. Inst. v. Board of Governors, 606 F.2d 1004, 1012-13 (D.C. Cir. 1979), *rev'd*, 450 U.S. 46 (1981); Agnew v. Board of Governors, 153 F.2d 785, 791-92 (D.C. Cir. 1946), *rev'd*, 329 U.S. 441 (1947).

75. *See* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137, 144-46 (1984); Investment Co. Inst. v. Camp, 401 U.S. 617, 629-34 (1971); New York Stock Exch. v. Smith, 404 F. Supp. 1091, 1098-99 (D.D.C. 1975), *vacated sub nom.* New York Stock Exch. v. Bloom, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied sub nom.* New York Stock Exch. v. Heinmann, 435 U.S. 942 (1978); Investment Co. Inst. v. Camp, 274 F. Supp. 624, 645-6 (D.D.C. 1967), *rev'd sub nom.* National Ass'n of Sec. Dealers v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *vacated in part, rev'd in part sub nom.* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971).

76. *See* Board of Governors v. Investment Co. Inst., 450 U.S. 46, 53 n.14 (1981).

lative body as a whole the specific intent and the purposes voiced in the committee reports and the statements of the legislative sponsors and drafters made to the legislature as a whole.[77]

There is, however, some point at which statements of specific intent or purposes cannot be ascribed to the legislature. Statements of interested witnesses at congressional hearings, statements of disinterested third-parties concerning pending legislation, and statements of individual legislators regarding their interpretation of proposed legislation cannot properly be characterized as the intent of the legislature. Yet it is this type of evidence that the courts have at times relied upon as evidence of specific legislative intent or of purposes.[78] The United States Supreme Court has occasionally criticized reliance on statements not made to the legislature as a whole to evidence legislative intent or purposes[79] but has failed to do so consistently.

The problem with the judiciary's current approach to statutory construction is not merely the theoretical problem of whether it is proper to ascribe to the legislature an intent or purpose which a third party has voiced. Rather, the problem is a more practical one: if such an approach is accepted, it is subject to judicial abuse. The court is free to comb the hearings

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77. Jones, *supra* note 69, at 743-50.

For purposes of this article the term sponsor includes the person submitting the bill for legislative consideration as well as the person(s) submitting any amendment. When a bill is drafted by a nonlegislative body—e.g. a government agency, such as the Federal Reserve Board—the explanation of the bill's meaning prepared by that body would be considered only if it was presented to the entire Congress. This might occur, for example, by appending a statement to the Committee Report(s) on the bill. When a bill was reported out of a conference committee, the statements of the members of the conference committee would also be considered as evidence of legislative history, but only if made to the entire Congress. Such conferees might be deemed "drafters" of the final legislation.

The Glass-Steagall Act, for example, was derived from S. 1631, sponsored by Senator Glass, and H.R. 5661, sponsored by Representative Steagall. The conferees on the part of the Senate which helped to create the final bill submitted to the Congress were Senators Glass, Bulkley, McAdoo and Walcott. 77 CONG. REC. 4277 (1933).

78. See *supra* note 20.

79. *See, e.g.*, Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 407 (1987) (refusing to attach substantial weight to statement of Rep. McFadden placed into the Congressional Record after the passage of the McFadden Act); Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 372 (1986) (stating that an article entered into the Congressional Record is not legislative history in any meaningful sense of the term).

surrounding the legislation, all the statements made or submitted in Congressional debates, and even the contemporaneous literature for evidence of specific intent or purposes, and then to use only whatever evidence supports its decision and discount the rest. In other words, the court becomes free to rewrite the statute in the name of the legislative intent which it has discovered.

(3) Ascribing specific legislative intent based on weak or circumstantial evidence. A third form of decisionmaking abuse is one of ascribing specific intent to the legislature when the evidence is weak or circumstantial.[80] An example is found in the Second Circuit's 1988 decision regarding section 20 of the Glass-Steagall Act. The Federal Reserve Board had imposed both a gross revenue test[81] and a market share test[82] to determine whether a bank's securities affiliate was "engaged principally" in securities underwriting. The Second Circuit rejected the market share test, implying that there existed concrete evidence that the legislature did not intend to impose a market share test. The court supported its conclusion in the following terms:

> In the legislative history there is evidence that before the enactment of Glass-Steagall, banks and bank affiliates had acquired an increasingly large share of securities activity in relation to investment banks. *See* W. Peach, *The Security Affiliates of National Banks* 108-10 (1941). For example, between 1927 and 1930 the percentage share of commercial banks in origination of bond issues more than doubled. *Id.* at 109. This increasing market share of commercial banks in traditional investment banking activities was not unknown to Congress. *See 1931 Hearings*, supra, at 299 (testimony of C.E. Mitchell, Chairman, National City Bank of New York) (presenting data). But, the fact that this was brought to Congress's attention and that Congress did not directly address it is, if anything, a strong indication that Congress was not concerned about market share. Rather, by using the term "engaged principally," Congress indicated that its principal anxiety was over the perceived risk to bank solvency resulting from their over-involvement in securities activity. A market share limitation simply does not further reduce this congres-

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80. *See supra* notes 26-30 and accompanying text.
81. *See Order Approving Application*, *supra* note 6, at 475-76, 485-86.
82. *See id.*

sional worry.[83]

In actuality there is no clear indication in the legislative history regarding the evidence to be utilized to define the term "engaged principally." In other words there is no evidence of specific legislative intent.

The problem with reliance on weak or circumstantial evidence is that it opens the door to judicial usurpation of the legislative power. Words of uncertain meaning—even if found in the otherwise useful committee reports or statements of the sponsor or drafter of the legislation—should not form the sole basis for a judicial decision. This is because vague statements might always be found which can be construed to support almost any judicial ruling. It is preferable for the court to admit that there is no concrete evidence of specific legislative intent, and for it to employ a purposes analysis instead.

III. STATUTORY CONSTRUCTION BASED ON FIXED PRINCIPLES

The primary aims of the judiciary with respect to statutory construction should be (1) to give effect to the legislature's intended meaning, and (2) to avoid judicial assumption of the role of legislating. These general aims are not subject to dispute. The problem, as discussed in section two of this article, is that the absence of any fixed standards of statutory construction makes it more likely that these aims are not served.

In this section I formulate an alternative approach to statutory construction. This fixed principle approach to statutory construction is presented in three steps.

A. Step One: Mandatory Application of Interpretive Approaches

Initially we are confronted with the three general approaches to statutory construction—plain meaning, specific intent and a purposes analysis. It is wise not to dictate the use of any one of these approaches to the exclusion of the others. The ultimate aim is to ascertain legislative intent, and all three offer useful insights regarding that intent.

Thus the preferred rule of construction should include all

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83. Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 68 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988).

three approaches. Often, when all three are not applied, evidence of specific intent, or an examination of the purposes of the legislation, or both, are ignored, based on a conclusion that the statutory language is clear and unambiguous.[84] Yet no words are completely free of ambiguity, and proper evidence of specific legislative intent offers clearer insight into the construction of the statute the legislature desired. Any rule which ignores any of the three approaches must be avoided.

Mandatory application of all three interpretive approaches would eliminate judicial discretion in choosing among the three. Courts should not be free to examine or to ignore the legislative history of the statute, based on subjective determinations that the statutory terms in question are or are not ambiguous. Instead, under the approach proposed, courts would, in all cases, be required to examine the plain meaning of the legislated terms which are the subject of litigation, *and* all available evidence of specific legislative intent, *and* would be required to evaluate the decision they propose in light of the properly ascertained purposes of the legislation.

Obviously when the conclusions suggested by all three approaches are in harmony, that conclusion would be consistent with the actual legislative intent and therefore the proper interpretation of the statute.

B. Step Two: Fixed Meanings for Each Interpretive Approach

The difficult case is presented when the three approaches to statutory construction lead to conflicting conclusions. Courts would then be required to resolve the conflict. This resolution is found in step three, discussed below. That discussion is delayed because its evaluation depends upon agreement concerning the exact meaning of each approach to statutory construction. Only when these meanings are fixed can one evaluate the wisdom of choosing among the approaches. The fixed meaning

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84. *See* Securities Indus. Ass'n v. Board of Governors, 847 F.2d 890, 897 (D.C. Cir. 1988) (clear language prevails over general purposes); A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136, 143 (D.C. Cir. 1982) (if the terms of the statute are clear the court's inquiry is at an end), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984). It has been pointed out that the United States Supreme Court no longer gives the plain meaning rule the effect of excluding evidence of legislative intent or purposes; however, many lower federal courts have continued to give the rule this exclusionary effect. Murphy, *supra* note 9, at 1299-1306.

that needs to be attached to each of the three approaches will now be discussed.

1. Components of the plain meaning rule

The plain meaning rule forces the courts to focus on the words utilized in the statute. The theory is that these are indices of the intent of the entire legislature. "Plain meaning" must not, however, refer to the subjective interpretation of the judge hearing a particular case. Instead, "plain meaning" should be defined as the generally accepted interpretation of the words contained in the statute. If the statute is one addressed to a particular industry group, the plain meaning of the terms used should be the meaning generally accepted in that industry.[85] This is because we are attempting to ascertain the legislature's intent and while it is true that the legislators are not members of the industry group, a common feature of the legislative process is extensive investigations and hearings preceding statutory enactments. These are aimed, in part, at ascertaining industry needs and practices and they lead to the formulation of legislation in light of accepted industry practices.

Explicit disagreement with this initial principle concerning the plain meaning rule does not currently exist. What is missing from many court decisions is explicit evidence of the accepted meaning of a particular term. This should be required. It should be required whether the term is one of ordinary usage or is one with an accepted industry meaning. The absence of a requirement of proof opens the door to subjective definitions which a court merely presumes others share. If there exists no evidence of a generally accepted meaning for a particular term, then the court should be compelled to conclude it has no plain meaning which the legislature desired to employ.

An additional question regarding the plain meaning rule is whether the meaning is to be determined as of the time of enactment of the legislation or currently. This is of particular importance for terms with an accepted industry meaning, since that meaning can change in light of new practices. Since the purpose of statutory construction is to ascertain the enacting legislature's intent, then the meaning of any term should be

85. *See supra* note 14 and accompanying text.

determined solely from the time of enactment.[86] If industry conditions change and necessitate a change in governing law, then it is for the legislature, and not the courts, to adopt such a change.

2. Components of specific legislative intent

The phrase "legislative intent" has been misused by the courts. First, it has been used when the only sources evidencing a particular interpretation are pronouncements not attributable to the legislature. Second, the plain meaning rule has been described as yielding evidence of legislative intent, and any conclusion consistent with general legislative purposes has been classified as the result intended by the legislature. This excessive use of the phrase "legislative intent" merely creates confusion and should be avoided. Instead, the term "specific legislative intent" should be utilized only in situations in which the question being litigated has been considered by the legislature in the course of a statute's consideration and the legislature has clearly indicated the result it considers the proper interpretation of the statute.

Given this limited use of the phrase "legislative intent," additional questions follow: what are the proper sources of such intent, and what is the nature of the evidence to be required?

It is clear that the legislature as a whole does not issue any evidence of the intended meaning of any statutory provision, except the statute itself. However, we must yield to the pragmatic conclusion that Congress does rely on the explanations of the statute's meaning which are prepared by the legislative committees that considered it and by the legislators that either draft or sponsor it.[87] Thus, committee reports and statements of legislative drafters and sponsors which are made to the entire legislature are proper sources for evidence of specific legislative intent.

Beyond these two sources there exists only a very tenuous connection between the actual intent of the legislature and the sources.[88] As a result, all other sources of specific legislative

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86. *See* Frankfurter, *supra* note 56, at 535-37; Pound, *supra* note 56, at 381.

87. *See* Jones, *supra* note 69, at 743-50; Kernochan, *supra* note 56, at 347; Murphy, *supra* note 9, at 1314.

88. *See* Reed Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 IND. L.J. 206, 220 (1975) (relentless pursuit of legislative

"intent" should be avoided. Statements made by either witnesses or legislators at committee hearings or statements inserted by legislators into the *Congressional Record* are not proper sources of specific legislative intent and must not be relied upon by the judiciary.[89]

The term specific legislative intent should be further limited to situations where the legislature not only *expressly considered* the interpretive issue in question but also gave a *clear answer* to it. If no clear answer is manifest in the proper legislative materials, a court should conclude there is no evidence of specific legislative intent. Vague answers to interpretive issues should not suffice.

3. Components of legislative purpose

Defining a statute's terms in light of legislative purposes is one of the most widely used vehicles of statutory construction. This is because specific legislative intent is often absent.

One question to be resolved is the proper source for the evidence of legislative purpose—the source(s) which should be utilized by the courts. Since the ultimate aim is to arrive at a decision the enacting legislature would have desired, acceptable statements of purpose should be limited to express statements of purpose found in the statute itself (*e.g.* its preamble), statements contained in the committee reports, and statements of the legislative drafters and sponsors of the bill which were made to the entire legislature. A court should not feel free to infer a purpose—not even from the terms of the statute,[90] nor should a court use statements of purpose contained in committee hearings.[91] This last rule applies to statements of nonlegislators, as well as to statements of committee members. Such statements were not brought to the attention of the legislature as a whole and therefore cannot be properly attributed to the legislature as a whole.

A second question is whether the court should examine the

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intent leads to temptation to utilize evidence which is unreliable or otherwise inappropriate).

89. Jones, *supra* note 69, at 750 (courts generally exclude declarations of members of Congress to evidence legislative meaning). However, analysis of the cases contained in our test group indicates exclusion is not as universal as Professor Jones had indicated. *See supra* notes 17-20 and accompanying text.

90. *See supra* text accompanying notes 32-43.

91. *Contra* Frankfurter, *supra* note 56, at 540-43. *But see supra* note 30.

specific purposes connected to the specific statutory clause in question or the general purpose(s) motivating passage of the bill as a whole. This is a choice the courts frequently ignore.[92] Both are useful to the court in evaluating a proposed interpretation. But whenever specific legislative purposes have been announced, they should be preferred.

This principle was ignored by the Second Circuit, for example, in *Securities Industries Ass'n v. Board of Governors*. The court resorted to the general purposes leading to enactment of the Glass-Steagall Act and ignored the available evidence of the specific purpose for enactment of section 20.[93]

A third question that arises is whether an evaluation should be made in light of conditions as they existed at the time of enactment of the legislation or at the time of the court's decision. "Conditions" includes both economic and industry conditions as well as other statutory protections and controls.

A court could place itself in the position of the original legislature. This could be classified as a contemporaneous evaluation approach. Alternatively, a court could evaluate stated purposes in light of current conditions—a current evaluation approach. The former position is not without merit in that the purposes approach to statutory construction is aimed at ascertaining the decision desired by the enacting legislature. However, I would suggest that the courts not be required to adopt a contemporaneous evaluation approach.[94] The issue of whether to interpret a term contemporaneously or currently arises when the legislature has arguably used a vague statutory term to address the hazards it perceived. The judiciary could justifiably take the position that the decision to employ an imprecise term was purposeful and intended to allow the courts to give meaning to the term in light of changing industry and legal conditions. This sanctions the use of the current evaluation approach.

C. Step Three: Stipulated Choices in Conflict Situations

The final step in our analysis of the fixed principles that

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92. *See supra* text accompanying notes 32-43.

93. Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 67 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988).

94. *But see* Richard A. Posner, *Statutory Interpretation-In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 810 (1983).

should govern statutory construction concerns the choice that must be made when the three approaches to statutory construction yield conflicting conclusions.

1. Evidence of specific intent controls if present

The following choices are advocated. If there is evidence of specific legislative intent, then that intent should control the court's decision. The plain meaning rule is, after all, a means to infer a legislative determination, so the conclusion thus reached should yield to any stated conclusion. This is true even if there is evidence of a generally accepted industry meaning for a statutory term, because we are merely inferring that the legislature used the term in question as it is commonly understood. If the legislature has clearly indicated, as part of a statute's legislative history, that a different meaning was employed, then the actual intended meaning, as opposed to the inferred or implied intended meaning, should be applied by the court.

Similarly, a purposes approach yields only a court-inferred meaning. Moreover, legislative purposes are often stated in such broad terms that any inferred meaning based thereon is uncertain at best. Thus, any statement of specific legislative intent is to be given controlling weight.[95] It must be remembered that the term "specific intent," as used in this article, means that the specific issue before the court was considered in committee reports, or statements of the drafters or sponsors made to the legislature, and a clear conclusion was stated.

2. Cases with no evidence of specific legislative intent

If there is no evidence of specific legislative intent, then the court may be asked to choose between a conclusion supported by the plain meaning rule and one consistent with the legislative purposes. This is a difficult choice.

Two distinct situations must be differentiated: (1) those in which no compromise position is possible, i.e. a forced choice situation, and (2) those in which a compromise position is possible. A compromise position would be an alternate conclusion which could be sustained under both a plain meaning approach

95. *See also* Dickerson, *supra* note 88, at 237; and Kernochan, *supra* note 56, at 349-50.

and a purposes approach.

a. Forced choice situations.[96] When a forced choice is presented, i.e. when there is no evidence of specific intent and the results of the other two approaches are irreconcilable, that choice should be governed by the two overriding principles that determine proper judicial construction of statutes: (1) the judiciary should apply the rule of law intended by the legislature, and (2) any system of interpretation must minimize the possibility of judicial abuse in the form of assumption of the power to legislate.

The first of these guiding principles would give controlling effect to a purposes approach if there is evidence regarding the purpose of the specific provision in question. This is because the basis of the plain meaning rule is the words of a statute—and they are never free from doubt.[97] Moreover, in applying the plain meaning rule, we are only inferring that the legislature intended to use the term as it is ordinarily understood. But if the result disserves the purposes the legislation was aimed at achieving, then this inference must be incorrect. Also, ascertaining the intention of the legislature is the principle of paramount importance. And stated specific purpose(s) are apt not to be as vaguely stated as general purposes, and therefore less prone to judicial abuse.

Yet this is only true if there is evidence regarding the specific purpose of the term or clause in question. If we are relying instead on the general purposes of the entire bill, then the purposes approach must yield to the plain meaning rule because of the second guiding principle above.

Enumerated legislative purposes often relate to the bill in general rather than the specific phrase in question. It is quite possible that in the course of legislative compromise a specific provision was enacted that did not entirely serve the general purposes of the legislation. An individual provision may be intended, for example, as a limitation on or exception to the general purposes behind the statute. It is the compromise so created that was enacted by the legislature and must be given

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96. One example of a forced choice situation is the litigation involving whether prime quality third-party commercial paper is a "security" under the Glass-Steagall Act. *See* A.G. Becker, Inc. v. Board of Governors, 519 F. Supp. 602 (D.D.C. 1981), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom.* Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137 (1984).

97. *See* Frankfurter, *supra* note 56, at 528; Jones, *supra* note 69, at 739.

effect by the court.[98]

The plain meaning rule, as used in our interpretive scheme, contains an objective measurement of meaning—i.e., concrete evidence of generally accepted meaning—while the purposes approach relies on subjective evaluations. The stated purposes are typically in very general terms, so that many conflicting interpretations could be deemed to serve one or more of these purposes. Determining whether a particular purpose is served or disserved necessarily involves a subjective evaluation on the part of the judge. This gives the judiciary too much leeway—too much room to pick and choose among purposes and to color a conclusion regarding whether they are served or disserved in light of the result the court wishes to impose. Hence the preference for the plain meaning rule under the second guiding principle.

Thus the plain meaning rule is to be given controlling effect over a purposes approach in all situations except where there is evidence of the specific purpose(s) of the statutory clause in question. It must be emphasized that a purposes approach as used in the interpretive scheme suggested in this article means a statement of purpose contained in the statute itself, committee reports, or statements of the bill's drafters or sponsors made to the entire legislature.

b. Compromise possibility situations. In contrast to the forced choice situation, some issues of statutory construction permit one or more compromise conclusions which would be consistent with both a plain meaning analysis and a purposes analysis. An example of a permissible compromise situation is the issue of the quantitative cutoff for the term "engaged principally" in section 20 of the Glass-Steagall Act. This issue was considered by the Second Circuit in *Securities Industries Ass'n v. Board of Governors*. The issue was whether the term "engaged principally" could be defined by the Federal Reserve Board to mean no more than 5% of a bank affiliate's gross revenues could be derived from impermissible forms of securities underwriting.

Utilizing my proposed fixed principle approach to statutory construction, a court faced with this issue would initially note that it is required to employ each of the three approaches to statutory construction and to reach a conclusion under each ap-

98. *See* Easterbrook, *supra* note 12, at 88-89.

proach. First, the plain meaning rule would be employed. The term "engaged principally" was not expressly defined in the statute. Therefore, the alternative source of meaning is extrinsic evidence of generally accepted meaning at the time of the statute's enactment. The term "engaged principally" is not a term that has special meaning in the banking or securities industry. Rather the meaning ordinarily or generally attached to that term must be sought. Employing this approach one would conclude that securities underwriting of ineligible securities must be a chief or main activity.[99] This does not mean that it must constitute more than 50% of a firm's business, but does mean that other activities are of secondary importance.

Second, the specific legislative intent approach would be employed. Sources of legislative intent would be limited to the committee reports and statements of legislative drafters and sponsors which were made to the entire Congress. The court would be forced to admit that the committee reports contain no evidence of specific legislative intent regarding the phrase in question. Similarly, statements of legislative drafters and sponsors contain only circumstantial, vague and/or inconclusive determinations.[100] Thus there is no clear evidence of specific legislative intent.

Third, a purposes approach would be utilized. There is evidence, found in the committee reports, of the specific purposes behind section 20 of the Glass-Steagall Act. The committee report accompanying the Act states:

> It has been suggested from many quarters that the affiliate system be simply, "abolished." This suggestion has much authority behind it, but, in addition to the manifest difficulty of enforcement, owing to the existence of well-known subterfuges to maintain control, there remains the question whether it would be of much real service so long as State legislation permits the growth of affiliates in connection with State banks and trust companies. The committee has, therefore, determined to present proposed legislation aimed at the following objects:

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99. THE UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1932) defines "principally" as "in the chief place, for the most part, mainly, chiefly." Similarly, THE CENTURY DICTIONARY AND CYCLOPEDIA (1900) defines "principally" as "in the principal or chief place; above all; chiefly."

100. The only evidence regarding the meaning of the term "engaged principally" is evidence not presented to the Congress as a whole. *See supra* note 30.

> (1) To separate as far as possible national and member banks from affiliates of all kinds.
>
> (2) To limit the amount of advances or loans which can be obtained by affiliates from the parent institutions with which they are connected.
>
> (3) To install a satisfactory examination of affiliates, working simultaneously with the present system of examination applicable to the parent banks.[101]

Thus, there was a desire to separate commercial banking and investment banking activities but a recognition that the federal prohibition might be avoided by conversion to state charter and nonmember status. There is further explanation for the purposes underlying section 20 contained in the committee hearings,[102] but these are inappropriate sources for ascertaining the purposes of the enacting legislature itself.

Applying these specific purposes to the issue of what quantitative measure should define the term "engaged principally," a court would be justified in rejecting a majority standard as the *only* proper quantitative measure. This is because the specific purpose at hand would be better served by employing a lower quantitative measure as long as nonmember bank affiliates would be subject to the same cutoff. However, the purposes approach gives no clear answer concerning what alternative quantitative measure should be adopted.

The fear of evasion, via conversion to state nonmember status, suggests that the term "engaged principally" might be defined as establishing a high cutoff, in order to minimize the incentive for conversion. If the determination were being made in 1933 that decision would serve the legislative purpose of

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101. S. REP. NO. 77, *supra* note 59.

102. There were several reasons advanced by witnesses. First, there was a need for participation by commercial banks in underwriting of large scale government issues of securities, such as that which accompanied World War I. *Hearings Pursuant to S. Res. No. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 72d Cong., 3d Sess., pt. 1, 183-209 (1931) (testimony of Albert Wiggen, Chase National Bank) [hereinafter *Hearings*].

Second, there existed a fear of deflation. *See* Osterweis, *Securities Affiliates and Security Operations of Commercial Banks*, 11 HARV. BUS. REV. 124, 130 (1933) (discussing statements of Mr. Anderson of Chase National Bank and of American Bankers Association).

Third, the reliance interest of banking institutions engaged in underwriting was thought to be wise to protect. *Hearings*, *supra*, at 357-400 (Eugene Meyer, Governor of the Federal Reserve Board).

avoiding conversion to state nonmember status. However, the purpose at issue might have been addressed via the Competitive Equality Banking Act of 1987, which amends the Bank Holding Company Act.[103] That amendment subjects all insured "depository institutions" (which of course includes nearly all state banks) to the restrictions contained in the 1956 Bank Holding Company Act, including the restriction that activities of the depository's affiliates be "closely related" to banking. The Federal Reserve Board has imposed restrictions on affiliates' underwriting activities based upon section 4(c)(8) of the Bank Holding Company Act.[104] The 1956 Act was not explicitly relied upon to impose the 5% limitation discussed above, but it could be utilized in that manner so as to ensure that member and nonmember banks are subject to the same restrictions. Since the United States Supreme Court would be asked to first resolve the statutory issue in 1991, rather than in 1933, a current evaluation approach would lead to reevaluation of the legislative fear of avoiding evasion, in light of current statutory provisions. Employing a current evaluation approach, the only specific purpose which retains significance is to "separate as far as possible" commercial and investment banking activities. This purpose is best served by establishing a low cutoff as the proper definition to be given to the term "engaged principally."

Thus, there is a conflict in the conclusion to which a court is led when employing a plain meaning approach and when employing a purposes approach. The former justifies a high cutoff, perhaps in the 25% range, while the latter justifies a low cutoff, even as low as 5%. The court would then recognize that a compromise position is possible which would be consistent both with the plain meaning of the language utilized and with the specific purpose identified.

A compromise position of 15 to 20% would serve to "separate as far as possible" commercial and investment banking while, at the same time, not ignoring that the term employed requires the activity be a "principal" activity. A lower compromise position of 10% might be too low in this regard, since it fails to satisfy, to any substantial degree, the demands of the plain meaning rule.

The conclusion reached under this fixed principle approach

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103. 12 U.S.C. § 1841(c) (1988).

104. *See Order Approving Application*, *supra* note 6, at 490-505.

might be criticized on the public policy grounds that it permits excessive involvement is risky securities undertakings.[105] But that is a policy decision to be addressed by the Congress.

The choices advocated in the absence of specific legislative intention are summarized in the following diagram:

FORCED CHOICE SITUATIONS

A. Evidence of Specific Legislative Intent

Available Evidence	Choice Advocated
—Plain Meaning —Purposes (specific legislative purposes)	Purposes

B. No Evidence of Specific Legislative Purposes

Available Evidence	Choice Advocated
—Plain Meaning —Purposes (general legislative purposes)	Plain Meaning

COMPROMISE POSSIBILITY SITUATIONS

Available Evidence	Choice Advocated
—Plain Meaning —Purposes (either specific or general)	Compromise position consistent with *both* plain meaning and state purpose

105. *See* Securities Indus. Ass'n v. Board of Governors, 839 F.2d 47, 67 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988); Vincent Di Lorenzo, *Public Confidence and the Banking System: The Policy Basis for Continued Separation of Commercial and Investment Banking*, 35 AM. U. L. REV. 647 (1986).

IV. CONCLUSION

The federal courts have failed to adopt rules of statutory construction which are given a uniform meaning and content and which are consistently applied. As a result, decisions involving issues of statutory construction under the Glass-Steagall Act, as well as other statutes, become subject to criticism. There is no longer any assurance that particular decisions reflect legislative intent. A fixed principle approach to statutory interpretation has been suggested in this article. Adoption of such an approach would help guard against impermissible exercise of the legislative function by the judiciary.