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THE ART OF STATUTORY INTERPRETATION:
IDENTIFYING THE INTERPRETIVE THEORY OF THE
JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR VETERANS' CLAIMS AND THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL
CIRCUIT

Linda D. Jellum*

I. INTRODUCTION

This Article explores the art of statutory interpretation, a topic of interest to scholars, academics, and practitioners. Whether you are a judge interpreting statutes, an academic teaching soon-to-be new lawyers how to interpret statutes, or a practitioner arguing the meaning of a statute to a judge, statutory interpretation matters. "The proper method of interpreting statutes is an enormously important legal issue that has seen enormous theoretical discussion, including some by Supreme Court Justices themselves." Yet, despite its importance, there is no universally agreed upon method for interpreting statutes.

Why must lawyers interpret statutes? Simply put, "legislation is an act of communication to be understood on the simple model of speaker and audience, so that the commanding question in legislative interpretation is what a particular speaker or group 'meant' in some canonical act of utterance." This particular "speaker or group" is the enacting legislature. Hence, statutory interpretation is the art of discerning the intent of the enacting legislature, "for it is the enacting legislature that has the constitutional authority to make law." For this reason, judges attempt to

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2 RONALD DWORKIN, LAW'S EMPIRE 348 (1986).
interpret statutes as the enacting legislature would have wanted, or intended.4

Interpreting statutes as originally intended sounds easy. It is not; for many reasons, discerning the enacting legislature’s intent is extremely difficult. One difficulty arises from discerning the intent of a group of individuals all having potentially different intents.5 How do judges discern each and every legislator’s intent? Judges cannot simply contact the legislators after the fact and ask them what they intended to accomplish. Even if the legislators were still alive, even if they remembered having an intent regarding the specific issue before the court, and even if they remembered accurately what that intent was, such after-the-fact rationalizations are not considered valid evidence of the intent of an entire legislature.6 Another difficulty lies with the idea that there is one, unified “meeting of the minds.”7 While legislators may share the goal of passing a bill to address a particular problem, rarely will all legislators have the identical reason for passage or even the same expectations regarding the bill’s impact. Rather, bills are the result of political compromise. A bill “emerges from the hubbub of legislative struggle, from the drafts of beginning lawyers, from the work of lobbyists who are casual about clarity but forceful about policy, from the chaos of adjournment deadlines.”8 Because of the chaotic enactment process, bills are filled with ambiguity, absurdity, lack of clarity, mistakes, and omissions.9 Legislators rarely intend to be ambiguous, absurd, unclear, mistaken, or incomplete, but they regularly are.10

4 Id.
5 See discussion infra Part III.B.1.
6 See, e.g., McDonald v. Comm’r, 764 F.2d 322, 336 n.25 (5th Cir. 1985) (“The Joint Committee[‘s] ... ‘Explanation’ was issued after the fact. Hence it does not directly represent the views of the legislators or an explanation available to them when acting on the bill.”).
7 See Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 870 (1930) (“The chances that ... several hundred [individuals] each will have exactly the same determinate situations in mind as possible reductions of a given [statutory issue], are infinitesimally small.”).
8 JACk DAvIES, LEGISLATIVE LAw AND PROCESS IN A NUTSHELL 304 (2nd ed. 1986).
9 See, e.g., United States v. Locke, 471 U.S. 84, 91–95 (1985) (finding that a federal statute that required land owners to file a record of ownership with the Bureau of Land Management “prior to December 31,” and holding that it was the legislature’s responsibility to be more careful, not the court’s job to rescue Congress from its drafting error); see also Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1142–46 (8th Cir. 2006) (holding that the word “less” in the Class Action Fairness Act actually meant “more” when the statute provided, “a court of appeals may accept an appeal ... if application is made to the court of appeals not less than 7 days after entry of the order” (quoting 28 U.S.C. § 1453(c)(1) (2006))). See generally Recent Case, Statutory Construction—Drafting Errors—D.C. Circuit Declares Section 92 of the National Bank Act Inconclusive—Independent Insurance Agents of America, Inc. v. Clarke, 105 HARV. L. REV. 2116 (1992).
10 For a sample listing of absurd state laws, see Dumb and Crazy Laws, BORED.COM,
Because of the difficulty of discerning legislative intent, judges have adopted a number of ways to interpret statutes. Some judges focus on the words of the text, believing that by giving words their ordinary meaning, judges will best discern legislative intent. Other judges focus on the purpose of the bill, believing that furthering that purpose is the best way to discern legislative intent. And other judges focus on the piecemeal nature of the legislative process, believing that by comparing various versions of the bill and any legislators’ statements accompanying those versions, they will best discern legislative intent. Legal scholars have named these ways of interpreting statutes the “theories of interpretation” and have exhaustively argued about which theory best accomplishes the goal of statutory interpretation. While lawyers are less aware of the differences, lawyers must master this topic to be effective advocates.

Perhaps more than for any other subject, understanding theory is critical to understanding statutory interpretation because theory drives every aspect of statutory interpretation. A judge’s theory of interpretation determines what information a judge will consider when searching for meaning. For example, some judges will not look at legislative history or social context for meaning unless the text of the statute is ambiguous or absurd. Assuming that the legislative history is helpful to a case, lawyers must learn to “talk the talk” to persuade these judges to move beyond the text.

This Article will help you learn to talk the talk, to understand why theory matters, and to identify the theory of your decision maker. Knowing a judge’s theory may not help you win your case, for judges are rightly more concerned with underlying equities than with dogmatically following a theory of interpretation; but knowing a judge’s theory will help you communicate your case more effectively. In short, knowing theory will make you a better advocate, a better judge, and a better scholar, whether you are trying to convince your judge, your colleagues, or your readers.

This Article proceeds as follows: In Part II, I identify the three sources of meaning that judges use when interpreting statutes: intrinsic sources, extrinsic sources, and policy-based sources. I also provide examples of each source. In Part III, I explore the three most prevalent theories of interpretation: textualism, intentionalism, and purposivism. Additionally, I


11 See infra Part III.A.1.
12 See infra Part III.B.2.
13 See infra Part III.B.1.
14 See infra Part III.
15 See infra Part III.A.2.
identify a few less prevalent theories. In doing so, I explain the goals and sources common to each of these theories. After explaining each theory, I then explore opinions from both the Veterans Court and the Federal Circuit to demonstrate how judges actually use these theories to resolve statutory-interpretation cases. Seeing how specific judges approach these issues will help you determine how your decision maker might approach these issues. Finally, in Part IV, I explain why theory matters: Simply put, knowing how judges use statutory-interpretation theories will help you become a better advocate, judge, or scholar.

II. THE EVIDENTIARY SOURCES OF MEANING

To understand theory, you must first understand the three sources of information, or evidence, judges will consider when interpreting statutory language: (1) intrinsic sources of evidence, (2) extrinsic sources of evidence, and (3) policy-based sources of evidence. The sources of statutory interpretation and the theories of statutory interpretation are related, but different. The sources underlie the theories. Let us start with the most basic sources—intrinsic sources.

A. Intrinsic Sources

Intrinsic sources are those sources that are part of the official act being interpreted, including the language of the statute itself. The first step in the interpretation process is always "(1) read the statute, (2) Read the Statute, (3) READ THE STATUTE!" While text is the most important intrinsic source, words alone are not the only intrinsic source of meaning. Other intrinsic sources include: grammar and punctuation; the components of the act, including purpose and findings clauses, titles, and definition sections; and the linguistic canons of statutory interpretation. The linguistic canons are rules we intuitively apply to language to help us understand a speaker or writer's meaning. Hence, these canons can help us understand statutory language. For example, the linguistic canon noscitur a sociis suggests that words in a statute should not be read in isolation because

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17 See Jellum, supra note 3, at 13; Eskridge & Frickey, supra note 16, at 97–99.


words are best understood in textual context. Hence, Justice Scalia famously said, “If you tell me, ‘I took the boat out on the bay,’ I understand ‘bay’ to mean one thing; if you tell me, ‘I put the saddle on the bay,’ I understand it to mean something else.” All of these sources are intrinsic because they are part of the text enacted into law (or, in the case of the linguistic canons, applied to the text enacted into law). And all of these sources play an important role in interpretation.

B. Extrinsic Sources

Extrinsic sources, a second source of meaning, are materials outside of the official act but within the legislative process that created that act. Extrinsic sources relate not to the text itself; rather, they relate to the enactment process. An example of an extrinsic source is legislative history—statements made during the enactment process. Another example is the canon that legislative silence in response to a judicial interpretation of a statute means agreement with the interpretation; this canon is known as legislative acquiescence. There are other extrinsic sources. For example, there is a presumption that by borrowing another state’s statute the legislature intended to adopt that state’s judicial opinions as well. Finally, the Chevron doctrine, by which courts defer to reasonable agency interpretations of ambiguous statutes, is an extrinsic source. All of these examples are extrinsic because they relate to the legislative enactment process; they help show the enacting legislature’s intent.

The use of some of these extrinsic sources is relatively noncontroversial—such as deference to agency interpretations. The use of others is more controversial—such as legislative history. Not so long ago, judges turned to extrinsic sources, especially legislative history, rather readily. Today, as a result of the focus on text, extrinsic sources play a supporting, rather than the starring, role in interpretation.

20 See id. at 97.
22 See JELLUM, supra note 3, at 14; Eskridge & Frickey, supra note 16, at 100–01.
24 JELLUM, supra note 3, at 14.
26 See infra Part III.B.1.
C. Policy-Based Sources

The third category of sources judges turn to for interpretive meaning is policy based. Policy-based sources are extrinsic to both the statutory text and the legislative process. They reflect important social and legal choices derived from the Constitution or existing common-law ideals. One example of a policy-based source is the constitutional-avoidance doctrine, which is a canon directing that if two fair interpretations of a statute exist and only one raises constitutional questions, then the other interpretation should prevail. Another policy-based source is the rule of lenity. This rule directs that where two reasonable interpretations of a criminal statute exist, a court should adopt the less penal interpretation. Also policy-based are two corollary rules: (1) statutes in derogation of the common law should be strictly construed, and (2) remedial statutes should be broadly construed. Last, the clear-statement canon is policy based; this canon directs judges to presume that in some important situations Congress would not have meant to alter the status quo absent a clear statement to that effect.

Reliance on policy-based sources has come in and out of vogue. For example, the rule of lenity, which arises from constitutional due-process concerns about providing adequate notice of penal conduct, has been relegated to a rule of last resort, given society’s current focus on penalizing criminals. Indeed, some state legislatures, such as California, have attempted to abolish the rule of lenity by statute; however, because the rule of lenity is derived from constitutional procedural due-process concerns, state legislatures have had limited success legislatively abolishing it. Currently, with the exception of the clear-statement rule, these policy-based sources play, at best, a minor role in interpretation.

37 JELLUM, supra note 3, at 14–15; see Eskridge & Frickey, supra note 16, at 101–08.
38 JELLUM, supra note 3, at 14.
39 Id.
40 Id.
41 Id.
42 Id. at 15.
43 Id.
44 Id.
45 See CAL. PENAL CODE § 4 (West 1999) (“The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.”); accord N.Y. PENAL LAW § 5.00 (McKinney 2009).
46 E.g., People ex rel. Lungren v. Superior Court, 926 P.2d 1042, 1053–54 (Cal. 1996) (“While ... the rule of the common law ... has been abrogated ... it is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute. ...” (quoting Ex parte Roseheim, 83 Cal. 388, 391 (Cal. 1890)) (internal
While it would be helpful if the above categories were consistently identified in judicial opinions, they are not. What one judge calls a policy-based source, another might identify as an extrinsic source. Understanding exactly which category a source falls within is less important than understanding that: (1) a breadth of informational sources are available to judges to help them discern a statute’s meaning and (2) some judges are more willing than others to look at these various sources for meaning. What sources a judge will consider depends on that judge’s theory of statutory interpretation.

III. THE THEORIES OF INTERPRETATION

Statutory interpretation is a “quest by judges to use the best available theory and [sources] to determine ‘what statutes mean.’” Unfortunately, there is no uniform method of statutory interpretation used by all judges. Rather, judges interpret statutes in a variety of ways that consider and emphasize the three sources identified above differently. These ways, approaches really, are known as the theories of statutory interpretation. Adherents of the different theories disagree about which sources show the intent of the enacting legislature and, thus, provide the best evidence of meaning.

The three most well-known theories, which are described in more detail below, are textualism, intentionalism, and purposivism. Not surprisingly, their adherents are known as textualists, intentionalists, and purposivists. Textualist judges believe that enacted text is the most important source; thus, textualists look primarily, but not exclusively, to intrinsic sources. Intentionalist judges look for the specific intent of the enacting legislature; thus, intentionalists find extrinsic sources particularly illuminating.

quotation marks omitted)); People v. Ditta, 422 N.E.2d 515, 517 (N.Y. 1981) (“Although [Penal Law § 5.00] obviously does not justify the imposition of criminal sanctions for conduct that falls beyond the scope of the Penal Law, it does authorize a court to dispense with hypertechnical or strained interpretations . . . .” (citations omitted)).


See Chisolm v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (“I thought we had adopted a regular method for interpreting the meaning of a . . . statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.”).


In addition to the statutory interpretation theories, there are a number of academic theories that relate to the legislative process. These theories are less often visible in judicial opinions. For more information, see JELLUM, supra note 3, at 33–36.

For a detailed description of this theory, see generally SCALIA, supra note 21.

See infra Part III.B.
Purposivist judges search for the purpose of the statute's enactment, which may be revealed by any of the three sources.43

Importantly, judges can and do blend these theories for a variety of reasons. A judge may generally prefer one theory, but find that for a specific case, or even a specific issue, the preferred theory does not work. Hence, that judge may adopt a different theory or meld a variety of theories. Additionally, appellate opinions are written by one judge, who may use one theory. But he or she is joined by other judges who may use a different theory. Also, theories change over time as a judge decides that a particular source (text or legislative history, for example) should have a greater or lesser role in the interpretive process. For all these reasons, judicial opinions rarely exemplify consistency.

Keep in mind that none of the theories is perfect: each has its strengths and its weaknesses, its proponents and its critics. Perhaps because of the imperfections, the preferred theory has changed over time.44 A theory that dominated during one era often falls out of favor in the next. For example, early in American jurisprudence, judges preferred purposivism; today, textualism has gained currency.45 Debate over the appropriate theory has raged; indeed, the battle over this choice has left the pages of academic law journals and has taken center stage in judicial opinions and legislative debates.46 For example, in State v. Courchesne, the Connecticut Supreme Court evaluated the various theories and selected purposivism.47 Ironically, the state legislature later overturned the court's choice, opting for textualism instead.48

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43 The point of this Article is not to argue that a particular theory best determines meaning, those arguments have already been made. See, e.g., Carlos E. Gonzalez, Statutory Interpretation: Looking Back, Looking Forward, 58 Rutgers L. Rev. 703 (2006) (exploring some of the arguments surrounding statutory interpretation); see also Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885, 890–913 (2003) (cataloging the influential work on interpretation).
44 JELLUM, supra note 3, at 16.
45 Id.
46 See id.
48 See Conn. Gen. Stat. § 1-2z (2005). As Judge Borden, the author of the majority opinion in Courchesne noted:
It is ironic that the legislative debate surrounding [this statute] specifically indicated that its purpose was to overrule that part of Courchesne. If we were to read [this statute] literally, and assume that it is not ambiguous in any way, we would be barred by it from consulting that very legislative history in order to determine that its purpose was to overrule Courchesne.
Below, I explore in some detail these theories, beginning with textualism. Keep in mind, however, that the theories I describe below are neither exhaustive nor exclusive.

A. Textualism

Textualism is a theory that places enacted text at the forefront of interpretation. Textualists focus on enacted text because they believe that judges should faithfully protect the power distribution identified within the vesting clauses of the Constitution. According to the Constitution, the legislature enacts laws, while the judiciary interprets laws. Moreover, for legislation to be enacted, the Constitution requires bicameral passage and either executive approval or a legislative override of an executive veto. Hence, "[t]extualists argue that looking beyond the text raises constitutional concerns. Textualists would hold Congress to the words it used. . . . [T]o do otherwise would permit Congress to legislate without completing the required process for enactment of legislation." Textualism, often called the plain-meaning theory of interpretation, relies on the plain-meaning canon of interpretation. The plain-meaning canon of interpretation directs judges to look for the plain, or ordinary, meaning of the words in the statute. By discerning the "plain meaning" of the words, textualists believe that they most effectively carry out the legislature's agenda. This canon nicely matches textualists' interpretative goal because textualists presume that the legislature used words, grammar, and punctuation to communicate this agenda. Textualists look for "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris." In other words, textualists look for the "ring the words [of the statute] would have had to a skilled user of words at the time, thinking about the same

49 JELLUM, supra note 3, at 16.
50 Id.
51 U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").
52 Id. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
53 Id. art. I, § 7.
55 Id. at 44 n.*. The plain-meaning canon instructs that the plain meaning of the words of the statute should control interpretation.
56 SCALIA, supra note 21, at 17.
problem." Textualism, particularly in its modern form, is appealing, in part because of its inherent simplicity: examine the text with a dictionary in hand and then be done interpreting.

But, one might ask, does textualism favor simplicity over accuracy? Perhaps. All forms of textualism rely heavily on the plain-meaning canon. Yet, one problem with the plain-meaning canon is that language that seems clear to one person can be ambiguous or even mean something completely different to another person. The cases identified so far should show that judges often disagree about what statutory language means. Consider the following examples as well: Is a “buck” a deer or a dollar? Is “dust” a verb or a noun? Is “bay” a body of water or a horse? Words mean more than one thing. While textual context, specifically the immediately surrounding words, will often help resolve meaning, equally often it will not. Litigation arises precisely because litigants and their lawyers disagree about a statute’s meaning. Theoretically, the plain-meaning canon should never resolve the issue in any litigated case involving statutes unless one party is simply being unreasonable. If the meaning were so plain, the litigants would not be in court paying huge sums of money to their attorneys to litigate the meaning of clear words.

There are other drawbacks with the plain-meaning canon. The meaning of words can vary with textual context. Illustratively, the word “assault” might mean one thing in a criminal statute and something completely different in a tort statute. Further, the linguistic capability of readers (including judges) can affect meaning; thus, other nontextual sources of meaning are often essential to interpretation. The New Mexico Supreme Court explained why:

[Textualism’s] beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute’s meaning.

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58 See infra Part III.A.2.
59 For example, in Meeks v. West, 13 Vet. App. 40 (1999), the dissent strongly disagreed with the majority that the text of the statute at issue in that case was clear and unambiguous. Id. at 44–45 (Steinberg & Kramer, J., dissenting). Criticizing the majority for “blithely” asserting that the text of statute had a plain meaning, the dissent said, “This conclusion seems fanciful. At the very least, [the statute] is an ambiguous statute that requires much interpretation . . . .” Id. at 44.
This rule is deceptive in that it implies that words have intrinsic meanings. A word is merely a symbol which can be used to refer to different things. Difficult questions of statutory interpretation ought not to be decided by the bland invocation of abstract jurisprudential maxims. . .

The assertion in a judicial opinion that a statute needs no interpretation because it is 'clear and unambiguous' is in reality evidence that the court has already considered and construed the act.60

Thus, despite its intuitive appeal, the plain-meaning canon, which is the very essence of moderate textualism, is imperfect.

Of all the theorists, textualists use the fewest sources, examining primarily the intrinsic sources. Thus, textualists will look at the text of the statute, including grammar and punctuation. Indeed, textualists are so text focused that they revere dictionaries, which allegedly provide the ordinary meaning of these words.61 Additionally, they will look to the act as a whole, both alone and within its statutory context, and to the linguistic canons.62 Generally, only when these intrinsic sources fail to identify the meaning of the statute will textualists look to other sources for meaning.63

Even when the intrinsic sources fail, textualists are reluctant to consider legislative history.64 Textualists believe that a text-centered approach "accompanied by a reduced reliance on legislative history . . . tend[s] to shift the spotlight away from the judge and back to the legislature."65


62 JELLUM, supra note 3, at 21.

63 See, e.g., Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 67 (2004) (Thomas, J., concurring) ("If the text . . . [is] clear, resort to anything else [is] unwarranted."); Union Bank v. Wolas, 502 U.S. 151, 163 (1991) (Scalia, J., concurring) ("Since there was here no contention of a 'scrivener's error' producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable.").

64 Koons Buick Pontiac GMC, Inc., 543 U.S. at 73 (2004) (Scalia, J., dissenting) ("I have often criticized the Court's use of legislative history because it lends itself to a king of ventriloquism. The Congressional record or committee reports are used to make words appear to come from Congress's mouth which were spoken or written by others . . . ").

Limiting the use of legislative history lessens the controversy surrounding interpretation by placing “political heat” back on the legislative branch, which is accountable to the electorate.  

1. Soft Plain-Meaning Textualists

There is more than one type of textualist. While all textualists rely foremost on the text of the statute for meaning, adherents of the different forms of textualism differ in their willingness to consider sources in addition to the text. “Soft plain meaning” is the oldest form of textualism; these theorists view the text as the primary, but not as the exclusive, source of meaning. For this reason, soft plain-meaning textualists are willing to consider legislative history and context. These theorists do not need to find a reason, such as ambiguity, absurdity, or scrivener’s error, to consider these extratextual sources.

Soft plain-meaning textualists are less prevalent today than in the past, but they do exist. For example, Judge Hagel used soft plain-meaning theory in *Osman v. Peake.* The issue in that case was whether the son of two permanently disabled veterans was entitled to one dependent-educational-assistance benefit or whether he was entitled to two separate awards, one based on each parent’s disability. The Board of Veterans’ Appeals (Board) had denied the son’s second request for benefits, which was based on his mother’s disability, because the son had already received benefits based on his father’s disability.

The Veterans Court reversed the Board’s denial. In doing so, Judge Hagel first identified the purpose of the statute. The codified purpose was to provide opportunities for education to children whose education would otherwise be impeded or interrupted by reason of the disability or death of a parent... incurred or aggravated in the Armed Forces... and...
aid[] such children in attaining the educational status which they might normal have aspired to and obtained but for the disability or death of such parent.73

Note that purpose, in this case, had been codified.74 Some textualist judges are more comfortable relying on codified purpose rather than implied purpose.75

Only after noting the purpose of the statute did Judge Hagel identify the text of the relevant statute: "Each eligible person shall . . . be entitled to receive educational assistance."76 "Person" in the statute had been defined as a "child of a person who, as a result of qualifying service . . . has a disability permanent in nature resulting from a service-connected disability."77 Judge Hagel did not look at this text in isolation; rather, he explored the text within its statutory context, including award limits.78 After doing so, Judge Hagel concluded that "the applicable statutes, and amendments thereto" were clear.79 Despite finding the text of the statute clear in context, Judge Hagel talked about the purpose of the statute, finding that the purpose further supported the court's interpretation of the text: "We believe that our interpretation of the applicable statutory language is most consistent with the intent of Congress in enacting it."80 Finally, Judge Hagel suggested that even if the question were "a close one," the court would apply a policy-based canon to resolve the conflict; namely that any interpretational tie would be resolved in the veteran's favor.81 Hence, Judge Hagel did focus on text, as any textualist would do; however, he did not focus exclusively on text. Had Judge Hagel used a more traditional textualist approach, he would have completed his analysis after finding the text clear; instead, he considered other intrinsic and policy-based sources.82 Hence, because Judge Hagel was willing to consider a variety of

73 Id. at 255 (quoting 38 U.S.C. § 3500 (2006)).
74 See id. at 255.
75 See, e.g., PRB Enters., Inc. v. S. Brunswick Planning Bd., 518 A.2d 1099, 1101 (N.J. 1987) (stating that a purpose clause that followed an enacting clause was substantive because of its location).
78 See id. at 255–56.
79 See id. at 258.
80 Id. at 259.
81 Id. at 259 (referring to the presumption that interpretive doubt should be resolved in favor of the veteran pursuant to Brown v. Gardner, 513 U.S. 115 (1994)).
82 See supra Part II.C.
sources other than the text despite the relative clarity of the statute, he applied soft plain meaning to resolve this case.83

Similarly, in Sursely v. Peake the Veterans Court affirmed the Board’s decision that refused a veteran’s request for two separate clothing allowances.84 The relevant statute authorized clothing allowances for disabled veterans who use a prosthetic or orthopedic appliance that tends to wear out or tear clothing.85 The veteran had an artificial arm and was in a wheelchair because he had lost both of his legs and his arm while serving in the military.86 Because he had two separate disabilities, he requested two separate clothing allowances.87 The Board had affirmed the regional office’s denial of the second claim based on the fact that the relevant statute used the singular: “shall pay a clothing allowance of $662 per year.”88 The Veterans Court affirmed the denial.89 Judge Schoelen, writing for the court, used soft plain-meaning theory. She first found the language clear: “The statutory language... clearly provides only one clothing allowance per eligible veteran.”90 Notably, Judge Schoelen rejected the veteran’s argument that “a” could mean “each.”91 In doing so, she said, “It is notable that the appellant argues that the statute unambiguously provides for his interpretation, but in order to reach that result the word ‘a’ must be replaced with ‘each.’”92 Judge Schoelen refused to reject the clear meaning of the word “a” so readily. “The ‘strong presumption’ that the plain language of the statute expresses congressional intent is rebutted only in ‘rare and exceptional circumstances,’ when a contrary legislative intent is clearly expressed.”93 Thus, Judge Schoelen focused heavily on the text.

Yet, despite finding the text clear, Judge Schoelen turned to the legislative history of the Act to confirm that “the [legislative] history... further support[ed] the conclusion that Congress intended each eligible

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83 In general, Judge Hagel is a moderate textualist, rather than a soft plain-meaning theorist. See, e.g., Jackson v. Nichobon, 19 Vet. App. 207, 211 (2005) (“[B]ecause we hold that the language of the regulation is clear and not ambiguous, that is ‘the end of the matter.’” (quoting Broun, 513 U.S. at 120)). Like most judges, Judge Hagel is not dogmatic about a chosen theory.

84 Sursely v. Peake, 22 Vet. App. 21 (2007), rev’d, 551 F.3d 1351 (Fed. Cir. 2009) (finding the statute to be ambiguous and resolving “interpretive doubt in the veteran’s favor” (citing Broun, 513 U.S. at 118)).

85 Id. at 22.
86 Id.
87 Id.
89 Id. at 28.
90 Id. at 22.
91 Id. at 25.
92 Id.
93 Id. (quoting Ardestani v. INS, 502 U.S. 129, 135–36 (1991)).
veteran to receive only one clothing allowance." In looking at this history, Judge Schoelen made it clear that she expected the litigants to address legislative history; indeed, she chastised both parties for failing to do so. Simply put, these litigants did not "talk Judge Schoelen's talk," so to speak: "The appellant did not address the legislative history of [the statute], but the Secretary has done so[,] although it is unclear why the Secretary did not address legislative history in his brief." Hence, in approaching the interpretive process, Judge Schoelen focused on the plain meaning of the text, found it clear, and then looked to legislative history to confirm her interpretation. She thus applied a softer version of textualism.

In this case, legislative history later proved to be critical. The Federal Circuit reversed the Veterans Court's decision. After finding the language clear, the Federal Circuit reviewed the enactment history. Originally, the statute had permitted clothing allowances for individuals using "a prosthetic or orthopedic appliance or appliances." In 1989, Congress amended the statute to delete the word "appliances" and to insert the singular "appliance." According to the court, this extrinsic evidence, the amendment, showed that Congress intended "to provide additional benefits for those veterans ... who use multiple orthopedic appliances." Thus, the attorney missed a powerful argument, which could have cost his client the case.

2. Modern, Moderate Textualists

A second form of textualism is modern, or moderate, textualism. Moderate textualists believe that when the meaning of the text is clear (based on the plain meaning of the words within their statutory context) interpretation is complete and no other sources should be consulted. Like soft plain-meaning textualists, moderates rely heavily on the plain-meaning canon; however, for moderates, this canon plays a more central role in interpretation than it does for the soft plain-meaning textualists. A
moderate textualist will look beyond text to nontextual sources only when
the text is ambiguous, absurd, or contains a scrivener's error. Indeed,
some moderates even refuse to consider other intrinsic sources, such as
codified purpose, findings, and title, when the text is clear.105

Today, many judges use moderate textualism; the Veterans Court
judges are no different. For example, Judge Hagel used moderate
textualism in Jackson v. Nicholson when he looked at the text of the relevant
statute and the statutory context. After finding the text clear, he stopped
the interpretive process.108

At issue in Jackson was whether the term "appellate decision" in a U.S.
Department of Veterans Affairs' (VA) regulation referred to a Board
decision or referred to a Federal Circuit decision. Certainly, "appellate
decision" in the abstract could mean decisions of the Federal Circuit
because the Federal Circuit is a federal appeals court. But Judge Hagel
noted that language is not looked at in a vacuum. Rather, statutory and
definite meaning, which involves no absurdity or contradiction, then there is no room for construction and courts
have no right to add to or take away from that meaning.")

104 See Manning, supra note 102, at 108-09 ("Modern textualists . . . are not literalists. In contrast to their
eyearly twentieth-century predecessors in the 'plain meaning' school, they do not claim that interpretation can
occur 'within the four corners' of a statute, or that 'the duty of interpretation does not arise' when a text is 'plain.'
Rather, modern textualists acknowledge that language has meaning only in context. . . . [T]hey believe that
statutory language, like all language, conveys meaning only because a linguistic community attaches common
understandings to words and phrases, and relies on shared conventions for deciphering those words and phrases
in particular contexts. Hence, textualists ask how 'a skilled, objectively reasonable user of words' would have
understood the statutory text, as applied to the problem before the court. The 'reasonable user' approach gives
textualists significant room to account for the nuances of language, a factor that is especially significant in a
mature legal system with a rich set of background legal understandings and conventions. . . . Like any reasonable
language user, textualists pay attention to the glosses often put on language (even in ordinary usage), the
specialized connotations of established terms of art, and the background conventions that sometimes tell readers
how to fill in the gaps inevitably left in statutory directions." (footnotes omitted)).

change the plain import of its words."); Jurgenen v. Fairfax County, 745 F.2d 866, 865 (4th Cir. 1984) (stating
that when "the operative sections [of a statute] are clear and unambiguous," the preamble of the statute is
"neither essential nor controlling in the construction of the Act" (alteration in original)).

he believed to be the appropriate approach to statutory interpretation:
The plain meaning [of a statute] must be given effect unless a literal application of [the] statute will
produce a result demonstrably at odds with the intention of its drafters. Only where a statute's plain
meaning leads to an absurd result that Congress clearly never could have intended is this plain
meaning rule abandoned for a review of the applicable legislative history and statutory construction.
If it is clear that . . . the literal import of the text . . . is inconsistent with the legislative meaning or
intent, or such interpretation leads to absurd results, the Court will not reach that result.

Id. at 30 (alteration in original) (internal citations and quotation marks omitted).


108 Id. at 211.

109 Id. at 208. Note that interpreting regulations does not materially differ from interpreting statutes. See id.
at 210 ("The basic principles that apply to construing statutes apply equally to construing regulations." (quoting

110 See id. at 210.
regulatory context affect meaning. As for the regulatory context, Judge Hagel noted that at the time the regulation was promulgated, the term “appellate decision” could have referred only to Board decisions because there was, at that time, no appeal process beyond the Board. Additionally, because the Secretary used the phrase consistently in its regulations to refer to Board decisions and not Federal Circuit decisions, “the Secretary’s interpretation would be harmonious with the rest of title 38 while [the veteran’s] interpretation would result in an anomaly.”

Examining the statutory context, Judge Hagel noted that “[t]he Secretary’s interpretation of [the regulation] comports with the statute, but [the veteran’s] interpretation does not.” After examining the regulatory and statutory contexts, Judge Hagel concluded that because “the language of the regulation [was] clear and not ambiguous, that [was] ‘the end of the matter.’”

Similarly, in Barela v. Peake, Chief Judge Greene of the Veterans Court used moderate textualism. The issue in that case was whether 38 U.S.C. § 1310 provided an independent basis for a veteran’s surviving spouse to seek benefits or whether the spouse had to qualify first for benefits under a separate statute. The Board had held that the statute at issue did not provide an independent basis for seeking benefits. In affirming, Chief Judge Greene first examined the text and structure of the statute and found the language clear.

Despite finding the text clear, he next examined the legislative history, which, he concluded, further supported the Board’s interpretation. As noted, moderate textualists generally do not look beyond clear text; so you

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111 Id.
112 Id.
113 Id.
114 Id. at 211.
115 See id. at 210.
116 Id. at 211 (quoting Brown v. Gardner, 513 U.S. 115, 120 (1994)).
117 Interestingly, nowhere in the opinion did Judge Hagel mention the applicable standard of review of agency interpretations of regulations. That standard, known as Auer deference, directs courts to affirm agency interpretations of their own regulations unless that interpretation is “plainly erroneous.” Auer v. Robbins, 519 U.S. 452, 461 (1997). For the reasons Judge Hagel cited, the Department’s interpretation was not plainly wrong.
118 See Barela v. Peake, 22 Vet. App. 155 (2008) (affirming Board’s determination that a statute allowing for increased benefits did not serve as a basis for an initial grant of benefits), aff’d, 584 F.3d 1379, 1384 (Fed. Cir. 2009) (using moderate textualism to resolve the issue and stating that “[a]lthough the plain language of [the section], in a vacuum, can be interpreted [as the surviving spouse suggested], . . . [t]he context of [the section] and the placement of [the section] reveal [the section’s meaning]”).
119 Id. at 156. The spouse was seeking dependency and indemnity compensation benefits. Id.
120 Id.
121 See id. at 157–58.
122 See id. at 158–59.
might wonder why I have characterized this opinion as one evincing moderate textualism. I do so because when Judge Greene turned to the legislative history, he specifically noted, "[E]ven if there were any ambiguity in the plain language of the statement, and we hold that there is not, the legislative history accompanying the statute[, specifically a committee report,] clarified the intent of Congress not to create a new avenue for obtaining . . . benefits." This "even if there were any ambiguity" language, which I call "the ambiguity caveat," allows moderate textualists to examine nontextual sources despite clear statutory language. In this case, Chief Judge Greene referred to the ambiguity caveat before he turned to the legislative history. Soft plain-meaning textualists do not need the ambiguity caveat to examine other sources of meaning.

Note that even though Chief Judge Greene used moderate textualism, he did not ignore legislative history. Indeed, understanding how to find and to use legislative history is essential to good advocacy. In this case, the attorney representing the spouse failed at this simple legal task by neglecting to bring the relevant legislative history to the Veterans Court's attention. Further, he stated repeatedly and mistakenly during oral argument that "there was nothing in the legislative history . . . that pertained to the question before the Court and [he] specifically responded that there were no Committee reports of note." Chief Judge Greene vigorously disagreed, finding that "a review of the legislative history of the [Act] expressly contradict[ed the attorney's] assertion." Moreover, Chief Judge Greene was so irritated by the attorney's behavior that he cited the Model Rules of Professional Conduct regarding competence and diligence, reminding the attorney "not to depart from these obligations."

The Federal Circuit affirmed, also using moderate textualism. According to Judge Prost, the language, in its textual context, was clear that the statute did not provide an independent basis for an award: "Although

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123 Id. at 159 (emphasis added).
124 See, e.g., Kilpatrick v. Principi, 16 Vet. App. 1, 6 (2002) ("[E]ven if the Court were to find [the statute] ambiguous, which it does not, . . . interpretive doubt in statutory interpretation is to be 'resolved in the veteran's favor.'" (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994))); Davenport v. Brown, 7 Vet. App. 476, 484 (1995) ("[E]ven were we to find any ambiguity, which we do not, . . . 'interpretative doubt is to be resolved in the veteran's favor.'" (quoting Brown, 513 U.S. at 118)).
125 See Barel v. Shinseki, 584 F.3d 1379 (Fed. Cir. 2009).
the plain language of [the section], in a vacuum, [could] be interpreted [as the surviving spouse suggested,] . . . [t]he context of [the section] and the placement of [the section] reveal [the section’s meaning].” Note that moderate textualists do not suggest “that interpretation can occur [only] ‘within the four corners’ of [the] statute” being interpreted. “Rather, [moderate] textualists acknowledge that language has meaning only in context.” That context includes the language of the entire act and even the entire code. In this case, Judge Prost found the placement of the statute within the statutory scheme to be conclusive of meaning and looked no further.

Other judges on the Federal Circuit also use moderate textualism. As noted above, in Sursely v. Peake the Veterans Court had affirmed the Board’s decision that refused a veteran’s request for two separate clothing allowances pursuant to a statute that required the VA to pay “a clothing allowance of $662 per year.” Using moderate textualism, the Federal Circuit reversed. Judge Garjarsa, writing for the court, first found the language clear and then concluded that “a clothing allowance” could refer to multiple awards despite Congressional use of the singular article “a.” To reach this conclusion, Judge Gajarsa quoted a codified canon of interpretation that “words importing the singular include and apply to several . . . things.” Thus, even though the statute used the singular “a,” Congress did not necessarily intend the singular. So, Judge Gajarsa focused on different language within the statute:

The key to clearly understanding the statute is the connection between the phrases “a clothing allowance” (setting out the benefit) and “a prosthetic or orthopedic appliance” (setting out the qualification for the benefit). This language is not a limitation, and does not expressly limit the veteran to a single clothing allowance. Instead, by linking receipt of the benefit to a single qualifying appliance, Congress recognized that multiple appliances might allow the award of multiple benefits.

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132 Id. at 1384.
133 See Manning, supra note 102, at 108.
134 Id.
135 See supra note 102, at 108.
136 Barsel, 584 F.3d at 1384. The court did reject the veteran’s absurdity argument. See id. (stating that “[i]t is not the prerogative of this court to second-guess the policy determinations of Congress”).
137 Sursely v. Peake, 22 Vet. App. 21, 22 (2007) (emphasis added) (stating that “[t]he statutory language . . . clearly provides only one clothing allowance per eligible veteran”), rev’d, 551 F.3d 1351, 1357 (Fed. Cir. 2009).
139 See id. at 1356.
140 Id.
Like Chief Judge Greene of the Veterans Court, Judge Gajarsa did not stop with this clear text.\textsuperscript{141} While this failure to stop might suggest he used soft plain-meaning textualism, he qualified the remainder of his search. Specifically, he indicated that even if there were ambiguity, any ambiguity could be resolved by reference to two other sources: one extrinsic and one policy based.\textsuperscript{142} The extrinsic source was the enactment history identified above; notably, that the statute was amended to omit the plural word “appliances,” retaining the singular word “appliance.”\textsuperscript{143} This amendment showed that Congress intended to allow multiple benefits.\textsuperscript{144} The policy-based source was the veteran’s-benefit presumption, articulated in Brown v. Gardner: “interpretive doubt is to be resolved in favor of the veteran.”\textsuperscript{145} This presumption exists in the veterans’ area because courts presume that Congress drafts with this presumption in mind.\textsuperscript{146} Thus, even though Judge Gajarsa examined sources after finding the text clear, he did so only after invoking the ambiguity caveat.

Lastly, Judge Gajarsa turned to the Secretary’s remaining argument that this interpretation was absurd. Absurdity, like ambiguity, is another method, or caveat, by which moderate textualists avoid the plain meaning of text in a statute.\textsuperscript{147} The Secretary had argued that the veteran’s interpretation would allow a veteran with multiple prosthetic appliances to recover multiple clothing allowances for a single item of clothing.\textsuperscript{148} Judge Gajarsa disagreed that this result was absurd,\textsuperscript{149} suggesting that the agency could take this factor into account when issuing an award.\textsuperscript{150} Judge Gajarsa found the language of the statute clear and looked to nontextual sources only in the event that ambiguity or absurdity remained; thus, Judge Gajarsa used moderate textualism in this case. Interestingly, Judge Gajarsa interpreted the statute differently than Judge Schoelen of the Veterans Court had, even though both took text-focused approaches.

Similarly, Judge Michel of the Federal Circuit used moderate textualism in Sears v. Principi.\textsuperscript{151} In that case, the court addressed the issue of whether a

\textsuperscript{142} See Sarsley, 551 F.3d at 1356-57.
\textsuperscript{143} Id. at 1356-57 (quoting Veterans Compensation and Relief Act of 1972, Pub. L. No. 92-328, § 103, 86 Stat. 393, 394 (amended 1989)).
\textsuperscript{144} See id. at 1357.
\textsuperscript{147} See Sarsley, 551 F.3d at 1357-58.
\textsuperscript{148} See id.
\textsuperscript{149} See id. at 1358 & n.6.
\textsuperscript{150} See id. at 1358.
\textsuperscript{151} See Sears v. Principi, 349 F.3d 1326, 1329 (Fed. Cir. 2003).
VA regulation that set an effective date for reopened claims was a reasonable interpretation of the controlling statute. Finding the text of the statute ambiguous, Judge Michel, writing for the court, looked next to the legislative history of the Act to resolve the ambiguity. Finding the legislative history ambiguous as well, he turned to an extrinsic source to resolve the issue, and specifically the *Chevron Doctrine*—deference to administrative interpretations. Pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, Judge Michel concluded that the VA regulation was a "reasonable gap-filling or ambiguity-resolving regulation."

All of these cases show that moderate textualism is alive and well in both the Veterans Court and the Federal Circuit.

3. New Textualists

Finally, finishing the textualist continuum are the strict, or new, textualists. These theorists, like moderate textualists, also require ambiguity, absurdity, or scrivener’s error to look beyond the text. However, unlike moderates, new textualists refuse to ever look at some types of non-textual sources, such as legislative history, legislative acquiescence, and unexpressed purpose. New textualists are unique in their refusal to allow consideration of these sources at all. These theorists believe that it is simply unconstitutional to consider anything that was not actually subject to the constitutional enactment process—bicameralism and presentment. Inexplicably, new textualists do not explain why they will look to dictionaries, which, of course, do not go through this process. Indeed, judges sometimes debate which dictionary is more appropriate to use.

The Veterans Court is not immune from this dictionary debate. For example, in *McDowell v. Shinseki*, the majority and dissent disagreed about both the relevant statutory language and the appropriate dictionary to use to interpret their identified language. In that case, the issue for the Veterans Court was whether DNA test results were more relevant to determining paternity than lay testimony that the veteran considered the

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152 *See id.* at 1327.
153 *See id.* at 1329.
154 *See id.* at 1330.
156 *Sears*, 349 F.3d at 1332.
157 *See, e.g., MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225-28 (1994) (identifying some dictionaries as legitimate and others as not).*
child his own. The Board had denied a woman’s claim that her minor daughter was the child of a veteran when DNA test results showed that there was only a .208% chance that the veteran was the father.

In affirming the Board’s decision, Judge Schoelen identified “illegitimate child” as the relevant language to be interpreted. She then used *Webster’s New World Dictionary* and *Random House Webster’s Unabridged Dictionary* to interpret that term as requiring a biological relationship. Hence, she concluded that the VA’s reliance on DNA was entirely appropriate. In direct contrast, Judge Hagel dissented and identified the word “father” in addition to “illegitimate child” as relevant. As for “father,” he concluded that there was no biological requirement for a person to be a father. He then turned to the term “illegitimate child.” Rejecting the majority’s decision to use an ordinary dictionary, Judge Hagel argued that the term “illegitimate child” had a unique, legal definition; hence, he believed that a legal dictionary was more appropriate. Because “[n]one of the law dictionaries contain the phrase ‘born of parents’ or any other phrase implying a biological connection,” Judge Hagel rejected the majority’s interpretation. To be fair, neither of these judges appear to be new textualists. Yet the court’s disagreement illustrates the problem that arises when judges make a fortress of the dictionary.

New textualists are rare. The most famous new textualist is Justice Antonin Scalia, who was appointed to the Supreme Court in 1986. He first articulated his new-textualist theory between 1985 and 1986 during a series of speeches in which he urged courts to ignore legislative history, especially committee reports. At that time, many members of the Supreme Court

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159 See id. at 210.
160 See id. at 209–10.
161 See id. at 212.
162 See id. at 211–12.
163 See id. at 216.
164 See id. at 217 (Hagel, J., concurring in the result and dissenting in part).
165 See id.
166 See id.
167 See id.

168 See id. at 218. In this case, the Veterans Court owed the Secretary’s interpretation of its own regulation a high level of deference. Indeed, the interpretation should have been controlling unless the appellant was able to show that the interpretation was plainly wrong. See *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997) (stating that agency interpretations of regulations are controlling unless plainly erroneous). Given this standard, the majority was correct to affirm the Secretary’s interpretation and the dissent was incorrect to ignore it. See *McDermott, 23 Vet. App. at 220* (Hagel, J., concurring in the result and dissenting in part) (incorrectly explaining and applying the *Auer* standard).

used intentionalism and regularly reviewed legislative history to glean evidence of meaning. Indeed, courts routinely cited legislative history, going so far as to find "that a crucial committee or a powerful sponsor had authoritatively revealed the specific intent behind general statutory language." Justice Scalia argued that legislators do not read the committee or other reports, and, thus, these reports cannot be relied upon as articulating the intent of a body that did not even read them:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.

... . . . [I]t is natural for the bar to believe that the juridical importance of [legislative history] matches its prominence in our opinions—thus producing a legal culture in which, when counsel arguing before us assert that "Congress has said" something, they now frequently mean, by "Congress," a committee report; and in which it was not beyond the pale for a recent brief to say the following: "Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language." Justice Scalia's interpretive process was coined "new textualism" in that it brought life back to textualism, which had largely disappeared, while simultaneously narrowing the sources that could be considered.

170 See id. at 214.
172 Green v. Bock Laundry Machine Co., 490 U.S. 504, 528–30 (1989) (Scalia, J., concurring) (citation omitted). Sometimes judges also turn to legislative history only after lamenting about the lack of legislative history. See, e.g., Patrie v. Area Coop. Educ. Serv., No. CV00440418S, 2004 WL 1489555, at *1 (Conn. Super. Ct. June 16, 2004) ("There is no appellate case law that interprets the word and both sides agree that the legislative history is of no direct help so this court must try to interpret the meaning of the word 'assault'... .").
Scalia initially gained a following for his theory. For example, Judge Easterbrook of the Seventh Circuit promoted a similar theory. But with time, Justice Scalia’s theory has garnered less appeal.

New textualism is akin to moderate textualism in its razor-like focus on the text and its need for ambiguity or absurdity caveats. New textualism adds only a slight wrinkle in that this theory limits some sources altogether. This wrinkle has not proved popular. Indeed, in Wisconsin Public Intervenor v. Mortier, the other Justices joined a footnote explicitly rejecting Justice Scalia’s suggestion that legislative history should never be relevant to statutory interpretation.

Whether popular or not, new textualism has been praised for limiting judicial discretion, increasing predictability and efficiency, encouraging careful drafting, and limiting inappropriate uses of legislative history. When judges and litigants are constrained by the text of the statute, statutory meaning becomes more certain and litigation decreases. When legislative history cannot be considered as relevant to meaning, the cost of discerning meaning lessens and certainty increases because legislative searches are neither cheap nor easy. Finally, when legislatures are held to the words they use, they are more likely to choose those words with care. But the most important contribution of textualism, particularly new textualism, is that it returned the focus of judicial interpretation to the text of the statute.

However, new textualism can also be faulted. First, it can be faulted for its adherents’ unwillingness to consider some sources of meaning, namely legislative history and unexpressed purpose. It makes little sense to

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175 Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (“As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, ‘where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.’ Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court’s practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future.” (internal citations omitted)).
176 See, e.g., Easterbrook, supra note 174, at 544–51.
177 Interestingly, legislators seem less convinced that textualism is the proper theory. See Joan Biskupic, Scalia Takes a Narrow View in Seeking Congress’ Will, 48 CONG. Q. WKLY. REP. 913, 918 (1990); Daniel B. Rodriguez, The Presumption of Reuntestability: A Study in Canonical Construction and Its Consequences, 45 VAND. L. REV. 743, 750 (1992) (citing Joan Biskupic, Congress Keeps Eye on Justices as Court Watches Hill’s Words, 48 CONG. Q. WKLY. REP. 2863 (1991)); see also Bernard W. Bell, Metademoctratic Interpretation and Separation of Powers, 2 N.Y.U.J. LEGIS. & PUB. POL’Y 1, 35–36 (1998) (“Even though Congress has never formally voted to require that legislative history, or particular aspects of legislative history, be considered in interpreting statutes, it seems reasonably clear that, over a long period of time, a large majority of Congress has rejected the absolutist position that legislative history should never
prohibit all evidence generated during the legislative process simply because that evidence was not enacted. Nontextualists do not claim that legislative history is "a statute, or even that, in any strong sense, it is 'law.' Rather, legislative history is helpful in trying to understand the meaning of the words that do make up the statute or the 'law.'"178 While the text is authoritative and has the force of law, legislative history provides evidence of what that law means. In other words, legislative history can help illuminate the meaning of the words that make up the law. In short, new textualists' refusal to consider legislative history is simplistic and misguided.179

Support for new textualism itself has waned in recent years. "Though often applied, [new textualism] is often condemned as simplistic because the meaning of words varies with the verbal context and the surrounding circumstances, not to mention the linguistic ability of the users and readers (including judges)."180 It is "a blunt, frequently crude, and certainly narrowing device, cutting off access to many features of some particular conversational or communicative or interpretive context that would otherwise be available to the interpreter or conversational participant."181

The "minimalist" judge "who holds that the purpose of the statute may be learned only from its language" has more discretion than the judge "who will seek guidance from every reliable source." A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own view of how things should be, but it may also defeat the very purpose for which a provision was enacted.182

Finally, some suggest that there is no "ordinary" or "plain" meaning; indeed, the act of ascribing plain meaning is itself a subjective act that masks judicial reasoning from public scrutiny.183

Regardless of the popularity of his theory, Justice Scalia properly returned judicial focus to the text of the statute as the starting point for interpretation. As a result of his and others' influence, the text of the statute

180 BLACK'S LAW DICTIONARY 1188 (8th ed. 2004).
181 Schauer, supra note 179, at 252.
has gained importance in recent years and likely will retain this importance in the years to come.

Today, new textualists are relatively rare; however, the case of Lippman v. Shinseki illustrates new textualism.184 In that case, the court rejected the VA’s regulation interpreting a provision in the Veterans Judicial Review Act, which allowed for attorney fees.185 In doing so, the court looked solely to the text of both the statute and the regulation.186 Even though the court found the text ambiguous and the regulation absurd,187 it looked at no other sources to reject the VA’s regulation as “unduly restrictive[,] . . . unreasonable[,] . . . [and] invalid.”188 Instead, the court suggested a hypothetical scenario to show how unreasonable, or absurd, the regulation was.189 Neither party discussed the legislative history of this statute. Yet the legislative history was informative and should have played a role in interpretation, as it had in Scates v. Principi,190 an opinion that the Lippman court quoted.191 In Scates, Judge Friedman had noted specifically that:

The history of the statutory provisions governing the payment of attorney fees in veterans benefits cases supports our conclusion that an attorney discharged during the case is entitled only to a fee reflecting his contribution to the litigation. Prior to 1988, the applicable statute was Civil War era legislation that limited attorney fees in veterans benefit claims cases to $10.00. Congress then recognized that the $10.00 fee limit was so small as to effectively preclude veterans from employing lawyers to handle their benefits claims. The Veterans Judicial Review Act reflects Congress’ conclusion that claimants should be able to have legal representation in pursuing benefits claims. The Act permits lawyers to receive contingent fees of up to twenty percent of benefits recovered. Because that percentage was less than contingent fees typically found in other areas of practice, Congress gave lawyers the offsetting benefit of

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185 See id. at 253. Judge Hagel authored the opinion. Yet, I am certain that Judge Hagel is not a new textualist. How am I so sure? In March of 2010, I had the opportunity to speak at the Veteran Court’s Eleventh Judicial Conference. Judge Hagel had invited me to speak. The morning before the presentation, we met for breakfast along with some other people. During that breakfast, he said that he wanted to challenge another of the presenters about that presenter’s interpretation of a statute. Judge Hagel then looked at me and said, “I want to talk about the legislative history. You don’t mind if I do that, do you?” And I responded, “No; I’m just surprised that you want to.”
186 See id. at 251–52.
187 See id. at 251, 252–53 (“Because the Secretary’s [interpretation] does not guard against improper deprivation of payment to attorneys for work actually performed, the regulation is unduly restrictive[,] . . . unreasonable[,] and . . . invalid.”).
188 Id.
189 See id. at 252.
190 Scates v. Principi, 282 F.3d 1362 (Fed. Cir. 2002).
certainty of collection; it provided for the Department to withhold that percentage from the benefits awarded and itself pay the fee directly to the lawyer.\textsuperscript{192}

Because neither party argued the relevance of this legislative history, and because the \textit{Lippman} court did not consider this source independently, the legislative history played no role in the court's final decision. In the end, despite acknowledging that the court should not impose its own construction of the statute in light of the statutory gap, the court did so anyway; it created a rule for attorney-fee awards.\textsuperscript{193} Thus, the opinion is redolent of new textualism.

To summarize textualism, textualists, especially those who subscribe to the moderate and strict forms of textualism, examine the fewest sources. Textualists will look at the text of the statute (including grammar and punctuation), the textual context, the statutory context, and the linguistic canons to determine meaning. The more strictly a judge adheres to the plain-meaning canon, the less frequently that judge will look beyond text itself, the fewer non-text sources that judge will consider, and the less weight that judge will give to these other sources.\textsuperscript{194}

\section*{B. Intentionalist-Based Theories}

Intentionalist-based theorists reject text-only theories for a variety of reasons. Like textualism, there is more than one intentionalist-based theory. Before discussing these different intentionalist-based theories, let us first discuss the underlying basis for these theories. Intentionalist-based theories are rooted in the belief that policies chosen by an elected, representative body should govern society.\textsuperscript{195} Intentionalist-based adherents believe that it

\begin{footnotesize}
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\item \textsuperscript{192} See 282 F.3d at 1366 (citations omitted).
\item \textsuperscript{193} See \textit{Lippman}, 23 Vet. App. at 253–54.
\item \textsuperscript{194} Textualism in the states: Although the Justices of the Supreme Court have wrestled throughout history with the appropriate theory of statutory interpretation, Congress has not chosen to provide direct guidance, though some scholars have suggested that it should. In contrast, many state legislatures have adopted statutes telling their judges how to interpret statutes. Perhaps, not surprisingly, textualism is the most common choice. For example, Connecticut has a textualist directive that reads as follows:
\begin{quote}
The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.
\end{quote}
\end{quote}

\textit{CONN. GEN. STAT.} § 1-2z (2010). Colorado, Hawaii, Iowa, North Dakota, Ohio, and Pennsylvania also have textualist directives. \textit{See} COLO. REV. STAT. § 2-4-203 (2010); HAW. REV. STAT. § 1-15 (2005); IOWA CODE § 4.6 (2010); N.D. CENT. CODE § 1-02-39 (2010); OHIO REV. CODE ANN. § 1.49 (West 2010); 1 PA. CONS. STAT. § 1921(b) (2008).
\item \textsuperscript{195} See JELLUM & HRICIK, supra note 54, at 47.
\end{itemize}
\end{footnotesize}
is the duty of the court to discern the intent of that representative body. Thus, intentionalist-based theorists attempt to understand the meaning of statutes by looking broadly for legislative intent.

There are two kinds of intent: specific intent and general intent. Specific intent can be defined as the intent of the enacting legislature on the specific issue presented. For example, assume that a white litigant sues an employer, claiming that the employer's affirmative action program violates the law. Assume further that the statute at issue, Title VII, says that no person shall be discriminated against on the basis of race. A judge looking for specific intent would search the text of the statute, related statutes, and legislative history to determine whether the enacting legislature intended the word "discriminate" to apply to affirmative action programs that promote the hiring of minority races. In other words, if the issue before the court had been presented to the enacting legislature, how would it have decided the issue? For a judge seeking specific intent, it matters whether the enacting legislature had a specific intent as to the language in dispute, in this example the word "discriminate."

In contrast, general intent refers to the overall goal, or purpose, of the legislature. Assume the same example: a white litigant sues his employer, claiming that the employer's affirmative action program violates Title VII. A judge looking for general intent would search the text, related statutes, social context, and legislative history to determine whether the enacting legislature's goal was to make society color-blind or whether it was to improve the plight of minorities (or whether it was for some other purpose). If the legislature's goal was to improve the plight of minorities, then affirmative action programs further this goal. Hence, the employer's program would not violate the law as interpreted to further this purpose. If, instead, the legislature's goal was to make society color-blind, then affirmative action programs would violate the law because they would not further this goal. For a judge seeking general intent, it does not matter whether the enacting legislature had a specific intent as to the language in dispute—in this example the word "discriminate." What matters instead is the goal, or purpose, of the legislation.

As you might expect, there are two prominent intentionalist-based theories. They are (1) intentionalism, which focuses on specific intent, and

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196 See id.
197 This hypothetical is based on United Steelworkers v. Weber, 443 U.S. 193 (1979).
(2) purposivism, which focuses on general intent. We will explore each of these two theories in detail next.

1. Intentionalism: The Theory

As noted, intentionalists, sometimes referred to as originalists, seek out the specific intent of the legislature that enacted the statute. They ask, “What did the enacting legislature have in mind in regard to the specific issue before the court when the legislature enacted the statute?” To answer the question, intentionalists start with the statutory language—the text. But intentionalists do not stop with the clear text, as a textualist would; rather, intentionalists move on and peruse other sources of meaning. Unlike a textualist, an intentionalist does not need a reason, such as ambiguity or absurdity, to consider sources beyond the text.

Because intentionalists are looking for help in discerning the specific intent of the enacting legislature, they often find statements made during the legislative process and early draft versions of the bill enlightening. If these extrinsic sources demonstrate that the ordinary meaning was not what was intended, intentionalists may reject the ordinary meaning for a meaning that furthers the intent, as shown in these other sources.

Remember that adherents of the competing theories differ regarding their view of the appropriate role for the judiciary when interpreting statutes. Intentionalists believe that their role is to be faithful agents of the enacting legislature, working to ensure that the legislature’s choices are

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186 As noted above, discerning the specific intent of the enacting legislature is often a difficult, if not impossible, task. Moreover, limiting interpretation to a static point in time creates its own issues. For these reasons, in 1907, Dean Roscoe Pound urged courts to adopt “imaginative reconstructionism” for discerning the intent of the enacting legislature. Using Dean Pound’s theory, a judge would try to imagine what the enacting legislature would have intended had the precise factual problem before the court been raised during the enactment process. To do so, Dean Pound proposed that judges recreate intent by examining the available historical evidence, including the statute, with a sense of morality and justice to determine what the enacting legislature likely intended given the realities of today. See Roscoe Pound, Spurious Interpretation, 7 COLUM. L. REV. 379, 381 (1907). This theory borrows from common-law analysis and civil-law practice in that the statute guides, but often does not answer, the question; rather, by using reason and analogy, a judge can apply the statute to situations not explicitly covered by the language to arrive at a just result. Imaginative reconstructionism is a normative theory in that it allows the judiciary to consider public policy when making interpretation choices. Using “practical reasoning,” judges can adopt flexible interpretations based on current public norms. Judge Learned Hand was a proponent of this theory.

Not surprisingly, imaginative reconstructionism suffers from some of the same criticisms as intentionalism: Whose intent is reconstructed? Should unenacted information play any role in interpretation? While Dean Pound’s theory has had some followers in academic circles, it garners little support in practice. Hence, it warrants no more than a footnote.

199 See supra Part III.
Intentionalists wish to avoid imposing their own preferences. As stated by Alexander Hamilton:

"It can be of no weight to say, that the courts on the pretense of repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body."  

Intentionalists believe that examining sources other than the text helps constrain the judiciary and helps maintain its separate function—that of interpreting statutes—by providing more information for a fully informed decision. Further, intentionalists believe that intentionalism furthers the doctrine of separation of powers by protecting the legislature’s power to legislate free from judicial interference. Judges must implement the enacting legislature’s intent, not impose their own policy preferences.

Like textualism, intentionalism has appeal; but it too is imperfect. For example, consider whether Congress, a group of more than five hundred individuals, all with different constituencies, can have one unified intent. "The chances that . . . several hundred [individuals] each will have exactly the same determinate situations in mind as possible reductions of a given [statutory issue], are infinitesimally small."  

More likely, each legislator will have a unique reason for voting for a bill. For example, Title VII, which prohibits discrimination in the workplace, was a compromise of various constituencies: the liberal Northern and Eastern legislators (who sponsored the bill) wanted to help black workers; the conservative Southern legislators wanted to ensure that black workers were not helped at the expense of white workers; and finally, the conservative Midwestern legislators, the pivotal voters, wanted to limit government interference in business altogether. With so many different goals, it is unlikely that each of these legislators would share a specific intent as to whether affirmative action programs were allowed. Additionally, one might ask whose intent matters more, "the 51st senator, needed to pass the bill, or the 67th, needed . . ."

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202 Radin, supra note 7, at 870.
to break the southern filibuster.\footnote{191} In \textit{United Steelworkers v. Weber},\footnote{192} the case in which this issue was addressed, the majority and dissent disagreed on whose intent was central. The majority focused on the liberal, Northern and Eastern legislators,\footnote{193} while the dissent focused on the conservative, Southern legislators.\footnote{194}

Of course, intentionalists respond to that criticism by arguing that a group can have intent, although you should consider whether their definition of intent sounds more like a definition of purpose:

Conceptually, . . . one can ascribe an "intent" to Congress in enacting the words of a statute if one means "intent" in its . . . sense of "purpose," rather than its sense of "motive." One often ascribes "group" purposes to group actions. A law school raises tuition to obtain money for a new library. A basketball team stalls to run out the clock. . . . Obviously, one of the best ways to find out the purpose of an action taken by a group is to ask some of the group's members about it. But, this does not necessarily mean that the group's purposes and the members' motives or purposes must be identical. The members . . . may have different, private \textit{motives} for their own actions; but that fact does not necessarily change the proper characterization of the group's purpose. . . .

. . .

. . . In practice, we ascribe purposes to group activities all the time without many practical difficulties.\footnote{197}

While the individual members may have different, private motives for their own actions, the existence of private motives does not necessarily eliminate the possibility that the group has a common goal or agenda. For example, consider a sports team as it takes the field or a political party as it enters an election. The group's agenda and the members' motives might not be identical, but each group has one, overarching intent: to win. Intentionalism is thus less about the reality of always finding a unified intent and more about the possibility of finding one.

To find specific intent, intentionalists commonly rely on legislative history. Intentionalists' use of legislative history is often criticized. Some argue that legislative history can be manipulated to support any result a
judge or a legislator wants. Judges may choose which legislative history to use, while rejecting contradictory history. Justice Scalia wrote that in “any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.”

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the language was . . . inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer–lobbyist; and the purpose of [that language] was not primarily to inform Members of Congress about what the bill meant . . . , but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her [language became] . . . the law of the land . . . .

Additionally, some argue that legislators can manipulate legislative history; for example, a legislator may decide to add information to the legislative record to influence future litigation. Finally, some point out that legislative history is not subject to bicameral passage and presentment, the constitutionally prescribed process for enactment. Thus, critics suggest that even if one unified intent exists, that intent should not be ascertained from anything other than the language of the statute for it is only the text itself that goes through the enactment process.

Intentionalists do not ignore these criticisms. Rather, they accept the criticisms as valid but suggest caution, not whole-scale rejection of the use of legislative history. True, legislative history is not enacted law, but intentionalists do not claim that it is. Rather, they claim that legislative history can offer insight into what some or all of the legislators may have been thinking when the law, which did go through the constitutionally prescribed process, was enacted. Moreover, the legislature acts by delegation: by “pre-agreement, whether tacit or explicit, . . . a subgroup of the legislature [acts] on behalf of the whole body in working out the details of laws that the entire body could not possibly take the time and effort to

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209 See SCALIA, supra note 21, at 36.
210 Id.
212 Cf. Amalgamated Transit Union Incal v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1096 (9th Cir. 2006) (Bybee, J., dissenting) (chastising the majority for relying on a Senate committee report that “was not submitted until eighteen days after the Senate had passed the bill, eleven days after the House had passed the bill, and ten days after the President signed the bill into law”).
213 See Breyer, supra note 178, at 863; McGreal, supra note 183, at 373 (“If the legislative process has its own assumptions and word usages, the process itself should be the context within which we seek a statute’s meaning.”).
understand in full detail.” Committees regularly draft reports to educate the remaining legislators. Because intentionalists wish to know what legislators were thinking, legislative history, especially the committee reports, can be useful. In short, legislative history simply offers a fuller picture of the legislative process for a particular bill. It is not, in and of itself, law.

Hence, intentionalism is a theory that is focused on finding the specific intent of the enacting legislature in regard to the language at issue in the statute and in the context of the specific issue before the court. Today, the theory focuses first on text, but also relies on all relevant sources, including the legislative history and unenacted versions of the bill.

Today, intentionalism is less commonly used than textualism; however, in *Wanless v. Shinseki,* Judge Davis of the Veterans Court used intentionalism. In that case, the issue was whether a privately owned prison qualified as a “Federal, State, or local penal institution.” Judge Davis initially spoke in textualist terms, suggesting that if the language of the statute was clear, then judicial inquiry would be complete. He then found the language ambiguous, suggesting that the language “[did] not explicitly include or exclude private prisons under State contract.” He next reviewed the statute’s title and structure, both intrinsic sources. He found that these latter sources “support[ed] the conclusion that Congress intended the compensation reduction provision to apply to all veterans[,] . . . regardless of whether the facility in which they were incarcerated was publicly or privately operated.”

Thus, Judge Davis began his analysis with the text and intrinsic sources, reminiscent of textualism. But he did not stop his analysis with these conclusive, intrinsic sources. Rather, he turned to an extrinsic source: legislative history. “The legislative history of section 5313 provides significant insight into the congressional intent underlying the section 5313 provision regarding benefits reduction for veterans incarcerated for a felony.” He found this history compelling. Moreover, he noted that the

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216 *See id.* at 144–45 (citing 38 U.S.C. § 5313(a)(1) (1993)).
217 *See id.* at 147 (citing Smith v. Derwinski, 2 Vet. App. 429, 431 (1992)).
218 *Id.*
219 *See id.* at 147–48.
220 *Id.* at 148.
221 *Id.*
veteran's interpretation was "unpersuasive" because the veteran had "provide[d] no support in the legislative history" for his argument that Congress intended to exclude State-contracted private prisons from the statute's coverage.222

Further, Judge Davis rejected the veteran's second argument regarding a recent amendment to the statute. In the amendment, Congress had specifically added "other penal institution or correctional facility" to the list of relevant prisons.223 The veteran had argued that this subsequent amendment to the statute showed that Congress believed that the statute as originally drafted did not apply to privately run prisons.224 Judge Davis rejected the veteran's argument because it was contrary to the legislative history: "[T]he legislative history of the [amendment] states that it was promulgated as part of 'technical and clarifying amendments to title 38.'"225 For Judge Davis, the legislative-amendment history "further demonstrate[d]... that the prior version of the statute adequately expressed the congressional intent to provide for a reduction of benefits to veterans incarcerated for commission of a felony, regardless of whether the institution in which a veteran is confined is a State institution or a State-contracted institution."226 Hence, Judge Davis used intentionalism in this case, finding legislative history to be dispositive evidence of Congress's specific intent on the issue.

Similarly, Judge Davis used intentionalism in Robinson v. Shinseki.227 The issue in that case was whether a woman who pled nolo contendere to killing her veteran husband could nevertheless recover benefits from the VA.228 The statute at issue used mandatory language—"shall"—requiring the payment of the benefits, and it contained no common-law slayer exception.229 Despite the clear language of the statute, the Board denied her claim based on a regulation interpreting the statute that specifically prohibited a surviving beneficiary from recovering benefits when that beneficiary intentionally and wrongfully killed the veteran.230

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222 Id. at 149.
223 Id. at 146 n.3, 149.
224 See id. at 149.
226 Id. (emphasis added).
228 See id. at 441–42.
230 See Robinson, 22 Vet. App. at 444.
The widow appealed, arguing that the Secretary did not have authority to issue the regulation under the relevant statute.\textsuperscript{231} In response, the Secretary said that it had never claimed that the statute at issue provided such authority.\textsuperscript{232} Rather, the Secretary argued that authority came from another statute, which allowed the VA "to prescribe all rules and regulations which are necessary and appropriate to carry out the laws administered by the Department."\textsuperscript{233} This latter statute offered a sufficient grant of authority from Congress to issue the regulation interpreting the benefits statute.\textsuperscript{234} To this argument, the widow responded that because the general language in the second statute was followed by four specific examples, each of which was procedural, the Secretary did not have authority to issue a substantive regulation.\textsuperscript{235} The Veterans Court rejected the widow's arguments.\textsuperscript{236} In rejecting her \textit{expressio unius} argument (that the expression of the procedural examples excluded the ability to issue substantive regulations), Judge Davis noted that a single sentence in a statute did not limit the court; rather, the court must "look to the provisions of the whole law and to its object and policy."\textsuperscript{237}

Looking at the law as a whole, Judge Davis reasoned that the statutory scheme showed that "Congress most certainly did contemplate that the Secretary would institute substantive rules under the authority of [the enabling statute]."\textsuperscript{238} As for the benefits statute specifically at issue in the case, Judge Davis was not troubled by the mandatory "shall" language, nor by the statute's silence on this topic.\textsuperscript{239} Rather, he found it "highly unlikely that Congress would have intended to confer DIC benefits of persons whose claims to those benefits result from their own acts of intentional and wrongful homicide."\textsuperscript{240} Instead, "Congress legislates against a common law background . . . [which includes] a long-standing common law principle known as the 'slayer's rule.'"\textsuperscript{241} Thus, Judge Davis concluded that Congress's likely awareness of this common-law background should defeat clear text.\textsuperscript{242}

\textsuperscript{231} See \textit{id.} at 443-44.  
\textsuperscript{232} See \textit{id.} at 444.  
\textsuperscript{233} See \textit{id.} at 443 (quoting 38 U.S.C. § 501(a) (2006)).  
\textsuperscript{234} See \textit{id.} at 444.  
\textsuperscript{235} See \textit{id.} at 443.  
\textsuperscript{236} See \textit{id.} at 445.  
\textsuperscript{237} See \textit{id.} (quoting Meeks v. West, 216 F.3d 1363, 1367 (Fed. Cir. 2000)).  
\textsuperscript{238} \textit{id.}  
\textsuperscript{239} See \textit{id.} at 445-46.  
\textsuperscript{240} \textit{id.} at 444.  
\textsuperscript{241} \textit{id.}  
\textsuperscript{242} See \textit{id.} at 445-46.
2. Purposivism: The Theory

Purposivists focus on the general intent, or purpose, for the statute, rather than the specific intent of the enacting legislature. The difference is subtle. As we just saw, intentionalists look for the enacting legislature's specific intent and search broadly to find it. Likewise, purposivists look broadly. Then, you might ask, how do these theorists differ? These two theorists differ in their reason for examining these extratextual sources of meaning. When examining extratextual sources, intentionalists seek specific intent: What did the enacting legislature intend regarding the precise problem presented to the court? For example, did the legislature intend to allow a wife to receive benefits when that wife intentionally killed her veteran husband? In contrast, when examining extratextual sources, purposivists seek general intent: What problem was the legislature trying to redress, and how did it redress that problem? Purposivists do not focus on whether the enacting legislature thought about and had an answer to the precise issue presented in the case. Rather, purposivists focus on what problem the legislature was trying to address and how the court's decision would best further that purpose. "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.

You will remember that intentionalists are willing to look at all sources of evidence to determine statutory meaning, but focus particularly on the text, legislative amendments, and legislative history. Similarly, because purposivism "focuses on the broad goals of a statute, on the problem the legislatures meant to address by passing the statute[, b]oth the text and the legislative history help a court determine those goals." Thus, purposivism, like intentionalism, begins with the text and, similarly, does not stop there:

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243 See, e.g., Train v. Colo. Pub. Interest Research Group, Inc., 426 U.S. 1, 10 (1976) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) [internal quotation marks omitted]).

244 See Robinson, 22 Vet. App. at 444.

245 Once the purpose and remedy have been identified, then purposivists interpret the statute to further that purpose subject to two caveats: judges should not give words (1) "a meaning [those words cannot] bear" nor (2) "a meaning [that] would violate . . . established policies." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).


There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words as used in the statute is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."248

Purposivism, also known as legal-process theory, is perhaps the oldest form of interpretation.249 In the Middle Ages, detailed statutes were difficult to produce, and it was hard to develop and circulate multiple drafts.250 Photocopiers did not exist. Thus, early English lawmakers voted based on the general goal, or purpose, of the statute, not on the precise statutory language.251 To interpret statutes enacted in this way, judges focused on "the spirit" of the legislation rather than on the exact wording. Purposivism permitted this focus.252

Like early English statutes, early American statutes were also very general. For example, the Sherman (Antitrust) Act, which was enacted in 1890, fits nicely on one page, while the Patriot Act, which was enacted in 2001, takes up 132 pages.253 The legislature drafted such broad statutes early on to allow reasoned judicial development of an area of law. With so little textual guidance, judges needed something other than the text to guide and unify interpretation. Purpose provided that unifying something. Judges could easily choose interpretations by discerning which interpretation best

248 Am. Trucking Ass'ns, 310 U.S. at 543-44 (footnotes omitted).
249 See JELLUM & HRICIK, supra note 54, at 51 ("Purposivism . . . may be a relic of early common law reasoning improperly brought from that realm into the modern realm.").
250 JELLUM, supra note 5, at 27.
251 Id.
252 Id.
furthered the statutory purpose. Purpose helped judges fit the statute into the legal system as a whole and make coherent public policy.254

In the United States, purposivism made an early appearance in the 1892 case Church of the Holy Trinity v. United States.255 In that case, a statute made it unlawful for anyone to import any alien into the United States to "perform labor or service of any kind."256 Holy Trinity Church had hired a rector from England—rectoring, according to the Court, qualified as both labor and service.257 Despite the clarity of the text, the Court held that the statute did not apply because the purpose of the Act was to "stay the influx of... cheap unskilled labor."258 Rectoring, the Court concluded, was neither cheap nor unskilled labor.259 Famously stating that "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers,"260 the Court resolved the case using purposivism.

Purposivism came more fully into vogue shortly after World War II, during a time of "relative consensus[,]... sustained economic growth, and burgeoning optimism about government's ability to foster economic growth by solving market failures and creating opportunities."261 The Supreme Court followed this theory, for the most part, throughout the 1950s and 1960s.262 By the 1970s, however, America was changing. Economic growth had faltered, and issues relating to war, family, and government were much more controversial. Government became the enemy rather than the savior. Additionally, statutes became more complex and comprehensive. With those changes came a change in the judicial theory of statutory interpretation. Intentionalism garnered favor with such justices as Chief Justices Burger and Rehnquist.263 Today, Justice Breyer remains one of the few remaining Supreme Court proponents of purposivism, although

254 See United States v. Monia, 317 U.S. 424, 431–32 (1943) (Frankfurter, J., dissenting) (cautioning, "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. . . . A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose.").
255 Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).
256 Id. at 458.
257 See id.
258 Id. at 465.
259 See id. at 472.
260 Id. at 459.
262 See JELLUM, supra note 3, at 28; Tiefer, supra note 169, at 213–15.
263 See JELLUM, supra note 3, at 28; Tiefer, supra note 169, at 213–15.
Justice Stevens occasionally joins him. To most judges, purposivism appears to be a relic from early statutory development that has little application in a world in which complex statutes are the norm. Today, there is a renewed emphasis on the importance and primacy of the text.

Remember that adherents of the competing theories differ regarding their view of the appropriate role for the judiciary. While intentionalists view themselves as faithful agents of the legislature, purposivists view themselves as "faithful agent[s] of a well-functioning regulatory regime." For this reason, purposivists attempt to discern the evil, or mischief, that the legislature wanted to address when enacting the statute. Next, they identify the remedy the legislature selected to address that mischief. Finally, they interpret the language of the statute to "suppress the mischief... and advance the remedy." To find the mischief and remedy, purposivists examine text and legislative history, as well as other relevant sources, such as social and legal context. "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy... That aim... is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose."

Purposivists, like intentionalists but unlike textualists, do not need a reason to look beyond the text. To a purposivist, a statute makes sense only when understood in light of its purpose. Understanding a statute without understanding its purpose is nonsensical. For example, consider a hypothetical city ordinance prohibiting "vehicles" in the park. Is a scooter a vehicle? To decide this issue, a purposivist judge might ask why the city council enacted the ordinance in the first place. If the council's
purpose was to limit air and noise pollution, then “vehicle” should not be interpreted so broadly as to include scooters. If, instead, the city’s purpose was to increase pedestrian safety, then, perhaps, “vehicle” should be so interpreted. This example shows how purpose can aid interpretation.

While purposivism and intentionalism are similar, purposivism has one advantage over intentionalism: Purposivists can interpret statutes in situations never contemplated by the enacting legislature. “Purposivism . . . renders statutory interpretation adaptable to new circumstances.” For example, return to the hypothetical city ordinance prohibiting vehicles in the park. A purposivist judge could determine whether the ordinance applied to skateboards and Segways even if these “vehicles” did not exist when the ordinance was adopted. In contrast, intentionalists might conclude that the ordinance does not apply because the city council could not have intended to regulate something not in existence when the law was enacted. Thus, purposivism offers flexibility that intentionalism does not and allows for laws to change with the times, something true intentionalism is incapable of.

Another advantage of purposivism is that, like intentionalism, purposivism allows its adherents to determine meaning from a wide variety of sources. Arguably, purposivists seek meaning from the broadest number of sources and thus make the most informed decision of all the theorists. Purposivists will consider all of the relevant evidence bearing on the meaning of the language at issue because the more evidence the court considers, the more likely the court will arrive at a proper conclusion regarding that meaning.

But there are criticisms of purposivism as well. The most troublesome aspect for purposivists, of course, is that it is difficult to discern a statute’s purpose. Ideally, legislatures would include a findings or purpose provision in the enacted text of every statute; a codified purpose clause would make text-focused judges more comfortable. Unfortunately, legislatures do not

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275 ESKRIDGE ET AL., supra note 203, at 221.
276 See Bell, supra note 274, at 88.
277 See JELLUM, supra note 3, at 29.
278 See id.
279 See id.
280 Under early English law, judges relied heavily on such clauses, viewing these clauses as the best evidence of statutory purpose. See id. at 124.
281 Surprisingly, textualists will not review such components, even those clauses that have been codified, absent ambiguity, absurdity, or scrivener’s error. See, e.g., Jurgensen v. Fairfax County, 745 F.2d 868, 885 (4th Cir. 1984) (“If the operative sections [of a statute] are clear and unambiguous, the preamble of the statute is neither essential nor controlling in the construction of the Act.”) (internal quotation marks omitted); see also Price
regularly do so. Thus, judges often look for unexpressed purpose. To find such unexpressed purpose, purposivists consider legislative history, legal history, social context, and other sources. But these sources may not be conclusive.\textsuperscript{282} What then? Some legal theorists have suggested that to figure out a statute’s primary purpose, a judge should posit various situations. In other words, a judge should start with the situations clearly covered and radiate outward.\textsuperscript{283} Yet, even if purpose is discernible in this or some other way, there may be competing ideas of how to further the identified purpose. For example, is affirmative action the best way to achieve racial parity?

A related criticism of purposivism is that statutes often have more than one purpose and these purposes can conflict. For example, one purpose of Title VII, which prohibits discrimination in the workplace, was to increase the number of African-Americans in the workforce.\textsuperscript{284} Another purpose was to make hiring and other work-related decisions color-blind.\textsuperscript{285} Voluntary affirmative action programs further the first purpose, but not the second.\textsuperscript{286} Is the fact that one purpose is furthered enough to sustain an interpretation, or must all purposes be furthered? Purposivism does not answer this question.

Similarly, a statute may have one purpose, while an exception to that statute may have a conflicting purpose. For example, one purpose of the Freedom of Information Act\textsuperscript{287} (FOIA) is to encourage open government.\textsuperscript{288} But some of the exceptions within the Act, such as prohibiting the disclosure of personnel files, exist to protect individual privacy.\textsuperscript{289} When a judge interprets an exception, which purpose should control: the purpose of the Act or the purpose of the exception?\textsuperscript{289} In other words, should the judge

\textsuperscript{282}See SmELLUM, supra note 3, at 28.
\textsuperscript{283}See HART & SACKS, supra note 245, at 1377–80.
\textsuperscript{285}See id. at 203–04.
\textsuperscript{286}See id. at 204.
\textsuperscript{288}See generally Church of Scientology v. U.S. Dep’t of Justice, 612 F.2d 417, 431 (9th Cir. 1979) (Wallace, J., dissenting) (arguing that an exception to FOIA should be narrowly interpreted because the Act “is in favor of disclosure” (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1979)) (internal quotation marks omitted)).
\textsuperscript{289}See § 552(b)(6).
\textsuperscript{290}In Church of Scientology, 612 F.2d 417, the majority and dissent split regarding which purpose mattered. The Church of Scientology had requested certain documents from the Department of Drug Enforcement Administration (DEA) under FOIA. Id. at 419. FOIA generally requires disclosure of all government records subject to limited exceptions. See § 552(a). The exception at issue in the case exempted from disclosure “records or information compiled for law enforcement purposes . . . [if] the production of such law enforcement records or information could . . . disclose the identity of a confidential
interpret the exception in FOIA narrowly to better further the purpose of the Act as a whole or broadly to better further the purpose of the exception? Again, purposivism does not answer this question.

Another criticism of purposivism is that judges are constitutionally required to interpret statutory language. They are not appropriate policymakers because they are not elected and they are not expected constitutionally to perform this function. [259] “[C]onsultation of extrinsic, non-textual sources of interpretation in every case, regardless of whether the language of the statute is clear . . . subordinates the statutory text and renders the analysis more vulnerable to subjectivity.” [260] When judges make decisions based on their own policy choices, disguised as purpose, at the expense of the legislature’s choices, judges aggrandize their constitutional role and intrude into the legislative arena.

In addition, some suggest that purposivism encourages “activist” or “unintended” interpretation. “[P]urpose . . . is normally of such generality as to be useless as an interpretative tool, unless . . . it is being used as a cover for the judge to ‘do justice’ as he sees fit.” [261] Finally, purposivism may have been more appropriate when statutes were broader and more general and

source . . . [or if the records or information were] furnished only by the confidential source.” § 552(b)(7)(D) (emphasis added); see Church of Scientology, 612 F.2d at 419. The issue for the court was whether the term “confidential source” included non-human sources, such as law enforcement offices. See Church of Scientology, 612 F.2d at 420.

Starting with the text, the majority found it clear: “[C]onfidential source” includes foreign state and local law enforcement agencies . . . .” Id. Despite the clarity of the text, the majority turned to the legislative history of the exception for confirming evidence of specific intent and purpose. Id. at 422. Finding no evidence of specific intent, the majority searched for purpose. See id. at 423. Reviewing the conference committee report, the President’s veto statement, and floor debates surrounding the override, the majority concluded that the legislature did not use the term “confidential source” to mean only human sources. See id. at 424–26. Rather, this history showed that the purpose of the exception was to ensure that law enforcement would be able to gather information. See id. at 425. Hence, a broad interpretation was appropriate in the case based on both the purpose and the text. See id. at 427.

The dissent disagreed with the majority’s interpretation of the legislative history. Agreeing that the text was clear, the dissent nonetheless pursued the legislative history for evidence of specific intent. See id. at 428 (Wallace, J., dissenting). Unlike the majority, the dissent found specific intent: Congress intended to cover only human “confidential sources.” Id. Further, the dissent disagreed with the majority that the purpose of the exception was the appropriate purpose to consider. See id. at 431. Rather, the purpose of FOIA, not FOIA’s exception, was relevant. See id. Because the basic policy of FOIA “is in favor of disclosure,” the dissent argued that the act should be narrowly interpreted. Id. Thus, unlike the majority, but like the Court in Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), the dissent would have allowed the legislative history and general purpose to trump plain meaning. See Church of Scientology, 612 F.2d at 431 (Wallace, J., dissenting).

292 See Walker, supra note 65, at 206.
293 State ex rel. Kalal v. Circuit Court for Dane Cnty., 681 N.W.2d 110, 125 n.8 (Wis. 2004).
thus were more in need of, and more amenable to, such interpretations. Purposivism, critics say, may be a relic of early common-law reasoning improperly brought into the modern realm.

Not surprisingly, opinions from the Veterans Court and Federal Circuit evince purposivism. For example, Judge Davis used purposivism in *Sharp v. Shinseki.* The facts of the case are complicated: In 1995, a VA regional office had granted a veteran’s service-connection claim. In the letter granting the claim, the VA told the veteran that he had one year to file additional information if he wanted additional compensation benefits for his dependents and if he wanted those benefits to be retroactive to the date of the award; he failed to forward the information timely. When he did send in the additional information, the VA awarded the benefits, but, because he forwarded the information after the one-year deadline, the award was effective only back to the date of the late filing (January 1997), not to the date of the original award (August 1995). The veteran did not appeal the additional compensation award, which for our purposes will be called the first award (the January 1997 award).

In 1998, the VA regional office determined that the veteran was unemployable due to service-related injuries and awarded him benefits effective from the date of his injury, December 1, 1988. The veteran challenged this award because it did not include additional compensation for his dependents retroactive to 1988. This award will be called the second award (the 1998 award). When the regional office denied the

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296 See Walker, supra note 65, at 237.
297 Judge Learned Hand was a noted purposivist; he acknowledged that searching for purpose was “a hazardous process,” but believed that judges could not “escape it, once [they] abandon[ed] literal interpretation,” which he described as “a method far more unreliable.” Borella v. Borden Co., 145 F.2d 63, 64–65 (2d Cir. 1944), affd, 325 U.S. 679 (1945). Judge Hand recognized one risk of purposivism: On the one hand [a judge] must not enforce whatever he thinks is best; he must leave that to the common will expressed by the government. On the other, he must try as best he can to put into concrete form that which will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed.

299 Id. at 269.
300 Id.
301 See id.
302 Id.
303 Id.
304 Id.
challenge, the veteran sought Board review; however, he died while the appeal was pending.305

After the veteran died, the veteran’s wife filed for the additional compensation based on the second award.306 The regional office denied the request, reasoning that the first award was final and that the law did not allow for an earlier effective date once entitlement to additional compensation had been established.307 The Board affirmed; the wife appealed to the Veterans Court.308 The issue before the court was whether the statute required that additional compensation benefits be awarded to dependents based on the first qualifying rating (in this case the first award) or whether it could be based on any qualifying rating (in this case the second award).309 To resolve this issue, the court had to reconcile two related statutes: 38 U.S.C. § 1115, which awarded additional compensation for dependents, and 38 U.S.C. § 5110(f), which established the effective date for any such awards.310

To reconcile the statutes, the court first examined § 1115 and found that the language of that statute “clearly and succinctly address[ed] when a veteran [was] entitled to additional compensation for dependents.”311 Additionally, Judge Davis turned to the legislative history and noted that “[t]he purpose of the statute [was] also clear.”312 The purpose of the statute was to “defray the costs of supporting the veteran’s . . . dependents’ when a service-connected disability is of a certain level hindering the veteran’s employment abilities.”313 Thus, the purpose would favor a broad interpretation of § 1115.

However, the text of § 1115 was silent regarding how the effective date for such claims should be determined. In the face of this silence, Judge Davis did not hesitate, but turned to the legislative history to resolve the issue of what effective date should apply to § 1115 claims:

The limited legislative history enlightens the Court as to the purpose of providing additional compensation for dependents, but such history does not assist the Court in determining whether Congress intended additional

305 Id.
306 See id.
307 Id. at 269–70.
308 Id.
309 See id. at 271.
310 See id.
311 Id.
312 Id. at 272.
313 Id. (quoting S. REP. NO. 95-1054, at 19 (1978)).
compensation for dependents under section 1115 to be on (1) only the first rating decision meeting statutory criteria of section 1115 or (2) any rating decision meeting the statutory criteria.\(^{314}\)

Finding the legislative history unenlightening, Judge Davis returned to the text and concluded that entitlement to §1115 benefits should accrue whenever the statutory factors were met.\(^{315}\) Although the statute did not explicitly so provide, Judge Davis concluded that whenever a veteran met §1115's criteria, the veteran’s dependents were impliedly entitled to additional compensation.\(^{316}\)

A finding of implicit entitlement was not, however, enough to resolve the issue before the court. The remaining issue, the effective date of the award, was still pending. Hence, Judge Davis next turned his focus to the second statute at issue, § 5110(f), to determine whether that statute conclusively resolved the question.\(^{317}\) Judge Davis turned first to intrinsic sources, including the text, dictionary definitions, and the statutory scheme.\(^{318}\) Next, he reviewed the legislative history and concluded that “neither statute on its face nor legislative history provides any guidance in answering the precise question at issue.”\(^{319}\) Having exhausted intrinsic sources and finding nothing useful in the legislative history, Judge Davis next turned to and rejected the relevant regulations because they “merely parrot[ed]” and “mirror[ed]” the statutory language.\(^{320}\) Ultimately, to resolve this issue, Judge Davis turned to a policy-based source: Gardner’s presumption that “interpretative doubt is to be resolved in the veteran’s favor.”\(^{321}\)

While Judge Davis’s opinion in this case has aspects of soft plain-meaning theory, for he started with text and did not end there, I have classified it as purposivist because Judge Davis stated that he was looking at the legislative history specifically to find the purpose of the two statutes in question. But this case shows that the categories of interpretive theory are imprecise.

\(^{314}\) Id.

\(^{315}\) See id.

\(^{316}\) See id.

\(^{317}\) See id.

\(^{318}\) See id. at 273.

\(^{319}\) Id. at 274.

\(^{320}\) Id. at 274–75.

\(^{321}\) Id. at 275 (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)) (internal quotation marks omitted).
As for the Federal Circuit, *Reizenstein v. Shinseki* provides an example of purposivism.\(^{322}\) In that case, the Federal Circuit affirmed the VA's position that one of its regulations applied only prospectively and not retrospectively.\(^ {323}\) In doing so, Judge Prost, writing for the majority, focused on the purpose of the regulation,\(^ {324}\) which was to protect veterans who were dependent on incoming compensation.\(^ {325}\) Granted, Judge Prost first suggested that the "text of the regulation [did] not unambiguously answer the question,"\(^ {326}\) but he did not explain why the text or other intrinsic sources failed to resolve the issue. Moreover, Judge Mayer, who dissented, used moderate textualism and specifically chastised the majority for ignoring the clear text:

> The text of the regulation is clear . . .

> . . . I cannot agree with the majority's reasoning that a regulation can be ignored when its application would not further . . . policy goals . . . .

> This [theory] makes a mockery of the literal text and invites the judiciary to cherry-pick among policies purportedly the source of the regulation even though the text speaks for itself.\(^ {327}\)

Hence, purposivism is alive and well within the Veterans Court and Federal Circuit.

C. A Compromise Theory

All of the theories have shortcomings. For this reason, Alaska's judiciary specifically rejected all of the above theories and created its own unique theory.\(^ {328}\) This theory, the "sliding-scale theory," blends elements of textualism, intentionalism, and purposivism.\(^ {329}\) It allows judges to consider a statute's meaning without first finding ambiguity, absurdity, or scrivener's error by applying a sliding scale of clarity. The sliding-scale theory states simply that *all* evidence of meaning is relevant; however, "the [clearer] the


\(^{323}\) *See id.* at 1333.

\(^{324}\) Although this case involved the interpretation of a regulation rather than a statute, for our purposes, there is no difference.

\(^{325}\) *Id.* at 1337.

\(^{326}\) *Id.*

\(^{327}\) *Id.* at 1338–39 (Mayer, J., dissenting).


\(^{329}\) *See id.*
statutory language, the more convincing the evidence of a contrary legislative purpose or intent must be." In other words, Alaska adopted soft plain-meaning theory with a twist.

The Alaska judiciary considered, but rejected, modern textualism because that theory overly restricted the inquiry. In doing so, the Alaska Supreme Court explained its choice. According to the court, "words are necessarily inexact and ambiguity is inherent in language," thus, other sources of meaning often prove helpful in construing a statute. For this reason, even if the statute under consideration is facially clear, the legislative history can be considered because it might "reveal an ambiguity not apparent on the face of the statute." Alaska’s sliding-scale theory has inherent appeal. It rejects textualism’s potential overreliance on text and intentionalism and purposivism’s potential underreliance on text. Under the sliding-scale theory, the plainer the text, the more convincing the contrary indications of meaning must be to trump the text. This soft version of textualism turns the plain-meaning canon into a rebuttable presumption: the ordinary meaning will control absent convincing evidence that the legislature intended a different meaning. In many ways, this theory blends the best of the above theories, while avoiding their weaknesses: Text is the primary, but not exclusive, evidence of meaning.

In at least one case, the Veterans Court followed this approach. In Davenport v. Brown, the court held that a vocational-rehabilitation statute did not require a veteran’s service-connected disability to "materially contribute" to the veteran’s employment handicap. In reaching this holding, Judge Farley first found the text of the statute clear, but then examined the legislative history. In doing so, he specifically stated, "The Secretary must make an extraordinarily strong showing of clear legislative intent in order to convince us that Congress means other than what it ultimately said." Ultimately, Judge Farley concluded that the Secretary

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330 Id. at 1299–1300.
332 Id.
333 Id.
335 Id. at 477.
336 See id. at 481–86.
337 Id. at 484 (citations omitted) (internal quotation marks omitted).
failed to make the extraordinary showing necessary because the legislative history actually supported the veteran’s argument.\textsuperscript{338}

IV. WHY THEORY MATTERS

In conclusion, there are a multitude of interpretive theories but no universal agreement as to which is best. Moreover, none of these theories is necessarily better than any other. Hence, one might wonder, “Does theory matter?” For practicing attorneys, the answer to the question, “Does theory matter?” is absolutely “yes.” Academics love to debate the pros and cons of each of the theories.\textsuperscript{339} But no one theory best resolves statutory meaning. There is simply no empirical way to prove that one theory reaches the “right” interpretation more often than another because there is no way to discern the true meaning of statutory language. Hence, the right approach to interpretation will continue to be debated in academic journals and in courtrooms.\textsuperscript{340}

The reality is that, beyond Justice Scalia and Judge Easterbrook, few judges are so rigid in their doctrine that they see only the trees and not the forest.\textsuperscript{341} Few judges doggedly adhere to just one theory. Our review of the Veterans Court and Federal Circuit judges proved this point. While Judge Hagel generally leans toward moderate textualism, he has written opinions that use soft plain meaning and new textualism, and he has signed onto opinions that might more correctly be labeled as intentionalist. Similarly, Judge Davis leans more toward intentionalism, but elements of textualism

\textsuperscript{338} Id. at 486.

\textsuperscript{339} See, for example, the famous article involving the hypothetical case of the Speluncean explorers. Lon L. Fuller, \textit{Case of the Speluncean Explorers}, 62 HARV. L. REV. 616 (1949). In this article, the late Professor Fuller explored a hypothetical case involving cannibalism and survival. See \textit{id}. He drafted the article to resemble a court opinion in which the hypothetical judges used different interpretive theories to determine whether the relevant statute had been violated. See \textit{id}. The statute provided simply: “Whoever shall willfully take the life of another shall be punished by death.” \textit{Id}. at 619. The article demonstrates the relevance of interpretive theory on decision-making.

\textsuperscript{340} Connecticut’s and Wisconsin’s judiciaries have had some interesting debates about these theories. See, e.g., State v. Courchesne, 816 A.2d 562 (Conn. 2003); State ex rel. Kalal v. Circuit Court for Dane Cnty., 68 N.W.2d 110 (Wis. 2004).

\textsuperscript{341} Even Justice Scalia may not be as dogmatic as he appears. See Miranda McGowan, \textit{Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation}, 78 MISS. L. J. 129 (2008) (concluding that even when Justice Scalia believes the text controls, he regularly decides that the ordinary meaning of the text has been overcome in the particular case). Justice Scalia has acknowledged as much: “I play the game like everybody else . . . I’m in a system which has accepted rules and legislative history is used . . . You read my opinions, I sin with the rest of them.” Frank H. Easterbrook, \textit{What Does Legislative History Tell Us?}, 66 CHI.-KENT L. REV. 441, 442 n.4 (1990) (quoting \textit{JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY} 174–75 (Robert A. Katzmann ed., 1988)) (internal quotation marks omitted).
find their way into his rhetoric. Indeed, to be effective, judges must eschew rigidity.

Professors Eskridge and Frickey best summed up the reality of today's doctrine:

We do not think the Supreme Court has entirely returned to the pre-Scalia days and suggest the following generalities about where it is today. First, the text is now, more than it was 20 or 30 years ago, the central inquiry at the Supreme Court level and in other courts that are not following the Supreme Court's lead. A brief that starts off with, "The statute means thus-and-so because it says so in the committee report," is asking for trouble. Both advice and advocacy should start with the statutory text. Because the Court frequently uses the dictionary to provide meaning to key statutory terms, the advocate should incorporate this methodology as well . . . . Second, the "contextual" evidence the Court is interested in is now statutory as much as or more than just historical context. Arguments that your position is more consistent with other parts of the same statute are typically winning arguments. Similarly, as [one case] indicates, the Court today goes beyond the "whole act" rule to something like a "whole code" rule, searching the United States Code for guidance on the usage of key statutory terms and phrases.

Third, the Court will still look at contextual evidence and is very interested in the public law background of the statute. If a statute seems to require an odd result . . . . , the Court will interrogate the background materials to find out why . . . . It remains important to research and brief the legislative history thoroughly. The effective advocate will appreciate that the presence of such materials in the briefs may influence the outcome more than the opinion in the case will indicate.342

V. CONCLUSION

In reality, while academics will continue to rigorously argue the legitimacy of the various theories, judges will remain less wedded to them:

In deciding a question of statutory interpretation in the real, as opposed to the theoretical, world, few judges approach the interpretive task armed with a fixed set of rigid rules. In briefs, the parties make all of the arguments they can think of, whether based on the relevant case law, the "plain text," the legislative history, or the statute's underlying purpose or purposes in effectuating a policy or remediating mischief. I have difficulty imagining that any judge, presented with such arguments, would,

342 Eskridge et al., supra note 203, at 770-71 (footnote omitted).
for example, simply evaluate the so-called plain meaning of the statute and then stop reading the brief. Even a judge’s strongest theoretical inclinations are tempered by the judge’s desire to accord a fair hearing to the parties’ arguments and to be open to all credible materials that might enhance the judge’s understanding of the case.343

Judges regularly mix theories, fail to identify their theory, and even change theories; ultimately, judges want to further justice, not to be dogmatically rigid. Perhaps, as legal realists theorize, none of this theory stuff really matters. The reality is that judges decide cases based on their own personal notions of justice and the underlying equities of the case. For this reason, you should not expect to win your case simply because you correctly identify a judge’s preferred theory. But, the theories do provide a language and a roadmap for you to present your case to a particular judge. If you know your judge’s theory, then you can structure your argument to best influence that judge. For example, if you are arguing before Justice Scalia, you know by now that you should not start your brief with an analysis of the legislative history. Ultimately, however, and regardless of a judge’s theory, to win your case you must prove to each judge that ruling for your client is the just and right thing to do.

343 Walker, supra note 65, at 232–33. When he wrote this article, John Walker was the Chief Judge of the Second Circuit.