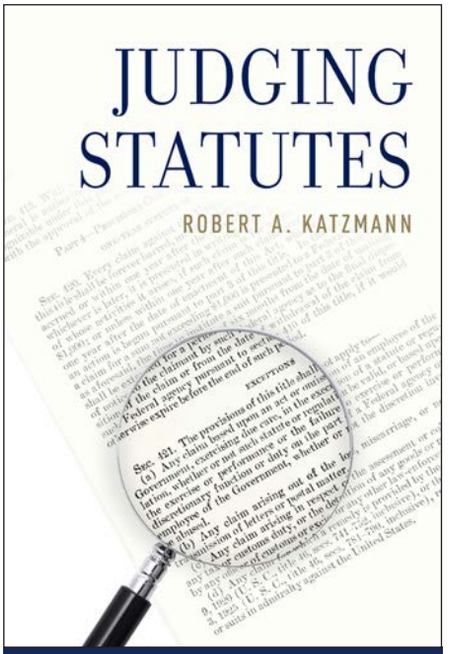
STATUTES – *CLEAR OR CONFUSING* – WHAT IS A JUDGE'S RESPONSIBILITY?

by Michael M. Baylson

Second Circuit Judge Robert A. Katzmann brings his unique professional career, including his distinguished experience and expertise in legislature, in academia, and as a jurist, to his masterful new book, *Judging Statutes* (Oxford University Press). With concise but lucid style, Judge Katzmann gives a thorough exposition of the analytical struggles a judge must go through while interpreting a less-than-clear statute.

The focus of the book is on the federal legislative machinery, both in terms of how Congress formulates legislation and how administrative agencies and judges must interpret Congress' sometimes difficult and confusing language. Judge Katzmann worked extensively in the halls of the legislature, in think-tanks in Washington, D.C., and as a professor of law and political science at Georgetown University before becoming an appellate judge. He has been a member of the U.S. Court of Appeals for the Second Circuit since 1999, becoming chief judge of that circuit in 2013.

As his biography reveals, Judge Katzmann has previously authored a number of books and articles on the general topic of legislation and judicial review of legislation. However, this slim volume reflects his unwavering and powerful endorsement of the judicial school of thought that considers legislative history when a statute's text is not clear.



JUDGING STATUTES
By Judge Robert A. Katzmann
Oxford University Press, 2014

TWO GENERAL APPROACHES

Judge Katzmann notes that there are two general approaches to interpreting statutes. First, he uses the term "purposivist" to describe the school of jurists who turn to the legislative history whenever the text of a statute is not clear. The other approach, which he refers to as the "textualist school," does not consider legislative history even if there is an ambiguity in the statutory language.

As Judge Katzmann recognizes, the phrase "legislative history" potentially covers a broad swath of congressional activity. Caution is essential. Preference must be strongly given to summaries of legislative enactments prepared by the committee that drafted the legislation, but only if a majority of the committee supports the summary. Judge Katzmann is very suspicious of attempts to create legislative history, and thus disdains any reliance on the "lone ranger" statements (my phrase, not his) that frequently appear in the Congressional Record. These statements may be the product of an individual lobbyist, constituent, or financial contributor to a legislator, and do not necessarily reflect the view of the entire legislative body that drafted the law.

Judge Katzmann discusses in some detail all of the reasons that the textualist school has developed to oppose the use of legislative history, listing them as follows:

1. Only the text is law.
2. Allowing reliance on legislative history gives too much discretion to a judge who is not elected and does not speak for the legislature.
3. Legislation will be more precise if courts refuse to consult legislative history.

4. Legislative history must be disregarded because what passes for interpretive history may really reflect market economics, the views of lobbyists, or legislators' reliance on contributions and/or regulators.

In any event, Judge Katzmann agrees that even the most ardent purposivists must first and foremost primarily respect the actual text of a statute and should not ignore it for purposes of some greater good or desired outcome in a case.

"Judge Katzmann agrees that even the most ardent purposivists must first and foremost primarily respect the actual text of a statute and should not ignore it for purposes of some greater good or desired outcome in a case.

THE *LEDBETTER* SAGA

One of the cases exemplifying Judge Katzmann's assessment of judicial statutory interpretation is *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Decided by a 5-4 majority, *Ledbetter* involved an interpretation of Title VII, which imposed a statute of limitations for wage-employment discrimination cases. The Court's majority opinion by Justice Alito, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas (unpersuaded by plaintiff Lilly Ledbetter's argument that each paycheck contributed to a pattern of discrimination that was within the statute's limitations period), held that Ledbetter's pay-discrimination claim was barred by the statute of limitations because she had long been on notice of pay discrepancies between female and male employees. Reading her dissent from the bench, Justice Ginsburg decried the majority's "cramped" interpretation of Title VII, and invited legislative action by noting that "the ball is in Congress' court."[1]

Politicians, civil rights activists, and other interest groups did not take long to heed Justice Ginsberg's call to action. On June 12, 2007, only two weeks after the Court issued its decision, House Democrats held a press conference to announce that legislation would be introduced to overturn the Court's decision, thereby strengthening an employee's ability to successfully bring a wage discrimination case. The resulting bill (H.R. 2831) proved to be a showcase for then-Democratic presidential primary candidates Hillary Rodham Clinton and Barack Obama, who both gave speeches on the Senate floor. Those defending the Court's decision likewise banded together, opposing the bill as far exceeding the stated purpose of undoing the Court's holding, effectively abandoning any statute of limitations in wage discrimination cases and opening the courts to a burdensome avalanche of cases. The bill passed the House (H.R. 2831) but was initially blocked by Senate Republicans in April 2008 (S. 1843). The bill was also subject to the threat of veto by President George W. Bush. Undeterred, activists and politicians continued to move to nullify *Ledbetter*, and the bill was eventually reintroduced in Congress in January of 2009. This time, the bill passed the House and Senate and, fulfilling his campaign pledge to invalidate *Ledbetter*, President Obama signed into the law the Lilly Ledbetter Fair Pay Act of 2009 on Jan. 29, 2009.

As Judge Katzmann points out, the *Ledbetter* saga is a testament to the appropriate relationship between the judicial branch and the legislative branch. Interpreting statutes is the job of judges, but the legislature has the power (and some say the duty), to correct a judicial interpretation that is inconsistent with how Congress actually intended a statute to be interpreted. In this sense, the legislature is dominant.

However, the congressional corrective following *Ledbetter* does not always occur. Indeed, there are many examples where the Supreme Court interprets a particular piece of legislation, often in a hotly disputed 5-4 decision, but Congress does not take any action to change the outcome.

Does this failure of Congress to act reflect a congressional consensus that the Supreme Court got it right? Or congressional gridlock? There is no real way to tell.

Judge Katzmann is very candid about his belief that legislative history, reflecting a consensus of the majority of the Congress that passed a particular statute, is essential if there are ambiguities in the text itself or if an ambiguity arises in application.

Judge Katzmann's book contains a splendid analysis of three cases in which he was the writing judge and details the decision-making process through which he interpreted a statute. In two of these cases, Judge Katzmann's view was supported by the Supreme Court, and in one of them, the Supreme Court disagreed.

THE "OBAMACARE" DECISION

Because of the date of publication, Judge Katzmann did not get to address an important recent case in which the Supreme Court applied a purposivist approach, *King v. Burwell*, 135 S. Ct. 2480 (2015). The Patient Protection and Affordable Care Act ("the Act") authorizes state governments to create healthcare exchanges and requires the federal government to establish an exchange for any state that refuses to do so. The issue presented in *King* was whether a provision in the Act stating that tax credits are available for taxpayers enrolled in an exchange "established by the State" applied to taxpayers in federal exchanges. The Court held that it did.

The majority opinion by Chief Justice Roberts emphasized placing words "in their context and with a view to their place in the overall statutory scheme,"[2] highlighting the Act's three interlocking reforms:

- Barring the denial of coverage or the charging of higher premiums based on an individual's health;
- Providing tax credits to enable certain individuals to afford health insurance; and
- Requiring an individual to either obtain coverage or pay a fee to the

> IRS, unless the cost of insurance less the tax credit (if any) exceeds 8 percent of the individual's income.

Chief Justice Roberts explained that these reforms can only work together. Without tax credits, virtually all citizens on federal exchanges would no longer be subject to the coverage requirement. Eliminating widespread coverage requirements, in turn, would cause a "death spiral": many patients would wait until they became sick to obtain insurance, forcing insurers to charge higher premiums and forcing yet more people to drop coverage as a consequence.

After lengthy analysis of many provisions of the statute, the Court held that the phrase "established by the state" was ambiguous and "the context and structure of the Act" compelled a departure "from what would otherwise be the most natural reading" as necessary to achieve the overall statutory purpose and intent.[3] The majority concluded that precluding tax credits for federal exchanges would decimate the effectiveness of health coverage in 34 states, and therefore those taxpayers enrolled in federal exchanges must also be eligible to receive the credit.

Justice Scalia's dissent (joined by Justices Thomas and Alito) emphasized the plain meaning of language in the statute. He noted that the Court's holding makes the phrase "by the State" surplusage, and that Congress' use of the term "established by the State" in other parts of the Act compels the conclusion that Congress made a deliberate choice to exclude federal exchanges from the tax credit program. Scalia argued that the Court's decision amounts to rewriting the law in violation of the separation of powers.

Scalia also took issue with the Court's purposivist arguments, arguing that a law's purpose must be divined from the statute itself and not "extrinsic circumstances."[4] He noted that one purpose of the Act is state participation in the establishment of exchanges, and the majority's holding removes incentives for states to do so.

DOES THE SUPREME COURT HESITATE TOO MUCH?

Trial judges have the most difficulty regarding statutory interpretation when a statute is not clear or is silent on important issues. The Supreme Court, although having the power to rule definitively, often chooses not to do so.

> "The inconsistency with which the Court applies these two differing schools of thought – either purposivist or textualist – results in confusion in the lower courts. . . . When the Supreme Court has an opportunity to settle the issue, the Court should recognize its responsibility and make a final ruling.

The old proverb, "he who hesitates is lost," obviously does not resonate with members of the Supreme Court. For its own reasons, the Court may often, some say too often, hesitate to make a definitive ruling on an important issue dividing the lower courts.

The inconsistency with which the Court applies these two differing schools of thought — either purposivist or textualist — results in confusion in the lower courts. When a statute contains one or more ambiguous provisions, this often results in substantial inconsistency in the lower courts. When the Supreme Court has an opportunity to settle the issue, the Court should recognize its responsibility and make a final ruling.

Three statutes come to mind where this principle has either not been followed or where there is great need for the Supreme Court to confront ambiguities at the earliest possible opportunity:

- In ERISA cases, the availability of injunctive relief. The Supreme Court has granted certiorari in an ERISA case pending this term, which raises the issue of equitable relief, *Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Ben. Plan.* The Eleventh Circuit opinion is reported at 593 F. App'x 903 (11th Cir. 2014).
- Class Action Fairness Act ("CAFA") was a severely compromised bill, reflecting the views of many different members of Congress. This resulted in a number of very confusing provisions, many of which are still working their way through district and appellate courts. None of these cases, however, has yet reached the Supreme Court.
- Racketeer Influenced and Corrupt Organizations Act ("RICO") remains ambiguous as to the applicable statute of limitations.

Judge Katzmann discusses this problem generally. His arguments would have been strengthened by using specific examples of congressional silence and Supreme Court vacillation or delay. A brief exposition of how the lack of a statute-of-limitations provision in the RICO statute, 18 USC §1961–1968, or a definitive Supreme Court holding (even 40 years after RICO was enacted), demonstrates how the many attempts by lower court judges to articulate a workable statute of limitations regime have caused much lost sleep and wasted paper.

To fully appreciate a limitations period, a jurist must understand three things: (1) the length of time included in the limitation period, (2) when the claim accrues, and (3) any events that might stop the clock. Congress was silent as to all three of these when it enacted the RICO statute, and it has remained silent since. Notwithstanding that silence, the Supreme Court has slowly trickled guidance to the lower courts. But how to properly calculate whether the limitations period has run in a civil RICO case remains uncertain, and the issue continues to drain valuable judicial resources.

For 17 years after RICO's enactment, the lower federal courts lacked any meaningful guidance regarding even the length of time

the limitation period ran for civil RICO claims. During this period, courts tested numerous approaches for importing limitations periods from other federal and state laws. All of the approaches included glitches that prevented all parties from obtaining the certainty and protection that statutes of limitations are designed to provide.[5]

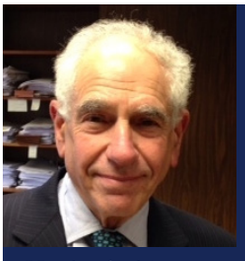
After nearly 20 years without RICO-specific guidance from either the Supreme Court or Congress, the Supreme Court stepped in and attempted to provide uniformity. Comparing the RICO statute to the Clayton Act, the Supreme Court imposed a four-year limitations period.[6] But defining the limitations period was of little use without a corresponding definition of how to determine the accrual of the cause of action.[7]

Unsurprisingly, circuits were split over how to measure the accrual of a RICO claim. And the split significantly diluted any clarity that *Malley-Duff's* four-year limitations period could have provided. Not only did the Court decline the opportunity to clarify the accrual rule in *Malley-Duff*, it surprisingly ducked the issue even when it granted certiori to consider the accrual rule ten years later. In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997), the Supreme Court merely ruled out one circuit's approaches instead of announcing which approach would apply. It was another three years before the Court finally announced an accrual rule in *Rotella v. Wood*, 528 U.S. 549 (2000).

But even *Rotella* failed to address the final piece of the limitations puzzle: tolling. *Rotella* included language that left open the possibility of the application of equitable tolling principles, but it cabined that language with the caution that tolling is "the exception, not the rule."[8] Thus, "to what degree the Court should use [tolling] to avoid the difficult issues surrounding accrual in RICO claims for relief remains an open question."[9] And a confused application of tolling statutes can have an adverse impact on judicial and litigant resources when even district and appellate courts cannot agree on the application of equitable doctrine. This is exemplified by *Pincay v. Andrews*, 238 F.3d 1106 (9th Cir. 2001), in which the Ninth Circuit reversed a jury verdict because the RICO claim was not timely. The Ninth Circuit rejected the district court's conclusion that, based on equitable principles, the limitations period did not begin to run upon constructive notice because the parties were in a fiduciary relationship.

Lower courts have expended valuable judicial resources wrestling with the void created by the silence in the statute and by the Supreme Court's slow, fractured guidance. These resources could have been better spent elsewhere had Congress at any point provided clarity on limitations issues or had the Supreme Court offered more specific rulings when it was clear that Congress was not going to do so.

Of course, as judges, we know that it is our job to do our best. The findings of a particular appellate court, whether a circuit court or the Supreme Court, may settle what the law is, but as Judge Katzmann's educational book indicates, do not necessarily lead to a conclusion that the judge below was "wrong."



MICHAEL M. BAYLSON is a U.S. District Court judge for the Eastern District of Pennsylvania.

He thanks his current law clerks, Selby Brown, Ilana Cohen, and Stephen Henrick for their assistance with research on this article.

[1] *Ledbetter*, 618 U.S. at 661 (Ginsburg, J., dissenting).

[2] *King*, 135 S. Ct. at 2489.

[3] *Id.* at 2495.

[4] *Id.* at 2503 (Scalia, J., dissenting).

[5] G. Robert Blakey, *Time-Bars: Rico-Criminal and Civil-Federal and State*, 88 Notre Dame L. Rev. 1581, 1668–80 (2013).

[6] *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150–52 (1987).

[7] *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring) ("[A]ny period of limitation is utterly meaningless without specification of the event that starts it running.").

[8] *Rotella v. Wood*, 528 U.S. 549, 561 (2000).

[9] Blakey, *supra* note 5, at 1732.