Chapter 3

Theories of Interpretation

> "The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."
>
> HENRY M. HART, JR. & ALBERT M. SACKS

I. Introduction

The first two chapters of this book focused on the relative powers of Congress and the Executive Branch in the creation of statutes and the procedures that Congress uses to make statutes. This chapter shifts the focus to courts and the interpretation of statutes. As noted above, many statutes adopted after the New Deal delegate powers to agencies to implement and administer statutes. Consequently, agencies often interpret statutes even before courts interpret the statutes. While the manner in which agencies interpret statutes can have significant impacts on the public and can affect the manner in which courts interpret the same statutes, those issues will be dealt with later in this book. This chapter focuses, instead, on statutory interpretation by ***courts***.

Judges utilize various ***theories*** and ***tools*** to interpret statutes, regardless of whether the statutes involve administrative agencies, and judges modify their interpretive approach to some extent when administrative agencies are involved. Agencies rely on many of the same theories and tools when deciding how to apply ambiguous statutes in the absence of judicial direction, as do lawyers when counseling and advocating for clients. ***Theories*** are the broad, general philosophical approaches to statutory interpretation, and focus on the goals of statutory interpretation. Theories address issues such as (1) whether laws should be interpreted based simply on the text as enacted; (2) whether they should be interpreted in a manner that advances the intent of the enacting legislature, even though that interpretation creates tension with the language enacted; (3) whether they should be interpreted in a manner that advances the overall purposes of the legislation; and (4) whether they should be interpreted dynamically, to evolve to address changes in the law and society. ***Tools***, on the other hand, are the very specific rules and canons that courts apply to interpret statutes once they have chosen a theory to use when interpreting the statute. Some examples of traditional rules and canons of statutory interpretation are (1)

language in a statute that can have multiple meanings should be interpreted according to the ordinary meaning of the language; and (2) when a word that can have several meanings is used in a list of other words, the word should be interpreted to have a meaning that is consistent with the meanings of the other words with which it is used. This chapter will focus on the ***theories*** of statutory interpretation. The ***tools*** will be covered in several subsequent chapters.

II. Lack of Uniformity in Statutory Interpretation

Take heed, readers, if you hope that this book will identify a consistent, uniform approach for statutory interpretation by courts. As Henry Hart & Albert Sacks, leaders of the "Legal Process" movement in the 1950s, observed (and as many have echoed since then), "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[1] While many judges rely on particular theories in most cases, few judges are dogmatic in their adherence to a single theory and judges routinely apply the canons and other tools of interpretation in seemingly inconsistent ways across the spectrum of cases that they decide.[2] Significantly, while courts give "stare decisis" effect to the interpretations of the ***language*** of statutes, they do ***not*** give any "stare decisis" effect to the ***methods*** that are used to interpret statutes (methodological stare decisis). Unlike most other areas of law, judges do not accord any precedential value to the ***theories*** or ***tools*** used to interpret statutes by superior courts (including the Supreme Court) or by their own court, even when they are interpreting a statute that they, or a superior court, has previously interpreted.[3] Thus, even though a court may have interpreted a statutory term according to its dictionary definition in one case, the court might interpret another section of the statute broadly to achieve the underlying purposes of the statute in another case, ignoring a primary dictionary definition.

Critics argue that the lack of uniformity makes it difficult for the public and lawyers to predict how courts will interpret statutes and gives courts too much discretion to interpret statutes in ways that are based on personal preferences rather than legislative preferences.[4] Even though judges frequently apply canons of construction (***tools***) to interpret statutes, Karl Llewellyn famously illustrated decades ago that most canons have

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[1] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). *See also,* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 14 (Amy Gutmann ed., 1997).

[2] *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1302 (2018).

[3] *Id.*

[4] *See, e.g.,* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2141-2142 (2002).

a counter-canon that could be argued to apply in similar circumstances to suggest a different interpretation of the statute than the interpretation suggested by the primary canon.[5] Accordingly, critics argue that the ad-hoc application of canons allows judges to assert authority for whatever interpretation aligns with their policy preferences.[6]

Many states have attempted to create a more consistent and uniform system of statutory interpretation by adopting statutory directives. A statutory directive is a provision enacted by the legislature that clearly indicates to courts the legislature's intentions regarding how a statute or provisions in the statute should be interpreted.[7] State legislatures have frequently enacted canons of construction or entire codes of construction as statutory directives.[8] At the federal level, Congress has been more sparing in the adoption of statutory directives. Professor Abbe Gluck maintains that Congress has adopted "thousands" of rules of construction, but most of the federal rules of construction are preemption clauses, savings clauses, and severability clauses, which are narrowly targeted to address specific issues in individual statutes.[9] One of the few general statutory directives adopted at the federal level is the Dictionary Act, which counsels, among other things, that singular terms in federal statutes include plural terms, words used in the present tense include the present and future tense, and words importing the masculine gender include the feminine gender as well.[10]

Several commentators have advocated for adoption of broader federal statutory directives to address the cacophony of statutory interpretation in federal courts. Professor Nicholas Rosenkranz has proposed that Congress and the courts adopt Federal Rules of Statutory Interpretation through a process similar to the process used to codify the Federal Rules of Evidence and Federal Rules of Civil Procedure.[11] Thus far, though, Congress has not

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[5] *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 Vand. L. Rev. 395 (1950).

[6] *See* Rosenkranz, *supra* note 4, at 2142.

[7] *See* Linda D. Jellum, *"Which is to Be Master,"The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 U.C.L.A. L. Rev. 837 (2009).

[8] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2089-90 (2002) (noting that all 50 states and the District of Columbia have interpretive codes and citing many of the statutory provisions); Glen Staszewski, *The Dumbing Down of Statutory Interpretation,* 95 B.U. L. Rev. 209, 217 (2015); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L. L. J. 1750, 1786 (2010).

[9] *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 Wm. & Mary L. Rev. 753, 791-792, 802-803 (2013).

[10] 1 U.S.C. § 1.

[11] *See* Rosenkranz, *supra* note 8. As an alternative to Rosenkranz' proposal, Gary O'Connor has argued in favor of the adoption of a Restatement of Statutory Interpretation. *See* Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. Legis. & Pub. Pol'y. 333, 334 (2003). However, some commentators suggest that neither federal rules nor a Restatement are necessary as consensus methods of statutory interpretation are developing and that an influential book authored by Justice Antonin Scalia and Brian Garner could serve as

significantly expanded its use of statutory directives and there remains no uniform, consistent approach to statutory interpretation in American courts.

Questions and Comments

1. Constitutional Authority: Does the Constitution address whether courts or Congress can, or should, establish rules regarding the interpretation of statutes? What is the role of the courts under Article III? Is there authority in Article I for Congress to establish rules that courts should use when interpreting statutes? Are there any Constitutional limits on the rules that Congress could require courts to follow when interpreting statutes? *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation,* 115 Harv. L. Rev. 2085, 2091, 2102-2121, 2156 (2002). *See also* Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 Northwestern University L. Rev. 871, 918-919 (2015); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 Wm. & Mary L. Rev. 753, 803 (2013), *citing* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 244-245 (2012); Linda D. Jellum, *"Which is to Be Master,"The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 U.C.L.A. L. Rev. 837, 841-842, 947, 879, 890-896 (2009); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. Rev. 1239, 1246 (2002).

2. Expertise and accountability: IF both Congress and courts have authority to establish rules regarding the interpretation of statutes, what arguments might be made in favor of having one branch establish such rules, based on factors including expertise and accountability? Should such rules be established retroactively on a case-by-case basis or proactively and holistically? How would your response to that question impact which branch would be better situated to establish such rules?

3. Broad rules of statutory interpretation v. narrow rules of statutory interpretation: Are there any concerns raised by a legislatively created rule of statutory interpretation that applies generally to all statutes, or all statutes of a specific type, as opposed to a legislatively created rule of statutory interpretation that applies to a single statute? See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2113-2114 (2002); Linda D. Jellum, "*Which is to Be Master,"The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 U.C.L.A. L. Rev. 837, 841-42, 879, 895-896 (2009).

4. Codification and rules of statutory interpretation: As noted in the last chapter, when statutes are codified, rules of statutory construction are often moved to sections of the U.S. Code that are separate from other portions of the statute to which they apply or are simply included in editorial notes in the Code. Consequently, lawyers and judges may

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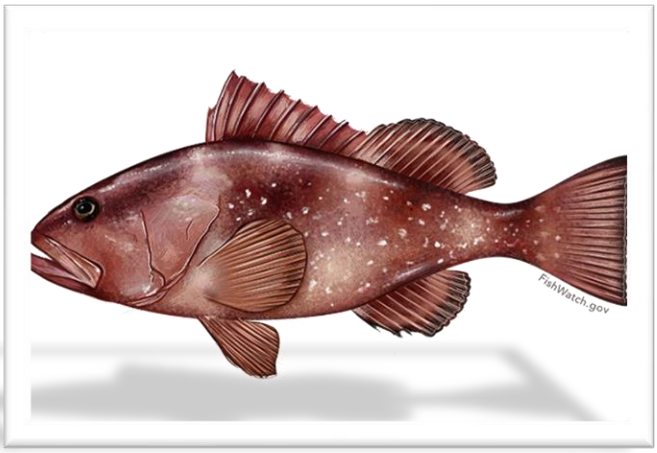
a de facto treatise on interpreting statutes. *See* Lawrence M. Solan, *Is it Time for a Restatement of Statutory Interpretation?*, 79 Brooklyn L. Rev. 733 (2014).

fail to apply those rules when interpreting the statute. This problem is exhibited quite clearly in the U.S. Supreme Court's decision in *Yates v. United States*, 574 U.S. 528 (2015). In that case, the Court was interpreting a section of Title 18 of the U.S. Code that imposes sanctions on anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an investigation by a federal agency." 18 U.S. C. § 1519. John Yates was a commercial fisherman who ordered a crew member to toss a red grouper into the sea to prevent federal authorities from confirming that he harvested undersized fish. 574 U.S. at 528 (Click here for a video of his story). The government maintained that the fish that was thrown overboard was a "tangible object," and that Yates had, therefore, violated Section 1519 of Title 18. *Id.* A plurality of the Court rejected the government's argument, relying, in part, on the location of Section 1519 within Title 18 and the fact that the title of Section 1519 is "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." *Id.* at 529. Justice Alito authored a concurring opinion that also relied, in part, on the title of the section. *Id.* at 552. However, neither of those opinions or the opinion of the dissenting Justices noted that Title 18 includes a provision, tucked into a note by the codifiers, that states that "[n]o inference of a legislative construction is to be drawn by reason of the [location] … in which any particular section is placed, nor by reason of the catchlines used in such title."[12] All of the Justices ignored, or were unaware of, the rule of construction adopted by Congress for Title 18 of the U.S. Code, which was relegated to the notes in the Code.



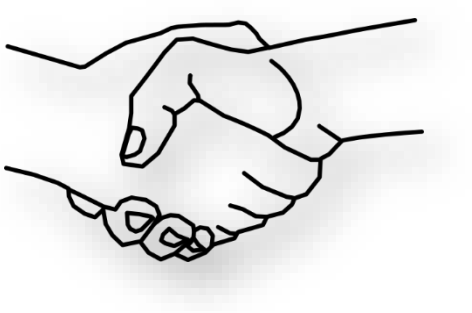
III. Role of the Court – Faithful Agent or Junior Partner?

The theory of interpretation that courts will adopt when interpreting statutes will depend, to some extent, on the court's view of the relationship between the judicial branch and the legislative branch. Most judges, and most theories, are based on the idea that courts

[12] *See* Act June 25, 1948, ch. 645, § 19, 62 Stat. 862.

are the "***faithful agents***" of the legislature.[13] When they interpret statutes, judges strive to give effect to the intent of the legislature, rather than substituting their own policy views.[14] The "faithful agent" model relies, in part, on a fiction that there is a "***unitary drafter***" of legislation."[15] The model is rooted in the Constitutional separation of powers, whereby Congress, not courts, has the power to make laws.[16] Most of the major theories of interpretation, including textualism, purposivism, and intentionalism, described below, are based on the "faithful agent" model, although the theories diverge with respect to identifying the appropriate way to effectuate the legislature's intent.[17]

There is, however, a competing model that is much less widely embraced. In lieu of a "faithful agent" model, some judges envision their role as "***junior partners***" of the legislature.[18] Those judges reject the view that their role is limited to implementing the legislature's intent and they believe that courts should enrich statutory law by interpreting laws consistent with contemporary values, even if such interpretations conflict with unambiguous statutory text.[19] This model is the foundation for the "dynamic" theory of interpretation discussed below.[20]



Regardless of whether statutory interpretation theories are based on a "faithful agent" or "junior partner" model, the theories generally espouse a "***universalist***" approach to statutory interpretation, in the sense that they are applied in the same manner regardless

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[13] *See, e.g.*, Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 110 (2010); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 10 n.26 (2006); William N. Eskridge, Jr., Phillip P. Frickey & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 5-8 (2d ed. 2006); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001).

[14] *See* Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 Geo. Mason L. Rev. 453 (2018); Abner J. Mikva & Eric Lane, LEGISLATIVE PROCESS 103 (2d ed. 2002).

[15] *See* Gluck & Bressman, *supra* note 13, at 915.

[16] See , Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. Rev. 1239, 1250-1254 (2002); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 520 (1948).

[17] *See* Barrett, *supra* note 13, at 112-113 (contrasting textualism and purposivism).

[18] *See* Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implication for Statutory Interpretation,* 100 B.U. L. Rev. 1817 (2020).

[19] *See* Barrett, *supra* note 13, at 113-114. *See* also Seidenfeld, *supra* note 18, at 1834.

[20] *See* Barrett, *supra* note 13, at 113-114. *See also* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 Colum. L. Rev. 990, 995-996 (2001) (arguing that the judicial power in Article III includes an equitable power to alter statutory text); William N. Eskridge, *Textualism, the Unknown Ideal?,* 96 Mich. L. Rev. 1509, 1522-32 (1998).

of the statute that is being interpreted.[21] A judge interpreting a statute through textualism will interpret the statute using the same canons, presumptions and tools regardless of the subject matter of the statute or the way the statute was enacted. Increasingly, however, academics are advocating for "***anti-universalist***" application of the theories, where the theories are applied differently based on the subject matter of the statute being interpreted or the procedures used to enact the statute.[22]

Theories of Interpretation

- Textualism
- Purposivism
- Intentionalism
- Imaginative Reconstruction
- Dynamic Statutory Interpretation

The following sections of this chapter introduce the major theories of statutory interpretation. Although this chapter will not focus on the specific tools (canons, etc.) used to interpret statutes, it will introduce some of them. As you read through the cases in this book, you will discover that a judge's choice of a theory of interpretation may influence which tools the judge will use when interpreting a statute. The most extreme textualists, for instance, will not consult legislative history to interpret statutory language. The two major theories of statutory interpretation today are ***textualism*** and ***purposivism***. This chapter will introduce those theories as well as three other theories that are less popular today but have historical significance: (1) ***intentionalism***; (2) ***imaginative reconstruction***; and (3) ***dynamic statutory interpretation***.

Questions and Comments

1. Are Courts Really Acting as "Faithful Agents" of the Legislature?: Prior to her elevation to the Supreme Court, Justice Amy Cohen Barrett argued that many substantive canons of statutory construction are designed to advance specific policy objectives, independent of the intent of the enacting legislature (i.e. canons to avoid interference with the powers of states or local governments, the rule of lenity; etc.) and that judges, even textualist judges, who apply those canons to interpret statutes are adopting a dynamic approach to statutory interpretation, rather than acting as "faithful agents" of the legislature. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 116 (2010).

Similarly, Professors Abbe Gluck and Lisa Bressman surveyed 137 attorneys who drafted legislation for Congress and determined that, in many cases, the drafters were unaware of canons of statutory construction and did not draft statutes with those canons in mind. Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An*

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[21] *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 797 (2014); Ganesh Sitaraman, *The Origins of Legislation*, 91 Notre Dame L. Rev. 79, 116 (2015). Professor Sitaraman attributes the universalism, in part, to the acceptance by most theories of the fiction of a unitary drafter. *Id.*

[22] *See* Sitaraman, *supra* note 21, at 116-119; Bressman & Gluck, *supra* note 21, at 797.

Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 906-907, 947 (2013). Considering those findings, Gluck and Bressman suggest that using those canons to interpret statutes does not necessarily advance Congress' intent in many cases. *Id.* at 913-917.

Professor Jesse Cross also argues that courts fail to act as "faithful agents" of the legislature at times, but he bases his criticism on judicial enforcement of statutory language that was enacted for non-judicial audiences. *See* Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 Geo. Mason L. Rev. 453 (2018). Cross asserts that Congress frequently includes language in statutes that was directed to agencies, constituents, or other non-judicial audiences and which was never intended to be enforced. *Id.* at 457. By interpreting the statutes to enforce that language, Cross argues that courts are ignoring the intent of Congress. *Id.*

2. Other Goals for Judicial Interpretation of Statutes?: If courts are not simply agents of the legislature when interpreting statutes, what other roles should courts play? Professors Bressman and Gluck discuss whether courts could interpret statutes in ways (1) that could force Congress to change the ways that it drafts laws (in response to the judicial methods of interpretation); (2) to impose coherence on the U.S. Code; or (3) to make laws more predictable for the public. *See* Gluck & Bressman, *supra*, at 905, 917, 950, 961. Are those appropriate roles for the judicial branch?

3. Anti-universalist proposals: The arguments for anti-universalist application of theories of interpretation are most forceful when focused on modifying approaches to interpretation based on the procedures used to enact statutes. For instance, the whole act rule is a canon of construction relied upon frequently by textualists that provides that words that are used in multiple places within a statute should be interpreted to have the same meaning. The canon is based on the fiction that Congress, when drafting the statute, was acting holistically, and was aware of all the instances where a term was used within the statute when it used the term in the statute and intended for the term to have the same meaning every time that it was used. While that fiction may not be unreasonable when applied to some short statutes adopted through the traditional law-making procedures, it is not defensible when applied to complex statutes adopted though omnibus law-making. As noted in the last chapter, in many cases, omnibus laws are created by combining many laws that were developed independently without reference to each other. Thus, it does not make sense to apply the canon to such a statute. Accordingly, anti-universalist supporters would argue that textualists should apply the canon differently, or not apply the canon at all, when interpreting omnibus statutes.

4. Different statutory interpretation approaches for different courts?: Some scholars have even suggested that different courts should adopt different approaches to statutory interpretation based on the institutional characteristics of the reviewing court. For instance, since a higher-level appellate court will likely hear fewer cases and have more resources than lower courts, it may be appropriate for lower courts to rely on simpler rules and canons to interpret statutes, instead of relying on in-depth analysis of legislative

history and intricate analysis of the text. *See* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court,* 97 Cornell L. Rev. 433 (2012). Similarly, since judges in some courts are elected while others are appointed, it may be more appropriate for judges who are elected to rely on purposivist theories of interpretation, since the public can vote them out of office if they disagree with the interpretive approach adopted by the judges. *See* Aaron-Andrew P. Bruhl & Ethan J. Lieb, *Elected Judges and Statutory Interpretation*, 79 U. Chi. L. Rev. 1215 (2012). What are the advantages and disadvantages of varying the method of interpretation based on the position of the court within the judicial hierarchy or the manner in which the judges are selected? Are there constitutional justifications for adopting different methods of interpretation?

CALI QUIZ

Before moving on to the next section, why not try a short quiz on the material you just read at https://www.cali.org/spl/19067 It should take about 15 minutes to complete.

IV. Textualism

A. The Theory

The predominant theory of interpretation applied at both the federal level and the state level is textualism. As the name implies, textualists interpret statutes by focusing on the ***ordinary meaning*** of the text that was enacted by the legislature. They look for the meaning "that a ***reasonable person*** would gather from the text of the law, placed alongside the remainder of the corpus juris [the body of law]" (***objective meaning***). [23] Textualists will frequently examine the ***structure*** of the statute and the ***context*** in which language is used in the statute to determine the ordinary meaning of the text but are generally reluctant to consult ***legislative history*** or other ***extrinsic sources*** to interpret the text.[24] ***New textualists***, a modern incarnation of textualism, will never examine

[23] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997). As Judge Frank Easterbrook has observed, textualists "look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words." *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 65 (1988).

[24] *See* Molot, *supra* note 13, at 2-4. Textualists may also examine the language, structure and context of ***other statutes*** to interpret text in a statute.

legislative history.[25] Some textualists will not even rely on grammar rules, canons of construction or other extrinsic sources unless the text that is being interpreted is ***ambiguous or absurd***, although most textualists will rely on those sources without making that initial determination.[26] In general, though, if the ordinary meaning of the text is clear, textualists will not adopt an interpretation of the text that conflicts with that ordinary meaning unless the application of the statute according to its ordinary meaning leads to an ***absurd result***.[27]

Although the textualist theory of interpretation is based on the "faithful agent" model of the judicial / legislative relationship, textualists do not search beyond the text for legislative intent because they believe that the text is the best evidence of Congress' intent.[28] Textualists fulfill their role as "faithful agents" of Congress by dutifully implementing the text enacted by Congress. From a constitutional standpoint, textualists maintain that only the text (and not legislative history or other extrinsic sources) was enacted by Congress into law through the process of bicameralism and presentment, so courts allow members of Congress to circumvent those procedures when courts rely on legislative history and other extrinsic sources to interpret the meaning of the text enacted into law.[29] In addition, many textualists assert that it is inappropriate to search beyond a statute's text to ascertain Congress' intent because there is no single intent for any

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[25] *See* William N. Eskridge Jr., James J. Brudney, Josh Chafetz, Philip P. Frickey & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 499-500 (West Academic Pub. 6th ed. 2020).

[26] *See* Linda D. Jellum, THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRTATIVE AGENCIES 89 (Carolina Academic Press 2016).

[27] The "absurd result" exception is discussed in the next chapter of this book.

[28] *See* Seidenfeld, *supra* note 18, at 1821; Barrett, *supra* note 13, at 112. As Justice Barrett notes, "The legislative process is path-dependent and riddled with compromise. … The language may appear awkward because competing factions agree "to split the difference between competing principles." To respect the deals that are inevitably struck along the way, the outcome of this complex process – the statutory text – must control." Barrett, *supra* note 13, at 112-113. *See also* Lisa Schultz Bressman, Edwin L. Rubin, & Kevin M. Stack, THE REGULATORY STATE 157 (Wolters Kluwer 3d ed. 2020) ("By sticking to the text, courts can confine … groups to the deals they extracted …").

[29] *See* Seidenfeld, supra note 18, at 1827; Scalia, *Common Law Courts, supra* note 23, at 17; John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 445 (2005). *See also* Linda D. Jellum & David Charles Hricik, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES AND LAWYERING STRATEGIES 45 (Carolina Academic Press 2d ed. 2009); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter and History in Statutory Interpretation,* 100 Colum. L. Rev. 901, 951 (2000).

legislation.[30] Congress is a "they", not an "it."[31] Accordingly, the search for a collective intent on behalf of Congress from sources extrinsic to the text is pointless.[32]

While textualists believe that textualism is the only theory of interpretation supported by the Constitution, they maintain that it has many other benefits. First, because it focuses on the ordinary meaning of the text as understood by reasonable readers, the theory gives the public clear notice of what the law requires.[33] Members of the public do not have to research legislative history, reconstruct legislative intent, or try to figure out the goals of the legislature in order to determine the rights and obligations created by a law. They simply must read the law.

Textualists also claim that textualism reduces opportunities for judicial activism and ideological decision-making, while purposivism enables judges to make law.[34] They argue that focusing on "genuine but unexpressed legislative intent" invites the danger that judges 'will in fact pursue their own objectives and desires' and, accordingly, encroach into the legislative function by making, rather than interpreting, statutory law."[35] If laws are outdated because of changes in social values or other changes in the legal landscape, textualists argue that it is up to the legislature, not courts, to update the laws.[36] If courts enforce the laws as written, the legislature can amend them if it (and the public) demand change.

Finally, textualists assert that consistent application of textualism by courts would improve the legislative process because it would reduce the incentive for legislators to try to pad

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[30] *See* Seidenfeld, *supra* note 18, at 1824; John F. Manning, *Without the Pretense of Legislative Intent*, 130 Harv. L. Rev. 2397, 2425-31 (2017); Gluck & Bressman, *supra* note 13, at 915, 965. *See also* Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 872 (1930).

[31] *See* Kenneth Shepsle, *Congress is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 Intl Rev. L & Econ. 239 (1992). Nevertheless, supporters of "intentionalist" interpretation of statutes counter that groups can have common goals or a common agenda, even though the individual members of the group have different motives. *See* Jellum, *supra* note 26, at 103; Eskridge, et al, *supra* note 25, at 422-424.

[32] *See* Seidenfeld, *supra* note 18, at 1824; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway.").

[33] *See* Gluck & Bressman, *supra* note 13, at 913; Seidenfeld, *supra* note 18, at 1819, 1848.

[34] *See* Seidenfeld, *supra* note 18, at 1819; Scalia, *Common Law Courts, supra* note 23, at 17-18; Molot, *The Rise and Fall of Textualism, supra* note 13, at 25-26. *See also* Gluck & Posner, *supra* note 2, at 1321. Professor Mark Seidenfeld notes that "[b]y standard accounts of comparative institutional advantage, courts are institutionally inferior to the legislature for making policy, not only because they are much less politically accountable but also because they have less ability to inform themselves about the substantive implications of their interpretations." *Id.* at 1840.

[35] *See* Congressional Research Service, *Statutory Interpretation: Theories, Tools and Trends* 14, C.R.S. Rep. No. R45153 (April 5, 2018).

[36] *See* Seidenfeld, *supra* note 18, at 1821, 1843-1844.

legislative history or otherwise manipulate the legislative process to influence the interpretation of statutes.[37]

Questions and Comments

1. Notice to the public: While some supporters of textualism tout its value in providing clear notice to the public regarding the rights and duties created by laws, some strains of textualism are also originalist, focusing on the meaning of text as it was understood at the time that the laws were enacted. How would that impact the extent to which textualist interpretations of statutes provide clear notice to the public about rights and duties?

2. Textualism and Codification Issues: Textualists often interpret language in statutes by examining the structure of the statute, the context in which the language is used in the statute, and occasionally the titles of sections in the statute. As noted in the last chapter, though, when statutes are codified in the U.S. Code, provisions in statutes are reorganized and often scattered throughout different titles in the Code. In addition, language included in statutes may be left out of the Code entirely or placed in editorial notes. What implications does this have for textualist interpretation of statutes? Would it be more appropriate to interpret statutes by examining sources other than the Code? *See* Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 U.C.L.A. L. Rev. 640 (2020).

3. Waiting for Congress to Act: Textualists prefer to allow Congress to update laws when the laws no longer make sense in light of changes in society or the underlying legal landscape. Does that approach make sense today? Why might Congress not act to change the laws? *See* Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implication for Statutory Interpretation,* 100 B.U. L. Rev. 1817, 1844 (2020).

B. Textualism in Action

The dissenting opinion of Justice Thomas in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004) provides a nice example of textualism in action. The case focused on whether the Age Discrimination in Employment Act (ADEA), which had been interpreted to prohibit discrimination against older workers in favor of younger workers, also prohibited ***discrimination against younger workers in favor of older workers***. The majority focused on the purpose and history of the ADEA, as well as its text, to conclude that the Act did ***not*** prohibit discrimination against

[37] *See* Gluck & Bressman, *supra* note 13, at 913; Bressman, Rubin & Stack, *supra* note 28, at 340.

younger workers in favor of older workers. Justice Thomas, in a dissent joined by Justice Kennedy, concluded that the plain meaning of the statute was clear and prohibited all discrimination based on age. The pertinent statutory language examined by the Court is reproduced below, followed by the majority's description of the factual and procedural background of the case, and then Justice Thomas' dissenting opinion. The oral argument for the case can be accessed here.

Statutory Provisions

29 U.S.C. § 623(a): **Employer practices** It shall be unlawful for an employer - (1) to … discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age

29 U.S.C. § 623(e): Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment…indicating any preference, limitation, specification, or discrimination, based on age.

29 U.S.C. § 623(f): Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause It shall not be unlawful for an employer, employment agency, or labor organization - (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, …

29 U.S.C. § 631(a): Individuals at least 40 years of age The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

Factual Background and Procedural History (from Justice Souter's majority opinion)

"In 1997, a collective-bargaining agreement between petitioner General Dynamics and the United Auto Workers eliminated the company's obligation to provide health benefits to subsequently retired employees, except as to then-current workers at least 50 years old. Respondents (collectively, Cline) were then at least 40 and thus protected by the Act, *see* 29 U.S.C. § 631(a), but under 50 and so without promise of the benefits. All of them objected to the new terms, although some had retired before the change in order to get the prior advantage, some retired afterwards with no benefit, and some worked on, knowing the new contract would give them no health coverage when they were through.

Before the Equal Employment Opportunity Commission (EEOC or Commission) they claimed that the agreement violated the ADEA, because it "discriminate[d against them] … with respect to … compensation, terms, conditions, or privileges of employment, because of [their] age," §623(a)(1). The EEOC agreed and invited General Dynamics and the union to settle informally with Cline.

When they failed, Cline brought this action against General Dynamics, combining claims under the ADEA and state law. The District Court called the federal claim one of "reverse age discrimination," upon which, it observed, no court had ever granted relief under the ADEA. *** It dismissed in reliance on the Seventh Circuit's opinion in *Hamilton v. Caterpillar Inc*., ***, that "the ADEA 'does not protect … the younger against the older,' " ***

A divided panel of the Sixth Circuit reversed, *** with the majority reasoning that the prohibition of §623(a)(1), covering discrimination against "any individual … because of such individual's age," is so clear on its face that if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so. *** The court acknowledged the conflict of its ruling with earlier cases *** from the First Circuit, but it criticized the cases going the other way for paying too much attention to the "hortatory, generalized language" of the congressional findings incorporated in the ADEA. *** The Sixth Circuit drew support for its view from the position taken by the EEOC in an interpretive regulation. ***

We granted certiorari to resolve the conflict among the Circuits, 538 U.S. 976 (2003)."

GENERAL DYNAMICS LAND SYSTEMS, INC.,
PETITIONER *v.* DENNIS CLINE et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Justice Thomas, with whom Justice Kennedy joins, dissenting.

This should have been an easy case. The plain language of 29 U.S.C. § 623(a)(1) mandates a particular outcome: that the respondents are able to sue for discrimination against them in favor of older workers. The agency charged with enforcing the statute has adopted a regulation and issued an opinion as an adjudicator, both of which adopt this natural interpretation of the provision. And the only portion of legislative history relevant to the question before us is consistent with this outcome. Despite the fact that these traditional tools of statutory interpretation lead inexorably to the conclusion that respondents can state a claim for discrimination against the relatively young, the Court, apparently disappointed by this result, today adopts a different interpretation. In doing so, the Court, of necessity, creates a new tool of statutory interpretation, and then proceeds to give this newly created "social history" analysis dispositive weight. Because I cannot agree with the Court's new approach to interpreting anti-discrimination statutes, I respectfully dissent.

I

"The starting point for [the] interpretation of a statute is always its language," *Community for Creative Non-Violence* v. *Reid,* *** and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank* v. *Germain* ***. Thus, rather than looking through the historical background of the

Age Discrimination in Employment Act of 1967 (ADEA), I would instead start with the text of §623(a)(1) itself, and if "the words of [the] statute are unambiguous," my "judicial inquiry [would be] complete." ***.

The plain language of the ADEA clearly allows for suits brought by the relatively young when discriminated against in favor of the relatively old. The phrase "discriminate … because of such individual's age," 29 U.S.C. § 623(a)(1), is not restricted to discrimination because of relatively *older* age. If an employer fired a worker for the sole reason that the worker was under 45, it would be entirely natural to say that the worker had been discriminated against because of his age. I struggle to think of what other phrase I would use to describe such behavior. I wonder how the Court would describe such incidents, because the Court apparently considers such usage to be unusual, atypical, or aberrant. See *ante* *** (concluding that the "common usage of language" would exclude discrimination against the relatively young from the phrase "discriminat[ion] … because of [an] individual's age").

The parties do identify a possible ambiguity, centering on the multiple meanings of the word "age." As the parties note, "age," does have an alternative meaning, namely "[t]he state of being old; old age." American Heritage Dictionary 33 (3d ed. 1992); see also Oxford American Dictionary 18 (1999); Webster's Third New International Dictionary 40 (1993). First, this secondary meaning is, of course, less commonly used than the primary meaning, and appears restricted to those few instances where it is clear in the immediate context of the phrase that it could have no other meaning. The phrases "hair white with age," American Heritage Dictionary, *supra,* at 33, or *"eyes … dim with age,"* Random House Dictionary of the English Language 37 (2d ed. 1987), cannot possibly be using "age" to include "young age," unlike a phrase such as "he fired her because of her age."

Second, the use of the word "age" in other portions of the statute effectively destroys any doubt. The ADEA's advertising prohibition, 29 U.S.C. § 623(e), and the bona fide occupational qualification defense, §623(f)(1), would both be rendered incoherent if the term "age" in those provisions were read to mean only "older age."[1] Although it is true that the " 'presumption that identical words used in different parts of the same act are intended to have the same meaning' " is not "rigid" and can be overcome when the context is clear, *** the presumption is not rebutted here. As noted, the plain and common reading of the phrase "such individual's age" refers to the individual's chronological age. At the very least, it is manifestly unclear that it bars *only* discrimination against the relatively

[1] Section 623(f)(1) provides a defense where "age is a bona fide occupational qualification." If "age" were limited to "older age," then §623(f)(1) would provide a defense only where a defense is not needed, since under the Court's reading, discrimination against the relatively young is always legal under the ADEA. Section 623(e) bans the "print[ing] … [of] any notice or advertisement relating to … indicating any preference, limitation, specification, or discrimination … based on age." Again, if "age" were read to mean only "older age," an employer could print advertisements asking only for young applicants for a new job (where hiring or considering only young applicants is banned by the ADEA), but could not print advertisements requesting only older applicants (where hiring only older applicants would be legal under the Court's reading of the ADEA).

older. Only by incorrectly concluding that §623(a)(1) clearly and unequivocally bars only discrimination as "against the older," *ante*, at 8, can the Court then conclude that the "context" of §§623(f)(1) and 623(e) allows for an alternative meaning of the term "age." *Ante*, at 13—14.

The one structural argument raised by the Court in defense of its interpretation of "discriminates … because of such individual's age" is the provision limiting the ADEA's protections to those over 40 years of age. See 29 U.S.C. § 631(a). At first glance, this might look odd when paired with the conclusion that §623(a)(1) bars discrimination against the relatively young as well as the relatively old, but there is a perfectly rational explanation. Congress could easily conclude that age discrimination directed against those under 40 is not as damaging, since a young worker unjustly fired is likely to find a new job or otherwise recover from the discrimination. A person over 40 fired due to irrational age discrimination (whether because the worker is too young or too old) might have a more difficult time recovering from the discharge and finding new employment. ***

This plain reading of the ADEA is bolstered by the interpretation of the agency charged with administering the statute. A regulation issued by the Equal Employment Opportunity Commission (EEOC) adopts the view contrary to the Court's, 29 CFR § 1625.2(a) (2003), and the only binding EEOC decision that addresses the question before us also adopted the view contrary to the Court's, see *Garrett* v. *Runyon*, *** I agree with the Court that we need not address whether deference under *Chevron U.S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* *** would apply to the EEOC's regulation in this case. See *ante*, at 16. Of course, I so conclude because the EEOC's interpretation is consistent with the best reading of the statute. The Court's position, on the other hand, is untenable. Even if the Court disagrees with my interpretation of the language of the statute, it strains credulity to argue that such a reading is so unreasonable that an agency could not adopt it. To suggest that, in the instant case, the "regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA," *ante*, at 18, is to ignore the entirely reasonable (and, incidentally, correct) contrary interpretation of the ADEA that the EEOC and I advocate.

Finally, the only relevant piece of legislative history addressing the question before the Court–whether it would be possible for a younger individual to sue based on discrimination against him in favor of an older individual–comports with the plain reading of the text. Senator Yarborough, in the only exchange that the parties identified from the legislative history discussing this particular question, confirmed that the text really meant what it said. See 113 Cong. Rec. 31255 (1967). *** Although the statute is clear, and hence there is no need to delve into the legislative history, this history merely confirms that the plain reading of the text is correct.

II

Strangely, the Court does not explain why it departs from accepted methods of interpreting statutes. It does, however, clearly set forth its principal reason for adopting its particular reading of the phrase "discriminate … based on [an] individual's age" in Part III—A of its opinion. "The point here," the Court states, "is that we are not asking in the abstract how the ADEA uses the word 'age,' but seeking the meaning of the whole phrase 'discriminate … because of [an] individual's age.' As we have said, *social*

history emphatically points to the sense of age discrimination as aimed against the old, and this idiomatic understanding is confirmed by legislative history." *Ante*, at 14 (emphasis added). The Court does not define "social history," although it is apparently something different from legislative history, because the Court refers to legislative history as a separate interpretive tool in the very same sentence. Indeed, the Court has never defined "social history" in any previous opinion, probably because it has never sanctioned looking to "social history" as a method of statutory interpretation. Today, the Court takes this unprecedented step, and then places dispositive weight on the new concept.

It appears that the Court considers the "social history" of the phrase "discriminate … because of [an] individual's age" to be the principal evil that Congress targeted when it passed the ADEA. In each section of its analysis, the Court pointedly notes that there was no evidence of widespread problems of anti-youth discrimination, and that the primary concerns of Executive Branch officials and Members of Congress pertained to problems that workers generally faced as they increased in age. The Court reaches its final, legal conclusion as to the meaning of the phrase (that "ordinary people employing the common usage of language" would "talk about discrimination because of age [as] naturally [referring to] discrimination against the older," *ibid.*) only after concluding both that "the ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young" and that "[t]here is … no record indication that younger workers were suffering at the expense of their elders, let alone that a social problem required a federal statute to place a younger worker in parity with an older one." *Ibid*. Hence, the Court apparently concludes that if Congress has in mind a particular, principal, or primary form of discrimination when it passes an anti-discrimination provision prohibiting persons from "discriminating because of [some personal quality]," then the phrase "discriminate because of [some personal quality]" only covers the principal or most common form of discrimination relating to this personal quality.

***

As the ADEA clearly prohibits discrimination because of an individual's age, whether the individual is too old or too young, I would affirm the Court of Appeals. Because the Court resorts to interpretive sleight of hand to avoid addressing the plain language of the ADEA, I respectfully dissent.

Questions and Comments

1. Language at issue: What was the language of the statute that the Court was interpreting? Does Justice Thomas suggest that the Court should examine any extrinsic sources to determine whether the statutory language is ambiguous? What are the different meanings of the statutory language identified by Justice Thomas? Does Thomas believe that one meaning is more commonly understood by reasonable persons as the meaning of the language? Does the majority believe that the statutory language is clear or ambiguous?

2. Context: Textualists will often examine the structure of a statute and the context in which language is used in a statute to determine the meaning of the language. What other sections of the statute did Justice Thomas examine to determine the meaning of

the statute? What presumption regarding the usage of language within a statute does Justice Thomas rely on to interpret the language at issue and what conclusion does he draw from the usage of the language in other sections of the statute? How does Justice Thomas reconcile his interpretation of the statute with 29 U.S.C. § 631(a)?

3. Agency interpretations: As you learn more about statutory interpretation, you will discover that courts frequently defer to the reasonable interpretation of statutory language adopted by an agency charged with administering the statute when the language is ambiguous. In this case, the EEOC was charged with administering the ADEA and had adopted a regulation that provided that the ADEA prohibited discrimination against younger workers as well as older workers. *See* 29 C.F.R. § 1625.2 (2003) (providing "It is unlawful … for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over.") The United States filed an amicus brief in the case, supporting the approach taken by the EEOC regulation. Did Justice Thomas defer to the EEOC's reading of the statute because the statute was ambiguous, and the agency's interpretation was reasonable? Did the majority reject the EEOC's reading because the agency's interpretation was unreasonable? The EEOC's current interpretation of the statute appears on its website, where the agency advises, "It is not illegal for an employer or other covered entity to favor an older worker over a younger one, even if both workers are age 40 or older."

4. Legislative history: Based on Justice Thomas' statement at the outset of his dissent ("if the words of the statute are unambiguous, my judicial inquiry would be complete"), is it necessary for him to examine the legislative history of the ADEA to interpret the language at issue in the case? Why, then, do you think that he examined the legislative history, and what did he find when looking there?

5. Social history: Textualists believe that the language adopted by Congress is the best expression of Congress' intent, so they are reluctant to examine the history of the enactment of statutes or the purposes of Congress in enacting statutes. From reading Justice Thomas' dissent, does it appear that the majority opinion considered those issues? How much weight does Justice Thomas believe the majority gave that evidence and how much weight does he believe courts should accord to such evidence?

6. Statutory Directives: While federal judges can choose to apply any of the theories of interpretation to discern statutory meaning, many states have adopted statutory directives that require judges to follow a particular approach when interpreting statutes. To the extent that states have addressed this issue in directives, they usually have required judges to interpret statutes using textualism. *See, e.g.,* CONN. GEN. STAT. ANN. § 1-2z; COLO. REV. STAT. § 2-4-203; HAW. REV. STAT. ANN. § 1-15; 1 PA. CONS. STAT. § 1921(b).

7. When should a textualist look at tools beyond the text?: In a dissenting opinion in *Chisom v. Roemer*, 501 U.S. 380 (1991), Justice Scalia wrote, "I thought we had adopted a regular method for interpreting the meaning of language in 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. If not -- and especially if a good reason for the ordinary meaning appears plain -- we apply that ordinary meaning." While Scalia's

opinion in *Chisom* and Thomas' opinion in *General Dynamics* are both textualist opinions, do you notice any difference in the way that the opinions discuss when it is appropriate to consult tools of interpretation beyond the text?

V. Purposivism

The other major, and clearly distinct, theory of interpretation utilized by some judges today is purposivism. This approach grew out of the legal process school of legal theory in the 1950s and is most frequently associated with Henry M. Hart and Albert M. Sacks.[38] Purposivist judges believe that legislatures enact laws for specific purposes and that laws should be interpreted to advance those purposes.[39] Hart and Sacks described the purposivist methodology as follows:

> (1) [d]ecide what purpose ought to be attributed to the statute and any subordinate provision of it;
>
> (2) [i]nterpret the words of the statute immediately in question so as to carry out [that] purpose as best it can", making sure
>
> (3) not to give the words "a meaning they cannot bear" and finally,
>
> (4) not to "violate any established policy of clear statement."

Henry M. Hart & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

A. Identify the Purpose; Advance the Purpose

The first two steps outlined above are the steps that are most frequently associated with the purposivist approach to interpreting statutes. When interpreting statutory language, purposivists (1) identify the purpose of the statute; and (2) interpret the statute in the manner that advances that purpose. Whereas textualists are reluctant to consult extrinsic sources to interpret statutory language, purposivists will examine a range of sources to ascertain the purpose of a statute, including not only the text and structure of the statute, but also the legislative history and the history of enactment of the statute (focusing on the problems that motivated the legislature to enact the law.) [40]

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[38] *See* Henry M. Hart & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1148 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

[39] *See* Robert A. Katzman, JUDGING STATUTES 31 (2014).

[40] *See* Congressional Research Service, *supra* note 35, at 12-13.

Hart & Sacks established several guidelines to use in identifying the purpose of a statute. First, they stressed the importance of an ***enacted statement of purpose***[41] included in the text of the legislation as a primary source for determining the purpose of the statute, "if it appears [that the statement was] designed to serve as a guide to interpretation, is consistent with the words and context of the statute and is relevant to the question of meaning at issue."[42] Second, they cautioned that identifying the purpose of a statute can be difficult because "purposes may be shaped with differing degrees of definiteness" and "purposes may exist in hierarchies" (recognizing that there ***may be multiple purposes*** for a statute).[43] Third, they counseled that the interpreter should try to determine the purpose that was envisioned by the ***enacting legislature***, not by focusing on "the short-run currents of political expedience that swirl around a legislative session", but assuming that the legislature was made up of "reasonable persons pursuing reasonable purposes reasonably."[44] Fourth, they argued that, in ascertaining purpose, it is appropriate to examine the state of the law immediately before enactment of the statute, its development before that, and general public knowledge of what was considered to be the mischief that needed remedying.[45] Fifth, even though the interpreter's goal is to determine the purpose of the statute intended by the enacting legislature, Hart & Sacks maintained that judicial, administrative and popular construction of a statute subsequent to its enactment are all relevant in attributing a purpose to the statute.[46]

B. What About the Text?

While the purposivist approach to statutory interpretation is usually associated with the two-step analysis outlined above, Hart & Sacks stressed that a statute should not be interpreted to give the words "a meaning they cannot bear" in order to achieve the purpose of the statute. Thus, like textualists, purposivists will generally ***begin their interpretation of a statute with the text of the statute***. If the statutory language is clear ("unmistakable"), most purposivists will stop there and will not proceed further to examine the purposes of the statute.[47] Occasionally, though, purposivists will follow that analysis to determine ***if*** the statutory language is ambiguous. If the statutory language ***is*** ambiguous, purposivists will follow the two-step analysis outlined above. Finally, in some extreme cases, when the text of a statute is clear, but leads to an absurd result or

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41 The previous chapter examined the structure of statutes, including the purposes and findings provisions in statutes. For a good discussion of enacted purposes, *see* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. Chi. L. Rev. 669 (2019).

42 *See* Hart & Sacks, *supra* note 38, at 1374.

43 *Id.* at 1374-1380.

44 *Id.*

45 *Id.*

46 *Id.* As a last resort, Hart & Sacks suggested that courts could determine legislative purpose based on "an appropriate presumption drawn from some general policy of the law." *Id.*

47 *Id.* at 1125.

a result the legislature clearly could not have intended, purposivists will depart from the plain meaning of the text and engage in the two-step analysis outlined above.[48]

C. Foundation for the Theory

Purposivists, like textualists, generally view themselves as ***"faithful agents"*** of the legislature when interpreting statutes.[49] However, while textualists believe that statutory language is the best evidence of legislative intent, purposivists are willing to consult a wider variety of sources to ascertain the intent of the enacting legislature. In that regard, purposivists resemble intentionalists, another group of theorists discussed below. However, while purposivists and intentionalists examine similar sources to determine the intent of the enacting legislature, intentionalists focus on identifying the specific intent of the legislature regarding the interpretive issue before the court, while purposivists focus on identifying the general purpose that the enacting legislature was trying to achieve and interpret the statute to achieve that purpose.[50] Consequently, if the social and legal landscape of the nation have changed significantly between the time a law was enacted and the time it is being interpreted, a purposivist judge might adopt a dynamic interpretation of a statute that carries out the purposes of the enacting legislature, even though the enacting legislature might have intended a different interpretation of the statute based on the social and legal landscape that existed at the time of enactment. In light of the possibility that purposivist judges could interpret statutes in such a dynamic fashion, some academics suggest that purposivists might be more willing to view themselves as partners to the legislature, rather than faithful agents.[51]

D. Criticisms of the Approach

Critics of purposivism complain that problems arise in implementing the theory because statutes frequently have multiple purposes, so judges must choose one purpose from many in order to engage in the two-step analysis of purposivism. Critics argue that (1) judges are ill equipped to determine which purpose predominates because the processes by which laws are made are too complex and the records of that process are contradictory

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[48] After courts engage in the two step analysis outlined above and ensure that the interpretation does not conflict with a clear textual reading of the statute, Hart & Sacks indicate that courts should ensure that the interpretation does not "violate any established policy of clear statement." *See* Hart & Sacks, *supra* note 38, at 1374. Those policies include, but are not limited to, policies against criminalizing conduct that is not thought to be blameworthy and policies against impinging on constitutionally protected values. *Id.* at 1376-1377. Before a purposivist judge adopts a statutory interpretation that violates such policies, Hart & Sacks counsel that the judge must ascertain that the legislature has spoken "with more than [the] ordinary clearness" on the issue. *Id.*

[49] *See* Barrett, *supra* note 13, at 112-113.

[50] *See* Bressman, Rubin & Stack, *supra* note 28, at 155. Purposivists are more skeptical than intentionalists that it is possible to determine the specific intent of the enacting legislature, given the complexities of the legislative process and the reality that the legislature may not have a shared intent.

[51] *See* Seidenfeld, *supra* note 18, at 1821.

or unavailable; and (2) judges are inappropriately making the law and doing so based on ideological judgments when choosing which purpose predominates.[52] Codification idiosyncrasies also complicate the identification of statutory purposes, as enacted purposes provisions of statutes are frequently relegated to editorial notes in the U.S. Code or left out of the Code entirely.[53]

Detractors of purposivism challenge the implementation of the second step of the traditional purposivism analysis, as well, arguing that it is not always clear which interpretation of a statute best advances the purposes of a statute even when there may be consensus regarding the purpose. Here again, critics complain that judges may choose the interpretation that best advances the statutory purpose based on ideological considerations.

E. Purposivism in Action

Perhaps the best example of purposivism (and most well-known) is the Supreme Court's 1892 decision, *Church of the Holy Trinity v. United States*, is reproduced below. The statutory language at issue in the case and the title of the statute have been bolded and italicized below.

CHURCH OF THE HOLY TRINITY V. UNITED STATES

143 U.S. 457 (1892)

MR. JUSTICE BREWER delivered the opinion of the Court.

Plaintiff in error is a corporation duly organized and incorporated as a religious society under the laws of the State of New York. E. Walpole Warren was, prior to September, 1887, an alien residing in England. In that month the plaintiff in error made a contract with him by which he was to remove to the City of New York and enter into its service as rector and pastor, and in pursuance of such contract, Warren did so remove and enter upon such service. It is claimed by the United States that this contract on the part of the plaintiff in error was forbidden by 23 Stat. 332, c. 164, and an action was commenced to recover the penalty prescribed by that act. The circuit court held that the contract was within the

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[52] *See* Manning, *supra* note 29, at 430; Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 18, 20-21, 376-378 (2012). Justice Scalia and Bryan Garner argue that purposivism is too easily manipulable, allowing the judge to ignore the text and "achieve what [the judge] believes to be the provision's purpose." *See* Scalia & Garner, *supra* at 18.

[53] *See* Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 U.C.L.A. L. Rev. 640, 643, 667, 688 (2020). In that regard, the codification process could be contributing to the modern trend away from purposivism.

prohibition of the statute, and rendered judgment accordingly, *** and the single question presented for our determination is whether it erred in that conclusion.

The ***first section*** describes the act forbidden, and is in these words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia."

It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words "labor" and "service" both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind," and further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It 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. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * *

[As the Court noted in *United States v.* Kirby, 7 Wall. 482, 486:] "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edw. II which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is

on fire, 'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." * * *

Among other things which may be considered in determining the intent of the legislature is the title of the act. We do not mean that it may be used to add to or take from the body of the statute, but it may help to interpret its meaning. * * * ***[T]he title of this act is "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia."*** Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms "labor" and "laborers" does not include preaching and preachers, and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors, and pastors.

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy, and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *** The situation which called for this statute was briefly but fully stated by MR. JUSTICE BROWN when, as district judge, he decided the case of *United States v. Craig,* 28 F. 795, 798: "The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage."

It appears also from the petitions and in the testimony presented before the committees of Congress that it was this cheap, unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and least of all that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress or of the people was not directed. So far, then, as the evil which

was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act.

A singular circumstance throwing light upon the intent of Congress is found in this extract from the report of the Senate committee on education and labor recommending the passage of the bill: "The general facts and considerations which induce the committee to recommend the passage of this bill are set forth in the report of the committee of the house. The committee report the bill back without amendment, although there are certain features thereof which might well be changed or modified in the hope that the bill may not fail of passage during the present session. Especially would the committee have otherwise recommended amendments, substituting for the expression, 'labor and service,' whenever it occurs in the body of the bill, the words 'manual labor' or 'manual service,' as sufficiently broad to accomplish the purposes of the bill, and that such amendments would remove objections which a sharp and perhaps unfriendly criticism may urge to the proposed legislation. The committee, however, believing that the bill in its present form will be construed as including only those whose labor or service is manual in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without change." P. 6059, Congressional Record, 48th Cong. And referring back to the report of the committee of the house, there appears this language: "It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material wellbeing of our own citizens, and regardless of the evil consequences which result to American laborers from such immigration. This class of immigrants care nothing about our institutions, and in many instances never even heard of them. They are men whose passage is paid by the importers. They come here under contract to labor for a certain number of years. They are ignorant of our social condition, and, that they may remain so, they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food, and in hovels of a character before unknown to American workmen. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body politic. The inevitable tendency of their presence among us is to degrade American labor and to reduce it to the level of the imported pauper labor." Page 5359, Congressional Record, 48th Congress.

We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.

But, beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from "Ferdinand and Isabella, by the grace of God, King and Queen of

Castile," etc., and recites that "it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered," etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from "Elizabeth, by the grace of God, of England, Fraunce and Ireland, Queene, defender of the faith," etc., and the grant authorizing him to enact statutes of the government of the proposed colony provided that "they be not against the true Christian faith nowe professed in the Church of England." * * *

If we examine the constitutions of the various states, we find in them a constant recognition of religious obligations. Every Constitution of every one of the forty-four states contains language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the wellbeing of the community. * * *

Even the Constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration common to the constitutions of all the states, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," etc., and also provides in Article I, Section 7, a provision common to many constitutions, that the executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill. * * *

If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters, note the following: the form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation? * * *

The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Questions and Comments

1. Plain meaning: As noted above, even purposivists generally begin their statutory analysis with an examination of the text to determine whether the language is clear or ambiguous. What is the statutory language in the Alien Contract Labor Act that the Court

is examining in the case and what is the statutory interpretation question that the Court is trying to resolve? Does the Court conclude that the text of the statute clearly addresses the question before the Court? Why or why not? Is there a purely textualist argument that could be made to support the Court's conclusion (based on the exemptions listed in section 5 of the statute)?

2. Departing from the plain meaning: Contrary to the approach suggested by Hart & Sacks and followed by most purposivists, the Court rejects the clear, unambiguous meaning of the text and adopts an alternative interpretation of the statute. When does the Court suggest that it is acceptable to depart from such clear statutory text? Does Justice Brewer believe that judges are legislating when they depart from the text?

3. Titles: In order to determine the purpose of the enacting legislature, purposivists will frequently examine the text of the statute as well as the structure of the statute. The majority in the instant case examines the long title of the statute to aid in identifying the statute's purpose. What does Justice Brewer conclude based on the long title? Do you agree with his reasoning? Is the long title of a statute enacted by Congress?

4. Other extrinsic sources used to determine the statute's purpose: In addition to examining the text and structure of a statute to determine its purpose, purposivists frequently look at the history of enactment of the statute, focusing on the problems that existed at the time of enactment and the pressure that was put on the legislature to address those problems. What events did Justice Brewer suggest motivated Congress to enact the Alien Contract Labor Act? What was the "mischief" or "evil" to which Congress was responding?

5. Legislative history: In clear contrast to the approach taken by many textualists, purposivists frequently explore legislative history to determine the purpose of statutes. Which portions of the legislative history did Justice Brewer examine and what purpose did he suggest those excerpts supported? There are many different types of legislative history that can be considered, including statements of individual legislators at hearings, statements by sponsors of legislation, and committee reports. Supporters of the use of legislative history identify some types of legislative history as more persuasive than others. Would the portions of the legislative history cited by the Court be particularly persuasive? Why or why not?

6. A religious nation: Why does the Court spend so much time focusing on the fact that the United States was "a religious people" and "a Christian nation"? Is that relevant to determining the purpose of the prohibition? Are there Constitutional implications?

7. Postscript: In 1891, while *Holy Trinity* was being litigated, Congress amended the Alien Contract Labor Act to explicitly exclude ministers but did not apply the new law to pending proceedings. *See* Act of March 3, 1891, 26 Stat. 1084, 1085. How should that impact the Court's interpretation of the prior version of the law that was being reviewed in *Holy Trinity?*

F. Conflicting Purposes

One of the criticisms to purposivism noted above is that statutes may have multiple purposes and purposivism gives judges the power to choose which purpose predominates, enabling them to choose the interpretation that aligns with their ideological preferences. *Daigle v. Shell*, which follows, is an example of a case decided, in part, based on the purpose of a statute (CERCLA) that has dueling purposes. The history of CERCLA is outlined here and the cleanup plan for the waste site in the case is here.

DAIGLE V. SHELL

972 F.2d 1527 (10th Cir. 1992)

BALDOCK, Circuit Judge.

This *** case arises from the cleanup effort at the Rocky Mountain Arsenal (the Arsenal), a federally controlled Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site near Commerce City, Colorado. 42 U.S.C.A. § 9601 *et seq.* The Plaintiffs-appellees, a group of individuals who reside near the Arsenal, seek "response costs" from Defendants-appellants Shell Oil Company (Shell) and the Government for medical monitoring under CERCLA § 107(a), 42 U.S.C.A. § 9607(a) * * * Plaintiffs contend that they suffered personal injury and property damage as a result of airborne pollutants released during the joint cleanup effort at the Arsenal by Shell and the Government.

Shell filed a Rule 12(b)(6) motion to dismiss the CERCLA claim * * * The Government filed a separate Rule 12(b)(6) motion to dismiss the CERCLA claim * * * With some uncertainty because of the factual immaturity of the case and the complete lack of appellate guidance, the district court denied the motions to dismiss the CERCLA medical monitoring claims. * * *

Shell and the Government appeal, contending that "response costs" under CERCLA § 107(a) do not encompass medical monitoring costs. * * *

We reverse the rulings denying dismissal of the CERCLA § 107(a) "response cost" claims against Shell and the Government. * * * The case is remanded to the district court for proceedings consistent with this opinion.

I. Background

This controversy stems from the year 1956, when the Army constructed and began using Basin F, a ninety-three acre hazardous waste surface impoundment on the Arsenal. The Army, as operator of the Arsenal, used Basin F to impound hazardous waste generated from its chemical warfare agent, chemical product and incendiary munition manufacturing activities. In addition, Shell used Basin F under lease from the Army to impound hazardous waste generated in its herbicide and pesticide manufacturing activities on the Arsenal. The combined activities of the Army and Shell on the Arsenal resulted in one of the worst hazardous waste pollution sites in the country, and Basin F is only a small portion of the problem. Army officials have estimated that the twenty-seven square mile Arsenal has 120 contamination sites which contain huge quantities of liquid and solid wastes, some of which is unique because of the mixture of private herbicide and pesticide manufacturing activities with Army munitions manufacturing activities. * * * Earnest response to these problems began in 1984, when the Army, with guidance from EPA, began a Remedial Investigation and Feasibility Study (RI/FS) pursuant to CERCLA § 104, 42 U.S.C.A. § 9604. The purpose of this study was to identify contamination sites and determine the feasibility of proposed responses. As part of this extremely long and complex process, the Army identified fourteen specific sites which needed Interim Response Actions (IRA's) to stop the spread of contaminants so as to protect human health and the environment. As indicated by their classification, these actions were to take place in the interim, before the implementation of a permanent, remedial response. Basin F was among the fourteen priority sites.

Hazardous wastes apparently had leaked from Basin F into the surrounding environment for many years before the IRA finally began in April 1988. The IRA was taken as a joint effort by the Army and Shell in agreement with EPA and the State of Colorado. In accordance with the agreed upon plan, the government contracted Ebasco Constructors, Inc., a private contractor, to transfer the liquid hazardous waste from Basin F to on-site storage tanks and lined surface impoundments, move contaminated solids into a lined and capped waste pile, and place a clay cap, top soil and vegetation over soils remaining

within the Basin. The bulk of this year-long process ended in March 1989 with the capping of the solid waste pile.

The parties involved in the Arsenal cleanup have litigated extensively in an effort to assign responsibility under CERCLA and various state statutes for the cleanup. This case, however, centers not on the necessary costs of the IRA but on alleged injuries resulting from the cleanup effort itself. The containment effort stirred up noxious odors and airborne pollutants that blew over Plaintiffs' residences, most of which were located in a trailer park one-and-a-half miles due west of Basin F. Some Plaintiffs registered complaints at least by December 1988, but the government decided that the odors were "a source of intermittent discomfort which [was] outweighed by the long-term benefit to the community of the removal activity conducted at Basin F." * * * Plaintiffs allege that this "intermittent discomfort" brought on property and economic damages and a variety of ailments ranging from conjunctivitis to skin rashes as well as the possibility of latent disease. * * *

II. Medical Monitoring

Plaintiffs seek the establishment of a fund to finance longterm "medical monitoring" or "medical surveillance" designed to detect the onset of any latent disease that may have been caused by exposure to toxic fumes stirred up during the Basin F cleanup. In their amended complaint, Plaintiffs state that the fund and the monitoring are necessary "to assist plaintiffs and class members in the prevention or early detection and treatment of chronic disease." * * * This type of action has been increasingly recognized by state courts as necessary given the latent nature of many diseases caused by exposure to hazardous materials and the traditional common law tort doctrine requirement that an injury be manifest. *In re Paoli RR. Yard PCB Litigation,* 916 F.2d 829, 849 (3d Cir.1990) (citing cases), *cert. denied,* 111 S.Ct. 1584 (1991). State tort law, however, is not at issue here. Plaintiffs instead seek redress in CERCLA § 107(a) private right of recovery for "response costs." Whether § 107(a) response costs include medical monitoring is an issue of first impression in the courts of appeals, although several district courts have decided the issue. * *

We turn first to the purpose and structure of CERCLA Congress enacted CERCLA to facilitate the expeditious cleanup of environmental contamination caused by hazardous waste releases. *See Colorado v. Idarado Mining Co.,* 916 F.2d 1486, 1488 (10th Cir. 1990), *cert. denied,* 111 S.Ct. 1584 (1991). In furtherance of this purpose, the Act establishes several mechanisms to respond to releases or threatened releases and delineates the respective powers and rights of governmental entities and private parties. *Id.* At issue here is § 107(a), which is designed to further the overall objective of shifting liability for cleanup costs to responsible parties. *Id.* The statute provides that certain responsible parties may be sued for ***

> (B) *any other necessary costs of response incurred by any other person consistent with the national contingency plan;* *** and

> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C.A. § 9607(a)(4) (emphasis supplied). *** At issue is whether Plaintiffs' monitoring claim falls within the subsection (B) private right of recovery for "any other necessary costs of response...."

In keeping with its notorious lack of clarity, CERCLA leads us down a convoluted path to the definition of "any other necessary costs of response." Actually, the drafters did not directly define the phrase as a whole, opting instead to define only the term "response." CERCLA § 101(25), 42 U.S.C.A. § 9601(25). A "response" is a "removal action" or a "remedial action." *Id.* "Removal actions," in turn, are actions designed to effect an interim solution to a contamination problem:

> "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to *monitor,* assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or *the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare* or to the environment, which may otherwise result from a release or threat of release. * * *

42 U.S.C.A. § 9601(23) (emphasis supplied). "Remedial actions," on the other hand, are designed to effect a permanent solution to the contamination problem:

> "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, * * * and *any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment....*

42 U.S.C.A. § 9601(24) (emphasis supplied).

In arguing for affirmance of the district court's denial of Defendants' 12(b)(6) motions, Plaintiffs direct our attention to the emphasized language, which in both definitions refers to "monitoring" in the "public health and welfare" context. They argue that this plain language clearly covers the monitoring costs they seek, citing *Brewer v. Ravan,* 680 F.Supp. 1176 (M.D.Tenn. 1988), and several cases which cursorily arrived at the same result as *Brewer.* * * Applying what it considered the plain language of the definitions, the *Brewer* court held that § 9601 "removal" and "remedial" costs encompass medical monitoring as long as the monitoring is "conducted *to assess the effect of the release or*

discharge on public health or to identify potential public health problems presented by the release." Id. at 1179. This holding apparently was persuasive to the district court in this case, although it did not write a memorandum in support of its ruling.

Plaintiffs correctly assert that certain monitoring costs are recoverable as "removal action" or "remedial action" "response costs." The express statutory language admits of no other result; however, we think Plaintiffs and the *Brewer* court go awry in affording a broad sweep to the "public health and welfare" language in the definitions. Several district courts, led by the comprehensive analysis in *Coburn v. Sun Chemical Corp.,* 28 Env't Rep.Cas. (BNA) 1665, 1988 WL 120739 (E.D.Pa. Nov. 9, 1988), have expressly rejected *Brewer* as too broad, basing their conclusion on an examination of the plain language of the definitions in context with the overall structure and history of CERCLA. * * * Defendants base their argument for reversal on the reasoning of these courts.

Turning to the context of the "monitoring" and "health and welfare" language, we note that both definitions are directed at containing and cleaning up hazardous substance releases. For example, the "monitor[ing]" allowed for under the "removal action" definition relates under the plain statutory language only to an evaluation of the extent of a "release or threat of release of hazardous substances." 42 U.S.C.A. § 9601(23). And the "remedial action" definition expressly focuses only on actions necessary to "prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.* § 9601(24).

Plaintiffs, however, concentrate on the additional § 9601(23) phrase referring to "other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare...." They contend that this should be read broadly to cover any type of monitoring that would mitigate health problems. Medical monitoring would mitigate the potential individual health problems of Plaintiffs, but the general provision for prevention or mitigation of "damage to public health or welfare" must be interpreted consistently with the specific examples of "removal costs" enumerated in the definition. * * * The specific examples all prevent or mitigate damage to public health by preventing contact between the spreading contaminants and the public. See, for example, the suggested actions regarding fencing, alternate water supplies, and temporary housing. *Supra* p. 1534. Although the statute provides that "removal" costs are not limited to these specific examples, we think it only reasonable under traditional statutory canons of construction to conclude that any other recoverable costs must at least be of a similar type. *See Ambrogi,* 750 F.Supp. at 1247 (discussing ejusdem generis). Longterm health monitoring of the sort requested by Plaintiffs — "to assist plaintiffs and class members in the prevention or early detection and treatment of chronic disease," * * * clearly has nothing to do with preventing contact between a "release or threatened release" and the public. The release has already occurred.

Our limited construction of the definition of "response costs" is supported by reference to legislative history, "sparse" as it is. *** Plaintiffs' request for medical monitoring to allow "prevention or early detection and treatment of chronic disease" smacks of a cause of

action for damages resulting from personal injury. And the history of the enactment of CERCLA reveals that both houses of Congress considered and rejected any provision for recovery of private damages unrelated to the cleanup effort, including medical expenses. Each chamber of Congress considered Bills which contained provisions for causes of action for certain economic damages and for personal injury. For example, the original House Bill contained a provision for private recovery of "all damages for personal injury, injury to real or personal property, and economic loss, resulting from such release or threatened release." *** This provision did not make it out of committee, and the final Bill as enacted by the House included no provision for medical expense recovery. *** The Senate Bill also contained a provision for private recovery of "all out-of-pocket medical expenses, including rehabilitation costs or burial expenses, due to personal injury." *** But this provision was later deleted by amendment, and H.R. 7020 was ultimately substituted as a compromise bill, amended, enacted by both chambers and signed into law without any reference to medical expenses.

District courts examining this evolution have looked to statements of Senator Randolph, the cosponsor of the compromise bill, for explanation. *** Senator Randolph expressly acknowledged the intentional deletion of any private cause of action for personal injury; the Senator stated that "[w]e have deleted the Federal cause of action for medical expenses or income loss." *** Given Senator Randolph's status as a cosponsor of the compromise bill, we find his statements a reliable indicator of Congressional intent to exclude "medical expenses" from recovery. His remarks, as well as statements from other Senators and Representatives throughout the evolution of CERCLA, confirm the obvious implication that Congress intentionally deleted all personal rights to recovery of medical expenses from CERCLA. * * *

Given the language of the response costs definitions and the history and structure of CERCLA, we hold that the medical monitoring which Plaintiffs seek is not recoverable under CERCLA § 107(a). We therefore reverse the district court's order denying Shell's and the Government's motion to dismiss.

Questions and Comments

1. Plain meaning: In *Holy Trinity*, as in most cases, the Court began its opinion with a discussion regarding the plain meaning of the text in question. The court in *Daigle* “turns first” to the purpose of CERCLA to interpret the text in CERCLA. What was the statutory interpretation question that the court was trying to resolve? Purposivist judges focus on the purpose of statutes to resolve ambiguity in statutory language, to confirm the plain meaning of statutory language, or, in unusual cases (like *Holy Trinity*), to interpret the statute against its plain meaning. Did the statutory language at issue in *Daigle* have a clear meaning? Was the court examining the purpose of CERCLA to confirm plain meaning, resolve ambiguity, or overturn plain meaning?

2. Dueling purposes: The court and the plaintiffs focused on two distinct purposes of CERCLA. What were the two purposes of CERCLA discussed in the opinion. There

were no dissenting judges in *Daigle*. However, can you articulate a purposivist reading of CERCLA that would support the plaintiff's claim for medical monitoring costs in the case?

3. Text and context: The *Daigle* court determined the purpose of CERCLA based on the text of several provisions of CERCLA other than Section 107(a), which did not define "response costs". Why did the court conclude that the language used in those other provisions of CERCLA demonstrated that Congress did not include Section 107(a) in CERCLA to advance the purposes identified by the plaintiffs? How did the plaintiffs argue that those same provisions demonstrated that Congress included Section 107(a) to advance the purposes that they identified?

4. Legislative history: As in *Holy Trinity,* the *Daigle* court consulted legislative history to assist the court in resolving the statutory interpretation question. (The legislative history for CERCLA is available here.) However, is the court examining the legislative history to determine the general purpose of CERCLA or to ascertain the enacting legislature's specific intent regarding the interpretive question in this case? What does the court find in the legislative history? Are the types of legislative history cited by the court more or less persuasive than the types of legislative history cited by the *Holy* Trinity Court? As you read through the cases in this book, you will find that it is often difficult to label opinions as textualist, purposivist, or any other "ist", because judges may include analyses based on multiple theories in a single opinion.

5. Health assessment or health effects studies: Why couldn't the plaintiffs recover medical monitoring costs under Section 107(a)(4)(D), which is identified in the opinion above?

6. Post-script: Several other circuit courts subsequently addressed the issue in *Daigle* and reached the same conclusion as the 10th Circuit, despite the dueling purposes of CERCLA. *See* *Giovanni v. United States Dep't of the Navy*, 906 F.3d 94, 106-110 (3d Cir. 2018); *Syms v. Olin Corp.*, 408 F.3d 95, 105 (2d Cir. 2005); *Price v. United States Navy*, 39 F.3d 1011, 1016-17 (9th Cir. 1994).

G. Advancing the Purpose

As noted above, just as critics complain that purposivism allows judges too much discretion to identify the purpose of statutes, critics also complain that judges have too much discretion in determining whether a particular interpretation of a statute advances the purposes of the statute. In the following case, the court was interpreting a statute that had conflicting purposes, so the court had to determine which purpose controlled and whether the actions taken by a government agency were consistent with the court's chosen purpose. Although the court and the government defendants ultimately agree, in the case, on the primary purpose of the statute at issue, the court and government disagree regarding whether the government decision that was challenged was consistent with that purpose. The plans referenced in the opinion are available here.

GREATER YELLOWSTONE COALITION V. KEMPTHORNE

577 F.SUPP. 2D 183 (D.D.C. 2008)

EMMET G. SULLIVAN, District Judge.

The instant case represents the latest in a series of challenges to the regulations promulgated by the National Park Service ("NPS") concerning snowmobile use in the National Parks. The regulations currently at issue propose new restrictions on recreational snowmobiling in Yellowstone and Grand Teton National Parks and the John D. Rockefeller Jr. Memorial Parkway (collectively "the parks"). There are two plaintiffs in this action. The first is the Greater Yellowstone Coalition, a group of conservation organizations that "take an active interest in maintaining the integrity of the National Park System." * * * The second Plaintiff is the National Parks Conservation Association ("NPCA"), the largest national organization in the United States dedicated to the protection and enhancement of the National Park System. * * * Defendants are the National Park Service, Dirk Kempthorne, in his official capacity as the Secretary of the Interior, Mary Bomar in her official capacity as Director of the National Park Service, and Mike Snyder in his official capacity as Director of the Intermountain Region of the U.S. National Park Service (collectively "NPS").

The new Winter Use Plan ("WUP," "Rule," or "Plan") promulgated by Defendants allows 540 recreational snowmobiles and eighty-three snowcoaches to enter Yellowstone National Park every day. * * * Plaintiffs *** claim that the plan violates the NPS Organic Act * * * Specifically, Plaintiffs' arguments focus on the WUP's substantive and procedural deficiencies as they relate to the plan's impacts on the parks' natural soundscapes, air quality, and wildlife. Agreeing that there are no facts in dispute, Plaintiffs and Defendants have filed cross-motions for summary judgment. The Court held a hearing on the motions on August 27, 2008, and the parties filed short post-hearing briefs. Upon consideration of the motions, the responses and replies thereto, oral argument at the hearing, the post-hearing briefs, the applicable law, and the entire administrative record in this case, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendants' Motion. The 2007 Winter Use Plan, the 2007 Final Environmental Impact Statement ("FEIS"), and the 2007 Record of Decision ("ROD") are hereby vacated and remanded to the agency for proceedings consistent with this opinion.

I. Procedural History

This Court's involvement in the ongoing series of cases regarding Yellowstone's winter management began in 1997 and has continued nearly without pause to the present day. *** Over the years, environmental and recreation groups have challenged the Park Service's restrictions on the use of snowmobiles in the parks, with the more recent controversies growing out of a year 2000 Record of Decision ("2000 ROD") which found that the use of snowmobiles at present levels so harmed the integrity of the parks' resources and values that it violated the NPS Organic Act. *** In light of this finding, in 2001, NPS published a Final Rule calling for the eventual phase-out of personal snowmobiles in the parks, and instead recommended continued winter access through the use of a snowcoach mass transit system. *** The "phase-out rule," promulgated by the Clinton administration, was published the day after President George W. Bush took office and was immediately stayed pending a review of the Rule by the new administration. *** In response to litigation brought by snowmobile manufacturers and enthusiasts, NPS prepared a Supplemental EIS ("SEIS") in 2003. The SEIS proposed a dramatic change of course. In place of the planned phase-out, NPS set a new limit of 950 snowmobiles per day in Yellowstone. *** Following two lawsuits in this Court and one in the District of Wyoming, NPS put into effect a "Temporary Winter Use Plan" which allowed a daily limit of 720 snowmobiles. Under the temporary plan, all snowmobiles entering the parks were required to meet "best available technology" standards for noise and emissions and were also required to be accompanied by a commercial guide. This temporary plan was to be in effect for three winter seasons, from 2004 through 2007, and then replaced with a long-term winter use plan in 2007/2008. It is the new long-term plan that is the subject of the instant case.

On September 24, 2007, NPS published its Winter Use Plan Final Environmental Impact Statement ("FEIS"). The complete plan was published in a November 20, 2007 Record of Decision ("2007 ROD"). The 2007 ROD claims to address this "Court's various concerns regarding the winter use 2003 Supplemental EIS" and allows 540 recreational snowmobiles per day, subject to "best available technology" [air pollution] standards, (hereinafter, "BAT"), 100% commercial guiding, and a requirement that all snowmobilers travel in groups of eleven or less. The Rule also requires that all snowcoaches and administrative snowmobiles implement BAT standards by 2011. *** On November 20 and 21, 2007, two lawsuits were filed in this Court by GYC and NPCA, respectively. * * * [Both lawsuits claimed that] the 2007 Final Rule violates the National Park Service Organic Act * * * The cases were consolidated by Order of this Court on March 19, 2008.

The Plan at issue was selected as one of seven alternatives analyzed [by the Park Service.] The alternatives ranged from a "no action" alternative which would have ended all oversnow vehicle ("OSV") use in the parks, to an "expanded recreational use" alternative which would have allowed up to 1025 snowmobiles per day. The details of the Winter Use Plan (also known as "Alternative 7" in the FEIS) are as follows. Recreational snowmobiles are limited to 540 per day in Yellowstone and snowcoaches are limited to

eighty-three per day. All snowmobiles must meet Best Available Technology ("BAT") standards for emissions and noise. Snowcoaches and administrative snowmobiles (including park staff and concessionaires) must also meet BAT standards by the 2011-2012 winter season. All snowmobiles must be accompanied by commercial guides and must travel in groups of one to eleven. * * *

[The court then noted that the government's plan was also challenged in court in separate actions by the State of Wyoming, Park County, and several snowmobile trade groups. Those plaintiffs argued that the limit of 540 snowmobiles per day in the plan was too restrictive and the rule violated the Organic Act. Those cases were brought in Wyoming and the federal defendants sought to have this case transferred to Wyoming, but the court denied the defendants' request.]

II. Legal Standards

* * *

3. Governing Statutory Mandates

* * * NPS is *** bound by specific statutory mandates that define the Service's mission and impose independent requirements upon the agency. Plaintiffs challenge the WUP as contrary to the National Park Service Organic Act * * *

The NPS was created in 1916 and charged with the duty to

> promote and regulate the use of the . . . national parks, monuments, and reservations hereinafter specified . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1. Congress supplemented and clarified these provisions through the General Authorities Act in 1970, and again through enactment of the "Redwood Amendment" in 1978. That Act, as amended, reinforced that management of the parks "shall be consistent with the Organic Act" and declared that the "protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park Service and shall not be exercised in derogation of the values and purposes for which these areas have been established, except as may have been or shall be directly and specifically provided by Congress." *** The NPS's 2006 Management Policies, which interpret the above directives, designate the Organic Act as "the most important statutory directive for the National Park Service." ***

III. DISCUSSION 1. Statutory Interpretation of Conservation Mandate

As an initial matter, both parties agree that the Organic Act imposes a "conservation mandate" upon NPS, and that that mandate is articulated in § 1.4.3 of the 2006 NPS

Policies. However, the parties disagree over precisely what the mandate requires and when it is triggered. Section 1.4.3 provides, in its entirety,

> The fundamental purpose of the national park system, established by the Organic Act and reaffirmed by the General Authorities Act, as amended, begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values. However, the laws do give the Service the management discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of the park, so long as the impact does not constitute impairment of the affected resources and values.
>
> The fundamental purpose of all parks also includes providing for the enjoyment of park resources and values by the people of the United States. The enjoyment that is contemplated by the statute is broad; it is the enjoyment of all the people of the United States and includes enjoyment both by people who visit the parks and by those who appreciate them from afar. It also includes deriving benefit (including scientific knowledge) and inspiration from the parks, as well as other forms of enjoyment and inspiration. Congress, recognizing that the enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired, has provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant. This is how courts have consistently interpreted the Organic Act.

NPS Policies, § 1.4.3.

Relying on the above passage, NPS argues that the conservation mandate of the Organic Act is only triggered when the impacts from a particular use rise to the level of "unacceptable impacts." *** Defendants paraphrase the mandate as follows: "[i]f unacceptable impacts are found, the Service deems the proposed use of park recourses to be in conflict with their conservation and therefore prohibits the proposed use." *** Applying this theory to the instant case, Defendants argue that because NPS has determined that the impacts of snowmobiling are "acceptable," then there is no "conflict" between conservation and use, and therefore the requirement that conservation predominate is not implicated. *** NPS reasons that the above-referenced "management discretion to allow impacts" encompasses the decision to allow the WUP's admittedly adverse impacts to the parks' natural soundscape, air quality, and wildlife, because those impacts do not conflict with conservation.

At the hearing, NPS argued that the adverse impacts of snowmobiling are acceptable because the Organic Act allows adverse impacts if they are unavoidable and appropriate. * * *

Plaintiffs strenuously disagree with this characterization of the Organic Act. While recognizing that the NPS has broad discretion to carry out its mission, Plaintiffs contend that the WUP impermissibly permits adverse impacts to park resources merely to provide another form of recreation. *** Plaintiffs argue that *** NPS has not explained how snowmobiling is "necessary and appropriate to fulfill the purposes of the park" such that the adverse impacts are acceptable, nor have they explained how the Plan seeks "ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values." ***

Plaintiffs point out that under the temporary use plan in place over the past three years, NPS's own "adaptive management thresholds" for air quality and soundscape protection have been exceeded on multiple occasions without generating a response from NPS. *** Plaintiffs argue that because actual daily use under the temporary plan has averaged only between 260-290 snowmobiles, and NPS's own thresholds for noise and air pollution have been exceeded in spite of the low numbers, allowing up to 540 snowmobiles per day will effectively double the environmental harms seen under the temporary plan. Plaintiffs insist that this result cannot be squared with the Organic Act, regardless of how NPS chooses to define "conflict."

The Court agrees. The Organic Act clearly states, and Defendants concede, that the fundamental purpose of the national park system is to conserve park resources and values. Section 1.4.3 of the NPS Policies, which provides the NPS's official interpretation of the Organic Act, states that "conservation is to be predominant."

Defendants claim that the Act "establishes the fundamental purposes of conservation and enjoyment but is silent as to how those two purposes should be analyzed." *** While it is true that the Act is "silent as to the specifics of Park management," *** Defendants' own official interpretation of the Organic Act explicitly instructs NPS on how to balance conservation and enjoyment. Namely, in the case of a conflict, "conservation is to be predominant." NPS Policies, § 1.4.3. Moreover, while it is true that "enjoyment" is also a fundamental purpose of the parks, enjoyment is qualified in the Organic Act in a way that conservation is not. The Organic Act charges NPS with the duty to "provide for the enjoyment" of the parks' resources and values in "such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. This is not blanket permission to have fun in the parks in any way the NPS sees fit. As Plaintiffs articulated at the hearing, the "enjoyment" referenced in the Organic Act is not enjoyment for its own sake, or even enjoyment of the parks generally, but rather the enjoyment of "the scenery and natural and historic objects and the wildlife" in the parks in a manner that will allow future generations to enjoy them as well. *Id.* Accordingly, while NPS has the discretion to balance the "sometimes conflicting policies of resource conservation and visitor enjoyment in determining what activities should be permitted or prohibited," *** that

discretion is bounded by the terms of the Organic Act itself. NPS cannot circumvent this limitation through conclusory declarations that certain adverse impacts are acceptable, without explaining why those impacts are necessary and appropriate to fulfill the purposes of the park. *See* NPS Policies, § 1.4.3.

The limits on NPS's discretion have been recognized by this Circuit. In *Daingerfield*, this Circuit upheld the NPS's choice of an interchange design that NPS had concluded "would have the least deleterious effect on the environment." 40 F.3d at 446. The Court noted that the Organic Act "gives the Park Service broad, but not unlimited discretion in determining *what actions are best calculated to protect Park resources.*" *Id.* (emphasis added). While not explicitly holding that NPS is required to choose the least deleterious option, the Circuit did cite with approval to the District Court's observation that "the only choice left to the Park Service was to approve the least intrusive interchange possible, which it did, or refuse to approve any interchange at all." *Id.* at n. 3. Accordingly, at the very least, NPS is required to exercise its discretion in a manner that is "calculated to protect park resources" and genuinely seeks to minimize adverse impacts on park resources and values. *See Daingerfield*, 40 F.3d at 446; NPS Policies, § 1.4.3. * * *

The record contains many compelling examples of the magnitude of this decision, but none more so than a letter from eleven former National Park Service Directors. *** Dated March 26, 2007, the letter was written in response to the original "preferred alternative" for the WUP, which would have allowed 720 snowmobiles per day, a proposal the former directors urged "would radically contravene both the letter and spirit of the 2006 Management Policies." *** While that number was ultimately reduced to 540, the letter contends that further reducing the limit to zero, "while expanding public access on modern snowcoaches, would further improve the park's health." *** Relying on the same studies found in the FEIS, the former directors argue that increasing snowmobile use over the current average of 250 snowmobiles per day would increase air and noise pollution and "sidestep a recent recommendation by Park Service scientists" that traffic should be kept "at or below current levels, not expanded."

* * *

[The Court then concluded that the snowmobile plan adopted by the Park Service would impair park resources and cause unacceptable impacts on the parks. Ultimately, therefore, the court concluded that the plan violated the Organic Act.]

Plaintiffs' Motion for Summary Judgment is **GRANTED** and Defendants' Cross-Motion for Summary Judgment is **DENIED.** The Winter Use Plan, 2007 ROD, and 2007 FEIS are vacated and remanded to the agency for proceedings consistent with this opinion. An appropriate Order accompanies this Memorandum Opinion.

Questions and Comments

1. Changes in the interpretation of the statute: As you read the factual background of the case, you probably noticed that the National Park Service frequently changed its

rules regarding the appropriate number of recreational snowmobiles that would be authorized per day in Yellowstone National Park. You may have recognized that the Park Service rules changed regularly as Presidential administrations changed. As you read cases in this book, you will notice that this is a common trend when agencies are authorized to administer and interpret statutes. Later chapters will focus on the procedures that agencies must follow and the analyses that agencies must conduct when changing rules, so those issues will not be addressed at this time.

2. Plain meaning: As in *Daigle*, the *Greater Yellowstone* court did not begin its analysis with an examination of the plain meaning of the statutory language. The plaintiffs were arguing that the National Park Service (NPS) violated the National Park Service Organic Act by approving a plan that allowed 540 recreational snowmobiles to be used each day in Yellowstone National Park. Did the text of the Organic Act clearly address whether it was appropriate for the NPS to authorize the use of 540 snowmobiles per day?

3. Purposes: What were the competing purposes of the Organic Act that the court identified in Section 1 of the Organic Act? How did the court determine which purpose controlled and which purpose did the court determine controlled? Did the court examine other provisions of the Organic Act to read Section 1 in context? Did the court examine the legislative history to ascertain the enacting Congress' intent regarding the conflicting purposes? Did the court discuss the circumstances surrounding the enactment of the legislation, as the Court did in *Holy Trinity?*

4. Section 1.4.3: The court spends a considerable amount of time in its opinion focusing on Section 1.4.3 to determine that the conservation purpose of the Organic Act takes precedence over other purposes of the Act when there is a conflict between the purposes. Section 1.4.3, however, is not a statute, but is part of a series of policies adopted by the NPS to implement the Organic Act and other authorities. You will recall that Hart & Sacks suggested that it was appropriate to consider subsequent administrative interpretations of a statute to determine the purpose of the statute. Later chapters will focus more directly on the amount of weight that courts will give to agencies' interpretations of statutes, but this case introduces the issue.

5. Advancing the purpose of the statute: Once the court concludes that the conservation purpose of the Organic Act takes precedence over other purposes, the court must still determine whether the NPS' rule that allows 540 recreational snowmobiles to access Yellowstone National Park each day is consistent with the conservation purpose of the Act. How does the NPS argue that the statute should be interpreted to carry out the conservation purpose while also allowing uses of the park that provide for enjoyment of the National Parks? Does the court agree with the NPS' reading of the statute? You will notice that the Court again is relying on the agency's policies in Section 1.4.3. As you read more cases in this book, you will notice that it is not unusual for courts to rely on agencies' interpretations of statutes to guide their interpretation of the statutes. Why does the NPS believe that its rule is consistent with its interpretation in Section 1.4.3? Does the court agree? Why or why not?

H. Comparing Textualism and Purposivism

In their most extreme forms, textualism and purposivism are clearly distinct theories of statutory interpretation. Historically, there was also an ideological divide between adherents of the opposing theories. Traditionally, the leaders in the textualist movement were ideological conservatives, while the leaders in the purposivist movement were ideological liberals.[54] Some academics have speculated that conservative judges and academics oppose purposivism because an exploration of statutory purposes tends to broaden the scope of government regulatory authority in statutes.[55] Similarly, ideological conservatives prefer that decisions are made by democratically accountable decision-makers, and argue that textualism constrains judges from basing their decisions on their personal views.[56]

While the contrast between textualism and purposivism is clear when the theories are applied in their most extreme forms, few judges adopt such extreme approaches, and many scholars believe that the theories are converging.[57] Regardless of which theory they adopt, most judges begin their analysis of a statute with the text. As Justice Elena Kagan has observed, "We're all textualists now."[58] In practice, many textualists are willing to consider extrinsic sources of interpretation if the text is ambiguous and many purposivists delay any focus on such sources until an examination of the text demonstrates that it is ambiguous.[59] In fact, few judges identify

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[54] *See* Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History,* 105 Cornell L. Rev. 1023 (2020).

[55] *Id.* at 1044.

[56] *Id.* at 1046-1047. Critics of textualism counter, though, that judges can use the canons of statutory interpretation equally adeptly in textualism to interpret statutes in a manner that aligns with their ideology. *See* Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 Tul. L. Rev. 955, 972 (2005); Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term,* 42 Houston L. Rev. 565, 580-581, 601-602 (2005); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647, 649 (1992).

[57] *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685 (2014); Molot, *The Rise and Fall of Textualism, supra* note 13, at 3; Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 348 (2005).

[58] *See* Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:28 (Nov. 17, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

[59] *See* Gluck & Posner, supra note 2, at 1300-1301; Congressional Research Service, *supra* note 35, at 16-17. "New textualists" will examine statutory purposes when the purpose can be derived from the text of the statute and the purpose is defined clearly. Modern purposivists tend to justify purposivist interpretations as consistent with the statutory text.

themselves as adhering rigidly to a single theory and many judges apply aspects of both theories on a case by case basis (as well as other theories described below).[60]

Perhaps the best example of the convergence of the theories is the Supreme Court's 2015 decision in *King v. Burwell*, 135 S.Ct. 2480 (2015), described by some as "textually constrained purposivism."[61] The oral argument for the case is available here.

KING V. BURWELL

135 S.Ct. 2480 (2015)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

* * *

I

A

The Patient Protection and Affordable Care Act [Affordable Care Act] ***grew out of a long history of failed health insurance reform. In the 1990s, several States began experimenting with ways to expand people's access to coverage. One common approach was to impose a pair of insurance market regulations—a "guaranteed issue" requirement, which barred insurers from denying coverage to any person because of his health, and a "community rating" requirement, which barred insurers from charging a person higher premiums for the same reason. Together, those requirements were designed to ensure that anyone who wanted to buy health insurance could do so.

The guaranteed issue and community rating requirements achieved that goal, but they had an unintended consequence: They encouraged people to wait until they got sick to buy insurance. Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill? This consequence—known as "adverse selection"—led to a second: Insurers were forced to increase premiums to account for the fact that, more and more, it was the sick rather than the healthy who were buying insurance. And that consequence fed back into the first: As the cost of insurance rose, even more people waited until they became ill to buy it.

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[60] In their survey of 42 federal appellate court judges, Abbe Gluck and Judge Richard Posner found that none of the judges was willing to associate themselves with textualism without some qualification and none identified as purposivists. *See* Gluck & Posner, *supra* note 2, at 1301-1303.

[61] *See* Michael J. Cedrone, *Supreme Silence and Precedential Pragmatism: King v. Burwell and Statutory Interpretation in the Federal Courts of Appeals*, 103 Marq. L. Rev. 43 (2019).

This led to an economic "death spiral." As premiums rose higher and higher, and the number of people buying insurance sank lower and lower, insurers began to leave the market entirely. As a result, the number of people without insurance increased dramatically.

* * *

B

The Affordable Care Act adopts *** three key reforms [to address those problems.] First, the Act adopts the guaranteed issue and community rating requirements. The Act provides that "each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." 42 U. S. C. §300gg–1(a). The Act also bars insurers from charging higher premiums on the basis of a person's health. §300gg.

Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS. 26 U. S. C. §5000A. Congress recognized that, without an incentive, "many individuals would wait to purchase health insurance until they needed care." 42 U. S. C. §18091(2)(I). So Congress adopted a coverage requirement to "minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *** Congress also provided an exemption from the coverage requirement for anyone who has to spend more than eight percent of his income on health insurance. 26 U. S. C. §§5000A(e)(1)(A), (e)(1)(B)(ii).

Third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. §36B. * * *

These three reforms are closely intertwined. As noted, Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. §18091(2)(I). And the coverage requirement would not work without the tax credits. * * *

C

In addition to those three reforms, the Act requires the creation of an "Exchange" in each State where people can shop for insurance, usually online. 42 U. S. C. §18031(b)(1). An Exchange may be created in one of two ways. First, the Act provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." *Ibid.* Second, if a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services "shall . . . establish and operate such Exchange within the State." §18041(c)(1).

The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange. The Act initially provides that tax credits

"shall be allowed" for any "applicable taxpayer." 26 U. S. C. §36B(a). The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act [hereinafter 42 U. S. C. §18031]." 26 U. S. C. §§36B(b)–(c) (emphasis added). * * *

At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34 States have elected to have HHS do so.

D

Petitioners are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as "an Exchange established by the State under [42 U. S. C. §18031]," so they should not receive any tax credits. That would make the cost of buying insurance more than eight percent of their income, which would exempt them from the Act's coverage requirement. * * *

II

* * *

The parties dispute whether Section 36B authorizes tax credits for individuals who enroll in an insurance plan through a Federal Exchange. Petitioners argue that a Federal Exchange is not "an Exchange established by the State under [42 U. S. C. §18031]," * * * The Government responds that * * * the phrase "an Exchange established by the State under [42 U. S. C. §18031]" should be read to include Federal Exchanges. Brief for Respondents 20–25.

* * *

It is *** our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. *** But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *** So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." *** Our duty, after all, is "to construe statutes, not isolated provisions." ***

A

We begin with the text of Section 36B. As relevant here, Section 36B allows an individual to receive tax credits only if the individual enrolls in an insurance plan through "an Exchange established by the State under [42 U. S. C. §18031]." * * *

First, all parties agree that a Federal Exchange qualifies as "an Exchange" for purposes of Section 36B. *** Section 18031 provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." §18031(b)(1). Although phrased as a requirement, the Act gives the States "flexibility" by allowing them to "elect" whether

they want to establish an Exchange. §18041(b). If the State chooses not to do so, Section 18041 provides that the Secretary "shall . . . establish and operate *such Exchange* within the State." §18041(c)(1) (emphasis added).

By using the phrase "such Exchange," Section 18041 instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section 18031. See Black's Law Dictionary 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned"). In other words, State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes. * * * A Federal Exchange therefore counts as "an Exchange" under Section 36B.

Second, we must determine whether a Federal Exchange is "established by the State" for purposes of Section 36B. At the outset, it might seem that a Federal Exchange cannot fulfill this requirement. After all, the Act defines "State" to mean "each of the 50 States and the District of Columbia"—a definition that does not include the Federal Government. 42 U. S. C. §18024(d). But when read in context, "with a view to [its] place in the overall statutory scheme," the meaning of the phrase "established by the State" is not so clear. ***

After telling each State to establish an Exchange, Section 18031 provides that all Exchanges "shall make available qualified health plans to qualified individuals." 42 U. S. C. §18031(d)(2)(A). Section 18032 then defines the term "qualified individual" in part as an individual who "resides in the State that established the Exchange." §18032(f)(1)(A). And that's a problem: If we give the phrase "the State that established the Exchange" its most natural meaning, there would be *no* "qualified individuals" on Federal Exchanges. But the Act clearly contemplates that there will be qualified individuals on *every* Exchange. As we just mentioned, the Act requires all Exchanges to "make available qualified health plans to qualified individuals"—something an Exchange could not do if there were no such individuals. §18031(d)(2)(A). And the Act tells the Exchange, in deciding which health plans to offer, to consider "the interests of qualified individuals . . . in the State or States in which such Exchange operates"—again, something the Exchange could not do if qualified individuals did not exist. §18031(e)(1)(B). This problem arises repeatedly throughout the Act. See, *e.g.*, §18031(b)(2) (allowing a State to create "one Exchange . . . for providing . . . services to both qualified individuals and qualified small employers," rather than creating separate Exchanges for those two groups).

These provisions suggest that the Act may not always use the phrase "established by the State" in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context.

Third, we must determine whether a Federal Exchange is established "under [42 U. S. C. §18031]." This too might seem a requirement that a Federal Exchange cannot fulfill, because it is Section 18041 that tells the Secretary when to "establish and operate such

Exchange." But here again, the way different provisions in the statute interact suggests otherwise.

The Act defines the term "Exchange" to mean "an American Health Benefit Exchange established under section 18031." §300gg–91(d)(21). If we import that definition into Section 18041, the Act tells the Secretary to "establish and operate such 'American Health Benefit Exchange established under section 18031.'" That suggests that Section 18041 authorizes the Secretary to establish an Exchange under Section 18031, not (or not only) under Section 18041. Otherwise, the Federal Exchange, by definition, would not be an "Exchange" at all. ***

This interpretation of "under [42 U. S. C. §18031]" fits best with the statutory context. All of the requirements that an Exchange must meet are in Section 18031, so it is sensible to regard all Exchanges as established under that provision. In addition, every time the Act uses the word "Exchange," the definitional provision requires that we substitute the phrase "Exchange established under section 18031." If Federal Exchanges were not established under Section 18031, therefore, literally none of the Act's requirements would apply to them. * * *

The upshot of all this is that the phrase "an Exchange established by the State under [42 U. S. C. §18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of the tax credits. * * * But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not.

* * *

The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s. See 124 Stat. 270, 911, 912.) Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." Cannan, A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History, 105 L. Lib. J. 131, 163 (2013). And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. *Id.,* at 159–167. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. * * *

Anyway, we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." * * *

B

Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. * * * Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. See *New York State Dept. of Social Servs.* v. *Dublino*, 413 U. S. 405, 419–420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

* * *

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. *** Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. *** And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, 42 U. S. C. §18032(c)(1), premiums outside the Exchange would rise along with those inside the Exchange. ***

It is implausible that Congress meant the Act to operate in this manner. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (slip op., at 60) ("Without the federal subsidies . . . the exchanges would not operate as Congress intended and may not operate at all."). Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well.

* * *

D

Petitioners' arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase "an Exchange established by the State under [42 U. S. C. §18031]" may seem plain "when viewed in isolation," such a reading turns out to be "untenable in light of [the statute] as a whole." *** In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.

Reliance on context and structure in statutory interpretation is a "subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself." *** For the reasons we have given, however, such reliance is appropriate in this case, and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like

their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.

* * *

The judgment of the United States Court of Appeals for the Fourth Circuit is

Affirmed.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

The Court holds that when the Patient Protection and Affordable Care Act says "Exchange established by the State" it means "Exchange established by the State or the Federal Government." That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.

I

* * *

This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it. In order to receive any money under §36B, an individual must enroll in an insurance plan through an "Exchange established by the State." The Secretary of Health and Human Services is not a State. So an Exchange established by the Secretary is not an Exchange established by the State—which means people who buy health insurance through such an Exchange get no money under §36B.

Words no longer have meaning if an Exchange that is *not* established by a State is "established by the State." It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words "established by the State." And it is hard to come up with a reason to include the words "by the State" other than the purpose of limiting credits to state Exchanges. * * * Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.

II

* * *

The Court persists that [the statute] "would make little sense" if no tax credits were available on federal Exchanges. *Ante,* at 14. Even if that observation were true, it would show only oddity, not ambiguity. Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provisions all lined

up perfectly with each other. This Court "does not revise legislation . . . just because the text as written creates an apparent anomaly."

* * *

III

For its next defense of the indefensible, the Court turns to the Affordable Care Act's design and purposes. *** This reasoning suffers from no shortage of flaws. To begin with, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *** Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision. Could anyone maintain with a straight face that §36B is unclear?

* * *

Compounding its errors, the Court forgets that it is no more appropriate to consider one of a statute's purposes in isolation than it is to consider one of its words that way. No law pursues just one purpose at all costs, and no statutory scheme encompasses just one element. Most relevant here, the Affordable Care Act displays a congressional preference for state participation in the establishment of Exchanges: Each State gets the first opportunity to set up its Exchange, 42 U. S. C. §18031(b); States that take up the opportunity receive federal funding for "activities . . . related to establishing" an Exchange, §18031(a)(3); and the Secretary may establish an Exchange in a State only as a fallback, §18041(c). But setting up and running an Exchange involve significant burdens—meeting strict deadlines, §18041(b), implementing requirements related to the offering of insurance plans, §18031(d)(4), setting up outreach programs, §18031(i), and ensuring that the Exchange is self-sustaining by 2015, §18031(d)(5)(A). A State would have much less reason to take on these burdens if its citizens could receive tax credits no matter who establishes its Exchange. (Now that the Internal Revenue Service has interpreted §36B to authorize tax credits everywhere, by the way, 34 States have failed to set up their own Exchanges. *Ante,* at 6.) So even if making credits available on all Exchanges advances the goal of improving healthcare markets, it frustrates the goal of encouraging state involvement in the implementation of the Act. *This* is what justifies going out of our way to read "established by the State" to mean "established by the State or not established by the State"?

* * *

IV

Perhaps sensing the dismal failure of its efforts to show that "established by the State" means "established by the State or the Federal Government," the Court tries to palm off the pertinent statutory phrase as "inartful drafting." *Ante,* at 14. This Court, however, has no free-floating power "to rescue Congress from its drafting errors." *** Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. The occurrence of a misprint may be apparent from the face of the

law, as it is where the Affordable Care Act "creates three separate Section 1563s." * * * The occurrence of a misprint may also be apparent because a provision decrees an absurd result—a consequence "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *** But §36B does not come remotely close to satisfying that demanding standard. It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble.

* * *

V

The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give *Congress* "[a]ll legislative Powers" enumerated in the Constitution. Art. I, §1. They made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that "[o]ur task is to apply the text, not to improve upon it." ***

Trying to make its judge-empowering approach seem respectful of congressional authority, the Court asserts that its decision merely ensures that the Affordable Care Act operates the way Congress "meant [it] to operate." *Ante,* at 17. First of all, what makes the Court so sure that Congress "meant" tax credits to be available everywhere? Our only evidence of what Congress meant comes from the terms of the law, and those terms show beyond all question that tax credits are available only on state Exchanges. More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, not by the unenacted will of our lawmakers. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *** In the meantime, this Court "has no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." ***

Even less defensible, if possible, is the Court's claim that its interpretive approach is justified because this Act "does not reflect the type of care and deliberation that one might expect of such significant legislation." *** It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate. Much less is it our place to make everything come out right when Congress does not do its job properly. It is up to Congress

to design its laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility.

Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges.

* * *

Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft-Hartley Act; perhaps not. But this Court's two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed ("penalty" means tax, "further [Medicaid] payments to the State" means only incremental Medicaid payments to the State, "established by the State" means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others and is prepared to do whatever it takes to uphold and assist its favorites.

I dissent.

Questions and Comments

1. Statutory Language: What was the statutory language being interpreted by the Court and what interpretive question was the Court trying to resolve? What did the challengers argue the language meant and what did the government argue it meant? Which interpretation did the majority adopt and which interpretation did the dissent adopt?

2. Plain meaning: In classic textualist form, the dissent argues that the plain meaning of the language in the Affordable Care Act is clear, so the Court must interpret the statute according to its plain meaning. Does the majority agree that the plain meaning of the language is clear? Does the Court make a determination about whether the statutory language is ambiguous before or after examining other portions of the statute? The dissent argues that courts should depart from the plain meaning of statutory language only when the application of the statute according to its plain meaning is absurd. Does the majority agree? Does the dissent believe that application of the statute according to its plain meaning is absurd?

3. Purposivism: After concluding that the statutory language is ambiguous, the majority suggests that the interpretation of the statute that it adopts is necessary to achieve the purposes of the statute. In many ways, the opinion has purposivist tones, as the Court, at the outset of the opinion, discusses the circumstances that led to the enactment of the statute and explains, in Part II.B. why its interpretation of the statute advances the purposes for which the statute was enacted. The majority claims to be acting as a "faithful agent" of Congress, implementing its will, and justifies its reliance on the text by arguing that the language in the statute is ambiguous. Why does the majority say that its interpretation is necessary to advance the purpose of the Affordable Care

Act? When does the dissent argue that it is appropriate to interpret statutes to achieve their purposes? What is the alternative purpose that the dissent argues the majority ignored in the case?

4. Unorthodox lawmaking: The majority notes that there are several provisions in the Affordable Care Act that are the result of "inartful drafting", related to the unorthodox manner in which the law was enacted. Does the majority believe that the statute should be interpreted differently than other statutes drafted in more traditional ways? Does the dissent agree? For an interesting discussion of the legislative history of the ACA, *see* John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*,105 L. Lib. J. 131 (2013), cited by the Court.

5. Proper roles: In what ways does the dissent believe that the majority has stepped out of its proper judicial role? If the statutory language as drafted is truly unworkable, what remedy does the dissent suggest is appropriate for such legislative "mistakes"?

6. Impact on decision-making in the appellate courts: As noted in chapter 2, courts do not generally accord methodological stare decisis to statutory interpretation canons or theories. While *King v. Burwell* established important administrative law principles (that were edited out of the opinion reproduced above), the decision seems to have had little effect on the statutory interpretation methodology employed by federal appellate courts. In a 2019 article, Professor Michael Cedrone examined seventy-two federal appellate court decisions that cited *King v. Burwell* in the two years following the decision and he found that the decision did not spark a new purposivist revolution in the courts. Instead, he found "a dynamic landscape in which courts seem relatively uncommitted to ideological battles over interpretive principles [and where courts] freely pursue the best reading of statutory text through textual and purposive means]. *See* Michael J. Cedrone, *Supreme Silence and Precedential Pragmatism: King v. Burwell and Statutory Interpretation in the Federal Courts of Appeals*, 103 Marq. L. Rev. 43, 47 (2019).

VI. Other Theories of Interpretation

While textualism and purposivism are the predominant theories of statutory interpretation today, judges have relied on other theories in the past and still rely, to some extent, on other theories today. One theory that is closely related to purposivism is ***intentionalism***. Intentionalist judges interpret statutes to ascertain the intent of the ***enacting legislature*** on the ***specific issue*** before the court.[62] They look at statutes through a similar lens as purposivists in that they focus on the text, legislative history and the conditions at the time of enactment of a statute to determine the legislature's intent, as those sources most directly bear on the legislature's intent.[63] Like purposivists, they start by focusing on the text of the statute, but they may turn to extrinsic sources once they have determined that the statute's text is ambiguous or they may examine the sources to determine that the

[62] *See* See, e.g., Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. Pa. L. Rev. 117, 123-24 (2009).

[63] *See* Bressman, Rubin, & Stack, *supra* note 28, at 155.

text is ambiguous or absurd.[64] Not surprisingly, as intentionalists are searching for the intent of the enacting legislature, the theory is based on the "faithful agent" model of the judicial/legislative relationship.[65] Intentionalists differ from purposivists in the level of generality of their inquiries into legislative intent. While purposivists attempt to determine the general purposes for which a statute was enacted and interpret the statute to advance those purposes, intentionalists search for the ***actual intent*** of the enacting legislature on the specific question that the court is trying to resolve.[66]

Critics argue that the search for legislative intent is futile because the legislature does not have a collective intent or because the collective intent cannot be discovered through the means utilized through an examination of legislative history or the other means used by intentionalists.[67] Even though groups can have collective intents, detractors of intentionalism criticize the efforts of intentionalists to determine the intent through examination of legislative history and statements of individual legislators.[68] After all, critics argue, it is not clear whether a court, in ascertaining the intent of the enacting legislature, should put more weight on the views expressed by the 51st Senator whose vote was needed to pass the bill, the 67th Senator whose vote was needed to break the filibuster on the bill, or any other member of Congress or committee in Congress.[69] Textualists also criticize intentionalists because intentionalists, like purposivists, examine legislative history and other extrinsic sources to interpret statutory meaning and they argue that the legislature only enacts the text that is included in statutes, and not the intent behind the text.[70]

A modern offshoot of intentionalism is the ***imaginative reconstruction*** theory of statutory interpretation. It was first proposed by ***Dean Roscoe Pound*** in 1907[71], and later championed by Judge Richard Posner.[72] Under the theory, the court acknowledges that the enacting legislature probably did not have an actual intent regarding the statutory interpretation question it is trying to resolve, but the court attempts to reconstruct what the enacting legislature would have intended if it thought about the question.[73] As with intentionalism, judges applying this theory

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64 *Id.* at 328. *See also* Jellum, *supra* note 26, at 102-104.

65 *See* William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION 14 (1994); Jellum, *supra* note 26, at 102-103.

66 *See* Bressman, Rubin, & Stack, *supra* note 28, at 155.

67 *See* Eskridge, Brudney, Chafetz, Frickey, & Garrett, *supra* note 25, at 422-423; Jellum, *supra* note 26, at 103.

68 *Id.* at 423-324. *See also* Bressman, Rubin & Stack, *supra* note 28, at 326-327; Jellum, *supra* note 26, at 103.

69 *See* Jellum, supra note 26, at 103. *See also* Bressman, Rubin & Stack, *supra* note 28, at 325.

70 *See* Bressman, Rubin & Stack, *supra* note 28, at 328.

71 *See* Roscoe Pound, *Spurious Interpretation,* 7 Colum. L. Rev. 379 (1907).

72 *See* Bressman, Rubin & Stack, *supra* note 28, at 156.

73 *Id. See also* Jellum, *supra* note 26, at 109.

rely on legislative history and the circumstances surrounding the enactment of the legislation, as well as the text of the statute, to help reconstruct what the enacting legislature would have intended if faced with the interpretive question.[74] Judges will consider the values and attitudes of the legislators at the time the statute was enacted, as well as "any sign of legislative intent regarding the freedom with which " judges should interpret the statute.[75] Like all the theories discussed so far, it is based on the "faithful agent" model of the relationship between the judiciary and the legislature. Imaginative reconstruction is challenged on the same grounds as other theories that look beyond the statutory text and look for intent of a collective body[76] but is also criticized because judges using the theory are not seeking to enforce the law passed by the legislature, but the law that the legislature would have passed (but didn't) if it had considered the statutory interpretation question before the court. Justice Rehnquist's opinion in *Leo Sheep v. United States*, 440 U.S. 668 (1979), is a good example of an opinion utilizing the imaginative reconstruction theory.

A final theory of interpretation that is utilized less frequently than the other theories is ***dynamic statutory interpretation.*** Unlike the other theories, this theory views judges as partners of the legislature, rather than "faithful agents."[77] The theory was created by Professor William Eskridge and resembles common law decision-making, in that judges interpret the law to change over time as social views and the legal landscape change.[78] With dynamic interpretation, it is entirely possible that a judge could interpret a statute in a way that the judge acknowledges the enacting legislature would not have intended because the social values and underlying law have changed in the years since the statute was enacted.[79] Eskridge argues, for instance, that even though the 1964 Congress would not have intended to approve affirmative action programs, the Supreme Court, in its 1979 decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), may have used dynamic statutory interpretation to interpret the 1964 Civil Rights Act to authorize such programs, in order to achieve the goals of the statute.[80]

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[74] *See* Jellum, supra note 26, at 109.

[75] *See* Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 817-818 (1983).

[76] *See* Jellum, supra note 26, at 109.

[77] *Id.* at 127. *See also* Seidenfeld, *supra* note 18, at 1821.

[78] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

[79] *Id.* Eskridge argued that "[i]nterpretation is not an archaeological discovery, but a dialectical creation. Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and creations." *Id.* at 1482. While "purposivist" judges might read a statute dynamically to advance the enacting legislature's goals differently than the enacting legislature may have, in light of changes in society and the law, "dynamic statutory interpretation" envisions a more expansive method of interpreting statutes that is not hinged directly to the actual or imagined intent of the enacting legislature.

[80] *See* Eskridge, Brudney, Chafetz, Frickey, & Garrett, *supra* note 25, at 422-423; Jellum, *supra* note 26, at 73-74.

Even though dynamic statutory interpretation is rarely used as an independent theory of interpretation, it has been criticized more than most other theories. First, to the extent that the theory allows judges to interpret statutes in ways that the legislature would not have intended, critics assert that the theory violates separation of powers principles ***and*** is bad from a policy perspective because judges do not have the expertise to make law based on the changed social and legal landscape and judges do not have the democratic accountability of legislators. Second, to the extent that the theory allows judges to ignore the text of statutes in order to update them, it reduces public notice of what the law requires and disrupts public planning. Finally, the theory gives judges too much power to make decisions based on personal and ideological preferences. Supporters of the theory counter, though, that dynamic interpretation is a fairer and more just method of interpretation and more consistent with public perception of what the law should be, based on current understanding of the meaning of the law in society.

The following case demonstrates the dynamic statutory interpretation theory. A news story about the case, with an interview with the plaintiff, is available here.

HIVELY v. IVY TECH COMMUNITY COLLEGE OF INDIANA

853 F.3d 339 (7th Cir. 2017)

Wood, Chief Judge.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers subject to the Act to discriminate on the basis of a person's "race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e-2(a). For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person's sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination. We therefore reverse the district court's judgment dismissing Kimberly Hively's suit against Ivy Tech Community College and remand for further proceedings.

I

Hively is openly lesbian. She began teaching as a part-time, adjunct professor at Ivy Tech Community College's South Bend campus in 2000. Hoping to improve her lot, she applied for at least six full-time positions between 2009 and 2014. These efforts were unsuccessful; worse yet, in July 2014 her part-time contract was not renewed. Believing that Ivy Tech was spurning her because of her sexual orientation, she filed * * * this action in the district court. [The court dismissed Hively's lawsuit and she appealed to this court. A panel of this court affirmed the district court's decision, noting that this circuit and most other circuits have held that Title VII's prohibition against discrimination based on sex

does not apply to discrimination based on sexual orientation. This court then agreed to rehear the case en banc.]

II

A

The question before us is not whether this court can, or should, "amend" Title VII to add a new protected category to the familiar list of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex. This is a pure question of statutory interpretation and thus well within the judiciary's competence.

Much ink has been spilled about the proper way to go about the task of statutory interpretation. One can stick, to the greatest extent possible, to the language enacted by the legislature; one could consult the legislative history that led up to the bill that became law; one could examine later actions of the legislature (i.e. efforts to amend the law and later enactments) for whatever light they may shed; and one could use a combination of these methods. * * *

Few people would insist that there is a need to delve into secondary sources if the statute is plain on its face. Even if it is not pellucid, the best source for disambiguation is the broader context of the statute that the legislature - in this case, Congress - passed.

* * *

Our interpretive task is guided *** by the Supreme Court's approach in the closely related case of *Oncale*, where it had this to say as it addressed the question whether Title VII covers sexual harassment inflicted by a man on a male victim:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits discriminat[ion]... because of ... sex in the terms or conditions of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

523 U.S. at 79-80 *** The Court could not have been clearer: the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.

It is therefore neither here nor there that the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so) may not have realized or understood the full scope of the words it chose. Indeed, in the years since 1964, Title VII has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B. The Supreme Court has held that the prohibition against sex discrimination reaches sexual harassment in the workplace, *** including same-sex workplace harassment, ***; it reaches discrimination based on actuarial assumptions about a person's longevity, ***; and it reaches discrimination based on a person's failure to conform to a certain set of gender stereotypes ***. It is quite possible that these interpretations may also have surprised some who served in the 88th Congress. Nevertheless, experience with the law has led the Supreme Court to recognize that each of these examples is a covered form of sex discrimination. * * *

[The court then analyzed Hively's claim that "sex discrimination" includes discrimination on the basis of sexual orientation under the "comparative method" employed in other cases, in which the court attempts to determine whether the plaintiff had described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way. The court concludes that if Hively were a man who was married to, living with, or dating a woman, and all other facts remained the same, Ivy Tech would not have fired her. Accordingly, the court held that Ivy Tech was disadvantaging her in the case because she was a woman, rather than a man. Thus, they were discriminating against her based on her sex. The court also held that Ivy Tech's actions were discrimination based on sex under the associational theory adopted by the Supreme Court in *Loving v. Virginia* and similar cases.]

III

Today's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation. We already have discussed the employment cases, especially *Hopkins* and *Oncale.* The latter line of cases began with *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court held that a provision of the Colorado Constitution forbidding any organ of government in the state from taking action designed to protect "homosexual, lesbian, or bisexual" persons violated the federal Equal Protection Clause. Romer was followed by *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Court found that a Texas statute criminalizing homosexual intimacy between consenting adults violated the liberty provision of the Due Process Clause. Next came United States v. Windsor, 133 S.Ct. 2675 (2013), which addressed the constitutionality of the part of the Defense of Marriage Act (DOMA) that excluded a same-sex partner from the definition of "spouse" in other federal statutes. The Court held that this part of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government."*** Finally, the Court's decision in [Obergefell v. Hodges, 576 U.S. 644 (2015)] held that the right to marry is a fundamental liberty right, protected by the Due

Process and Equal Protection Clauses of the Fourteenth Amendment. *** The Court wrote that "[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality." ***

It would require considerable calisthenics to remove the "sex" from "sexual orientation." The effort to do so has led to confusing and contradictory results, as our panel opinion illustrated so well. The EEOC concluded *** that such an effort cannot be reconciled with the straightforward language of Title VII. ***

This is not to say that authority to the contrary does not exist. As we acknowledged at the outset of this opinion, it does. But this court sits en banc to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago. The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.

* * *

We hold ***that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes. It was therefore wrong to dismiss Hively's complaint for failure to state a claim. The judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

Posner, Circuit Judge, concurring.

I agree that we should reverse, and I join the majority opinion, but I wish to explore an alternative approach that may be more straightforward.

* * *

[I]nterpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text) — a meaning that infuses the statement with vitality and significance today. An example of this *** form of interpretation - the form that in my mind is most clearly applicable to the present case - is the Sherman Antitrust Act, enacted in 1890, long before there was a sophisticated understanding of the economics of monopoly and competition. Times have changed; and for more than thirty years the Act has been interpreted in conformity to the modern, not the nineteenth-century, understanding of the relevant economics. The Act has thus been updated by, or in the name of, judicial interpretation - the form of interpretation that consists of making old law satisfy modern needs and understandings. And a common form of interpretation it is, despite its flouting "original meaning." Statutes and constitutional provisions frequently are interpreted on the basis of present need and present understanding rather

than original meaning — constitutional provisions even more frequently, because most of them are older than most statutes.

Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted. But I need to emphasize that this third form of interpretation — call it judicial interpretive updating — presupposes a lengthy interval between enactment and (re)interpretation. A statute when passed has an understood meaning; it takes years, often many years, for a shift in the political and cultural environment to change the understanding of the statute.

* * *

It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII. *** [W]hat is certain is that the word "sex" in Title VII had no immediate reference to homosexuality; many years would elapse before it could be understood to include homosexuality.

A diehard "originalist" would argue that what was believed in 1964 defines the scope of the statute for as long as the statutory text remains unchanged, and therefore until changed by Congress's amending or replacing the statute. But as I noted earlier, statutory and constitutional provisions frequently are interpreted on the basis of present need and understanding rather than original meaning. * * *

Nothing has changed more in the decades since the enactment of the statute than attitudes toward sex.

[Judge Posner then described the changes in society and the changes in case law upholding same sex marriage and providing protections for persons based on their sexual orientation.]

I am reluctant however to base the new interpretation of discrimination on account of sex in Title VII on such cases as *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), a case of sexual harassment of one man by other men, held by the Supreme Court to violate Title VII's prohibition of sex discrimination. ***

Another decision we should avoid in ascribing present meaning to Title VII is Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which Hively argues protects her right to associate intimately with a person of the same sex. That was a constitutional case, based on race. It outlawed state prohibitions of interracial marriage. It had nothing to do with the recently enacted Title VII. ***

The most tenable and straightforward ground for deciding in favor of Hively is that while in 1964 sex discrimination meant discrimination against men or women as such and not against subsets of men or women ***, the concept of sex discrimination has since broadened in light of the recognition, which barely existed in 1964, that there are significant numbers of both men and women who have a sexual orientation that sets them

apart from the heterosexual members of their genetic sex (male or female) *** Title VII in terms forbids only sex discrimination, but we now understand discrimination against homosexual men and women to be a form of sex discrimination; and to paraphrase Holmes, "We must consider what this country has become in deciding what that [statute] has reserved."

* * *

I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of "sex discrimination" that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963-1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.

Sykes, Circuit Judge, with whom Bauer and Kanne, Circuit Judges, join, dissenting.

Any case heard by the full court is important. This one is momentous. All the more reason to pay careful attention to the limits on the court's role. The question before the en banc court is one of statutory interpretation. The majority deploys a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. So does Judge Posner in his concurrence. Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges. Judge Posner admits this; he embraces and argues for this conception of judicial power. The majority does not, preferring instead to smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents. Either way, the result is the same: the circumvention of the legislative process by which the people govern themselves.

Respect for the constraints imposed on the judiciary by a system of written law must begin with fidelity to the traditional first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.

In a handful of statutory contexts, Congress has vested the federal courts with authority to consider and make new rules of law in the common-law way. The Sherman Act is the archetype of the so-called "common-law statutes," but there are very few of these and Title VII is not one of them. *** So our role is interpretive only; we lack the discretion to ascribe to Title VII a meaning it did not bear at its inception. Sitting en banc permits us to overturn our own precedents, but in a statutory case, we do not sit as a common-law court

free to engage in "judicial interpretive updating," as Judge Posner calls it, or to do the same thing by pressing hard on tenuously related Supreme Court opinions, as the majority does.

Judicial statutory updating, whether overt or covert, cannot be reconciled with the constitutional design. The Constitution establishes a procedure for enacting and amending statutes: bicameralism and presentment. See U.S. CONST. art. I, § 7. Needless to say, statutory amendments brought to you by the judiciary do not pass through this process. That is why a textualist decision method matters: When we assume the power to alter the original public meaning of a statute through the process of interpretation, we assume a power that is not ours. The Constitution assigns the power to make and amend statutory law to the elected representatives of the people. However welcome today's decision might be as a policy matter, it comes at a great cost to representative self-government.

I

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Sexual orientation is not on the list of forbidden categories of employment discrimination, and we have long and consistently held that employment decisions based on a person's sexual orientation do not classify people on the basis of sex and thus are not covered by Title VII's prohibition of discrimination "because of sex." *** This interpretation has been stable for many decades and is broadly accepted; all circuits agree that sexual-orientation discrimination is a distinct form of discrimination and is not synonymous with sex discrimination. ***

Today the court jettisons the prevailing interpretation and installs the polar opposite. Suddenly sexual-orientation discrimination is sex discrimination and thus is actionable under Title VII. What justification is offered for this radical change in a well-established, uniform interpretation of an important — indeed, transformational — statute? My colleagues take note of the Supreme Court's "absence from the debate."*** What debate? There is no debate, at least not in the relevant sense. Our long-standing interpretation of Title VII is not an outlier. From the statute's inception to the present day, the appellate courts have unanimously and repeatedly read the statute the same way, as my colleagues must and do acknowledge. *** The Supreme Court has had no need to weigh in, and the unanimity among the courts of appeals strongly suggests that our long-settled interpretation is correct.

Of course, there is a robust debate on this subject in our culture, media, and politics. Attitudes about gay rights have dramatically shifted in the 53 years since the Civil Rights Act was adopted. Lambda Legal's proposed new reading of Title VII — offered on behalf of plaintiff Kimberly Hively at the appellate stage of this litigation — has a strong foothold in current popular opinion.

This striking cultural change informs a case for legislative change and might eventually persuade the people's representatives to amend the statute to implement a new public policy. But it does not bear on the sole inquiry properly before the en banc court: Is the prevailing interpretation of Title VII — that discrimination on the basis of sexual orientation is different in kind and not a form of sex discrimination — wrong as an original matter?

* * *

B

To a fluent speaker of the English language — then and now — the ordinary meaning of the word "sex" does not fairly include the concept of "sexual orientation." The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning. Contrary to the majority's vivid rhetorical claim, it does not take "considerable calisthenics" to separate the two. *** The words plainly describe different traits, and the separate and distinct meaning of each term is easily grasped. More specifically to the point here, discrimination "because of sex" is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here.

* * *

C

This commonsense understanding is confirmed by the language Congress uses when it does legislate against sexual-orientation discrimination. For example, the Violence Against Women Act prohibits funded programs and activities from discriminating "on the basis of actual or perceived race, color, religion, national origin, sex, gender identity, ... sexual orientation, or disability." 42 U.S.C. § 13925(b)(13)(A) (emphases added). *** The federal Hate Crimes Act is another example. It imposes a heightened punishment for causing or attempting to cause bodily injury "to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person." 18 U.S.C. § 249(a)(2)(A) (emphases added). Other examples can be found elsewhere in the U.S. Code. * * *

State and local antidiscrimination laws likewise distinguish between sex discrimination and sexual-orientation discrimination by listing them separately as distinct forms of unlawful discrimination. * * *

I could go on, but the point has been made. This uniformity of usage is powerful objective evidence that sexual-orientation discrimination is broadly recognized as an independent category of discrimination and is not synonymous with sex discrimination.

II

My colleagues in the majority superficially acknowledge Ulane's "truism" that sex discrimination is discrimination based on a person's biological sex. *** As they see it, however, even if sex discrimination is understood in the ordinary way, sexual-orientation discrimination is sex discrimination because "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." ***

Not true. An employer who refuses to hire homosexuals is not drawing a line based on the job applicant's sex. He is not excluding gay men because they are men and lesbians because they are women. His discriminatory motivation is independent of and unrelated to the applicant's sex. Sexism (misandry and misogyny) and homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics. Simply put, sexual-orientation discrimination doesn't classify people by sex; it doesn't draw male/female distinctions but instead targets homosexual men and women for harsher treatment than heterosexual men and women.

* * *

This brings me back to where I started. The court's new liability rule is entirely judge-made; it does not derive from the text of Title VII in any meaningful sense. The court has arrogated to itself the power to create a new protected category under Title VII. Common-law liability rules may judicially evolve in this way,but statutory law is fundamentally different. Our constitutional structure requires us to respect the difference.

It's understandable that the court is impatient to protect lesbians and gay men from workplace discrimination without waiting for Congress to act. Legislative change is arduous and can be slow to come. But we're not authorized to amend Title VII by interpretation. The ordinary, reasonable, and fair meaning of sex discrimination as that term is used in Title VII does not include discrimination based on sexual orientation, a wholly different kind of discrimination. Because Title VII does not by its terms prohibit sexual-orientation discrimination, Hively's case was properly dismissed. I respectfully dissent.

Questions and Comments

1. Statutory Interpretation Question: What was the statutory interpretation question that the court was trying to resolve? Was there any prior appellate court or Supreme Court precedent directly addressing the question?

2. Faithful agent or partner?: The majority and Judge Posner, concurring, adopt dynamic readings of the statute. Do the majority or Judge Posner see the court as a faithful agent of the legislature? Do the majority or Judge Posner attempt to interpret the statute in a way that is consistent with the intent of the enacting legislature?

3. Differing approaches: The majority and Judge Posner take different paths to the conclusion that “discrimination based on sex” includes discrimination based on sexual

orientation. How does the majority justify its reading of the statute and how does Judge Posner differ in reaching the same result? Does either opinion focus on the plain meaning of the text, the structure of the statute, the legislative history, or the circumstances leading to the enactment of the legislation?

4. Dynamic interpretation: Both the majority and Judge Posner discuss the changes in social views and attitudes and the changes in the legal landscape between the time that the Civil Rights Act was enacted in 1964 and the time of the decision as justifications for updating the law. Does Judge Posner suggest that the approach that he is taking in the case is an approach that should be used when interpreting every statute? Does the dissent agree that courts should update outdated laws or interpret them in a common law manner? Why or why not?

5. Textualism: The opinion of the dissenting judges outlines the classical textualist interpretation of the statute. Why does the dissent argue that "discrimination based on sex" should not be interpreted to include discrimination based on sexual orientation?

6. Theories of interpretation: To the extent that a court, using dynamic statutory interpretation, ignores the clear textual interpretation of a statute and other evidence of a contrary intent by the enacting legislature, the court's opinion will likely be criticized on the grounds that the court is making law and violating Constitutional principles of separation of powers. Putting aside that extreme situation, Professor Nicholas Rosenkranz argues that the Constitution does not require courts to apply specific theories of interpretation. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002). As a corollary, then, Congress could include directives in legislation that require courts to apply specific theories when interpreting particular statutes. Even without such explicit directives, Professor Kevin Stack argues that modern regulatory statutes impose a duty on agencies to implement the statutes that they enforce in accordance with the purposes the statutes establish. *See* Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. Rev. 871, 876 (2015).

The Case of the Speluncean Explorers

In a classic 1949 law review article, Professor Lon Fuller explored the dueling theories of statutory interpretation and the proper roles of the legislative, judicial and executive branches through a series of fictional judicial opinions addressing an appeal of a murder conviction for several explorers who resorted to cannibalism when trapped in a cave. You can read the article, Lon L. Fuller, *The Case of the Speluncean Explorers,* 62 Harv. L. Rev. 616 (1949) through JSTOR or HeinOnline. After you read the article, answer the following questions:

1. What was the statutory language at issue in the case and did the statute include any exceptions to the prohibited activity?

2. Which Justices adopted a textualist interpretation of the statute and what is the textualist interpretation? Neither of the Justices who adopts a textualist interpretation of the statute necessarily believes that the defendants should be executed. Why, then, does each of those Justices suggest that the statute should be interpreted according to its plain meaning? Is any Justice concerned with the "rule of law?"

3. Which Justice would have overturned the defendants' conviction based on purposivism and what was the purposivist reading of the statute set forth by that Justice? When does that Justice suggest that courts should depart from a literal reading of a statute? Two other Justices criticize the purposivist approach in their opinions. On what grounds do they criticize the approach as applied to the facts of this case?

4. On what grounds would Justice Handy overturn the defendants' convictions? On what theory is Justice Handy relying? What criticisms might be raised regarding the manner in which Justice Handy decided the case? Is Handy's approach more or less defensible than Justice Foster's reliance on "natural law"?

5. Do any of the Justices discuss the authority of courts to correct legislative mistakes? Is there disagreement among the Justices regarding the proper role for courts?

6. What are the conflicting views expressed by the Justices regarding the relationship of the judicial branch and the executive branch in interpreting the law?

No Vehicles in the Park

In the spring of 1940, a teenager injured ten pre-school children while driving his car through the Springfield Veterans Park in Springfield, Ames. Two weeks later, several children were riding bicycles through the Midway Community Park and struck a group of picknickers. These were only a few of a series of highly publicized accidents in public parks in the State of Ames during that year.

In response to those events, Representative Linda Jolly introduced a bill in the state House of Representatives to prohibit the operation of vehicles in public parks. During debate on the bill on the House floor, Representative Mykel Symons introduced an amendment to the bill that would include a definition of the word "vehicle" to include any mechanized mode of transportation. Symons argued that it was necessary to define the term because it was not clear that the term "vehicle" would include radio-controlled airplanes. "Radio controlled aircraft are a nuisance in our parks," Symons argued, "as they are loud, difficult to control, and have collided with people and their property when their operators could not control them." Representative Jolly rose to speak after Representative Jolly and said, "everyone already knows that vehicles include mechanized modes of transportation, whether on land, sea or air, so we don't need to say that in the statute." Representative Symons' proposed amendment was ultimately voted down in the House.

When the bill was being considered in the Senate Transportation Committee, Senator Dylan Flood noted his concern that the House bill could be read to prohibit the operation of radio-controlled airplanes in parks. "One of the most popular past-times at many of our parks," he noted, "is the operation of radio-controlled airplanes. It's also a source of revenue, since we require hobbyists to get a permit to fly the planes in the parks. I hope we are not going to prohibit those planes in parks." In response, Senator Mira Patel assured Senator Flood, "We have no intention of banning radio-controlled airplanes under this law. Our concern is with the vehicles that are driving through the park. We don't need to exempt radio-controlled airplanes in the law because vehicles transport people and cargo and radio-controlled airplanes do not transport anything."

After the House and Senate passed different versions of the proposed law, a conference committee reconciled the competing versions. One significant portion of the conference report addressed the goals of the law, stating "This statute is necessary to protect public health and safety and to reduce air pollution."

The law that was enacted by the Ames legislature, "The Public Park Health and Safety Act of 1940", included the following provisions that are noteworthy for this problem:

Section 1. Findings and Purposes

(a) There has been a sharp increase in the number of accidents in parks caused by automobiles, bicycles, motorcycles, and other vehicles colliding with park visitors.

(b) Noise levels increase, on the average, 20 decibels, when vehicles are driven through parks. Prolonged exposure to higher noise levels can cause hearing loss.

(c) It is necessary to limit the operation of vehicles in public parks in order to protect public health and safety.

Section 2. Vehicles in the Park

No vehicles may be operated in any public park.

Section 8. Citizen Suits

Any person may sue any other person who violates any provision of this Act. The district court shall have jurisdiction to award penalties of not more than $1000 for each offense.

It is now almost a century since Ames enacted the Public Park Health and Safety Act, but a question concerning interpretation of the law has arisen. Earlier this year, the Springfield Department of Parks and Recreation began using drones for surveillance in the public parks in Springfield after several of the playgrounds in the parks had been vandalized. Several community members are upset that the Parks Department is using drones and feel that the city is illegally invading their privacy by operating the drones in the parks while they are in the parks. They sued the Parks Department under Section 8 of the Public Park Health and Safety Act, arguing that the Parks Department is violating Section 2 of the Act. The Parks Department has filed a motion for summary judgment, arguing that drones are not "vehicles" under the Act.

In resolving the statutory interpretation question, a court might look at some dictionary definitions for the term vehicle. The most recent version of the Cambridge Dictionary defines "vehicle" as "a machine, usually with wheels and an engine, used for transporting people or goods, especially on land." The Merriam Webster Dictionary defines the term as (1) "a means of carrying or transporting something" and (2) "a piece of mechanized equipment."

Some additional information about drones and the State of Ames may be helpful to the court in resolving the interpretive question in this case.

First, although some forms of drones have existed since the mid-19th century, drones like the ones used today and used by the Springfield Parks Department did not exist in 1940 and have only been widely used by individuals over the past few decades. They are similar to radio-controlled airplanes in some ways, but are quieter, are not generally operated with gasoline, and do not generally cause air pollution. In addition, drones are easier to control than the radio-controlled airplanes that were in existence in the 1940s and can be operated outside of the line of vision of the operator, with the assistance of cameras and GPS technology that did not exist in the 1940's. Consequently, they are generally much safer to operate than the radio-controlled airplanes of the 1940's. Nevertheless, in cases of pilot error or occasional technical malfunctions, drones may crash and injure persons or damage property. Most drones like the ones operated by the Parks Department are only a few pounds, but some drones can be much larger. The drones used by the Parks Department carry four cameras, but each weigh only a few grams. In most cases, a collision with a drone like the ones used by the Parks Department will only cause minor injuries or harm to property.

A majority of the drones in the United States are produced in factories in the State of Ames. The state derives significant tax revenue from the companies producing drones in the State. Operation of drones, as a hobby, is very popular in Ames, and the parks in the state generally welcome visitors to fly their drones in the parks in designated areas and during designated times. In fact, the Midway Community Parks hosts an annual "National Drone Fly-In", attracting visitors from dozens of different states. Two of the sports franchises in the State of Ames are named after drones, or particular models of drones.

Armed with that background information, draft two opinions on the motion for summary judgment, choosing from the following options:

1. A textualist opinion, holding that a drone is not a vehicle.

2. A purposivist opinion, holding that a drone is a vehicle.

3. A purposivist opinion, holding that a drone is not a vehicle.

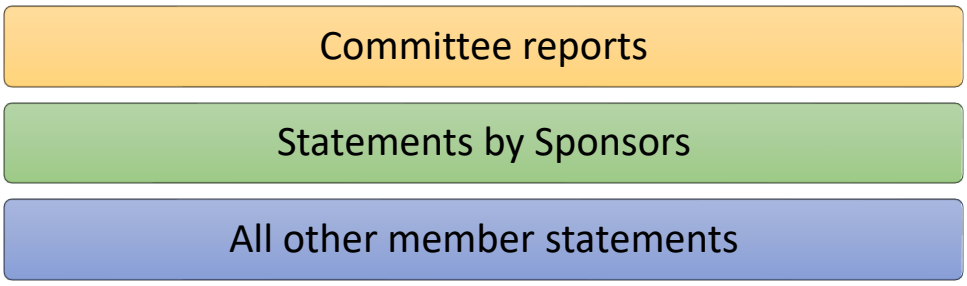
4. An intentionalist opinion, holding that a drone is or is not a vehicle.

5. An opinion using dynamic interpretation, holding that a drone is a vehicle.

The opinions should include some boilerplate language appropriate to each theory regarding whether, and when, the court is willing to look beyond the text to consider extrinsic sources and the role of the court versus the legislature in interpreting the law.

VII. The Importance of Legislative History

As early as the late 19th century, the Supreme Court endorsed House and Senate committee reports as a legitimate statutory interpretation tool.[81] Similarly, until the 1970s, there was almost universal consensus on the Supreme Court and among scholars that it was appropriate to rely on legislative history to interpret statutes and that there was a hierarchy of reliability across the different types of legislative history sources.[82] The generally accepted hierarchy from that era is outlined below.[83]



In the 1970's, citations to legislative history increased dramatically and courts began to cite the secondary types of legislative history with increasing frequency.[84] In the 1980's, however, several prominent federal appellate judges, led by D.C. Circuit Judge (and later Justice) Antonin Scalia, strongly criticized reliance on legislative history of any type.[85] In his confirmation hearings for the Supreme Court, Scalia noted that "if he could create the world anew", he would get rid of legislative history.[86] Judges and academics took sides in a debate that often divided along ideological lines and aligned with specific statutory interpretation theories. Conservative judges and textualist interpreters tended to oppose the reliance on legislative history, while liberal judges and purposivist interpreters supported it.[87] Overall, citations to legislative history in the federal

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81 *See* Benjamin & Renberg, *supra* note 54, at 1029. *See, e.g. Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 474 (1921).

82 *Id.* at 1025-1026.

83 *See* Jesse M. Cross, *Legislative History in the Modern Congress*, 57 Harv. J. on Legisl. 91, 151 (2020).

84 *See* Benjamin & Renberg, *supra* note 54, at 1031.

85 *Id.* at 1025-1026.

86 *Id.* at 1037-1038. During his career on the Supreme Court, Justice Scalia often wrote separate opinions simply to avoid joining with an opinion that cited legislative history. *See, e.g., S.D. Warren Co. v. Maine Bd. of Environmental Protection,* 547 U.S. 370 (2006) (Scalia, J., joining the opinion of the Court except as to Part III-C, discussing legislative history); *Williams v. Taylor,* 529 U.S. 362, 399 (2000) (Scalia, J., joining Justice O'Connor's opinion of the Court as to Part II except as to footnote discussing legislative history).

87 *See* Benjamin & Renberg, *supra* note 54, at 1027.

courts declined in response to the anti-legislative history movement of the 1980's and the increasing popularity of textualism as a theory of interpretation.[88]

Opponents of legislative history criticize its use on several grounds. First, as noted above, strict textualists oppose reliance on legislative history because only the text of the statute was enacted through the constitutional process, so only the text is the law.[89] Second, opponents argue that there is often no guarantee that members of the legislature read or were aware of various forms of legislative history and certainly no evidence that they voted for or against the legislation because of the legislative history.[90] Third, opponents assert that reliance on legislative history encourages members of the legislature to strategically include material in the legislative history to "pad" it to encourage courts to adopt a particular reading of the statute, even though it was not embodied in the text of the statute.[91] Fourth, critics argue reliance on legislative history enables judges to legitimize decision-making based on personal preferences, because it is easy to support any reading of a statute through selective citation to legislative history.[92] Critics frequently cite former D.C. Circuit Judge Harold Leventhal, who reportedly said that "the use of legislative history [was] the equivalent of entering a crowded dinner party and looking over the heads of the guests for one's friends."[93] Fifth, opponents assert that some legislative history, like some statutory text, is directed to non-judicial audiences, like agencies, interest groups, other members of the legislature, and other congressional bodies, so it should not be relevant to the interpretation of the statute.[94] Finally, some critics base their opposition to reliance on legislative history on an opposition to a search for legislative intent. As noted earlier, some interpreters argue that it is inappropriate to try to interpret statutes based on the intent of the enacting legislature because the legislature did not have any collective intent or it is impossible to determine what that intent was.[95]

Despite these criticisms, most of the statutory interpretation theories, other than new textualism, approve of the use of legislative history, at least to clarify ambiguities, and most judges will examine legislative history on some occasions.[96] There is less agreement today, though, regarding the hierarchy of reliability of legislative history sources. Professor Victoria Nourse, for example, rejects a strict ranking based on the

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88 *Id.* at 1051.

89 *Id.* at 1041. *See also* Gluck & Bressman, *supra* note 13, at 965. Along similar lines, some critics argue that reliance on committee reports represents an unconstitutional delegation of law-making authority to subdivisions of Congress. *See* Gluck & Bressman, *supra* note 13, at 965.

90 *See* Benjamin & Renberg, *supra* note 54, at 1041-1042.

91 *Id. See also* Gluck & Bressman, *supra* note 13, at 965.

92 *See* Benjamin & Renberg, *supra* note 54, at 1044-1045.

93 *Id.* at 1046-1047.

94 *See* Gluck & Bressman, *supra* note 13, at 965, 973; Sitaraman, supra note 21, at 109-110.

95 *See* Gluck & Bressman, *supra* note 13, at 965; Seidenfeld, *supra* note 18, at 1824-1829.

96 *See* Gluck & Posner, *supra* note 2, at 1324-1326.

type of source and focuses more closely on the timing of the evidence (later is better) and how directly it addresses the statutory interpretation question at issue.[97] Professors Abbe Gluck and Lisa Bressman surveyed Congressional drafters regarding the drafting of legislative history to solicit their views regarding the reliability of various types of legislative history and found that the drafters felt (1) committee reports and conference committee reports were the most reliable forms of legislative history; (2) floor statements by members opposed to legislation were the least reliable form of legislative history; (3) party leaders' floor statements supporting legislation were less reliable than statements of other members on the floor; and (4) legislative history is generally less reliable for laws enacted through unorthodox processes, because it may not involve committee consideration or it may be a confusing combination of materials from several different committees.[98] Other academics agree that the manner in which legislation is enacted should impact the weight attributed to specific types of legislative history.[99]

Finally, Professor Jesse Cross interviewed Congressional staffers to ascertain who is responsible for drafting various types of legislative history, what level of expertise they possess in the subject matter of the legislation, and what incentive they have to draft legislative history that accurately describes the legislation.[100] He determined that committee reports are generally drafted by committee legislative staff, statements of committee chairs and ranking members are also drafted by committee legislative staff, statements of other members of Congress at hearings or markups are generally drafted by member legislative staff, and floor statements of members are drafted by member

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97 *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L. J, 70 (2012).

98 *See* Gluck & Bressman, *supra* note 13, at 977-979. The drafters suggested that party leaders statements were less reliable because they were not necessarily involved in drafting the legislation, but were focused instead, on shepherding the legislation through the law-making process. *Id.* In general, the drafters were reluctant to endorse any legislative history created outside of the committee process. *Id.*

99 *See* Sitaraman, supra note 21, at 119-121; Bressman & Gluck, *supra* note 21, at 760-761. Professor Ganesh Sitaraman, for instance, argues that when legislation is drafted through a bipartisan committee process, the statements of members of both parties who supported the legislation could be relevant, while if the legislation was drafted through a partisan committee process, only statements from the party members who drafted the legislation would be relevant. *See* Sitaraman, supra note 21, at 119-120. Similarly, Sitaraman argues that Committee Chairs do not always play the same role in navigating bills through the committee for every bill and that individual members of the committee may play greater roles than the Chair in some cases, so it may not make sense to accord the same level of deference to statements from Committee Chairs for every bill. *Id.* at 120. The Congressional drafters who were surveyed by Professors Bressman and Gluck almost unanimously agreed that the process by which a statute is enacted affects how it, and the legislative history, is drafted. *See* Bressman & Gluck, *supra* note 21, at 760. The drafters said that legislative history for omnibus bills is confused and more likely erroneous. *Id.* at 761. For appropriations legislation, though, they suggested that legislative history is central and important to its drafting. *Id.*

100 *See* Cross, *Legislative History, supra* note 83.

communications or legislative staff.[101] Based on the interviews, he also concluded that (1) committee legislative staff have the most expertise in the subject matter of legislation, knowledge regarding the legislation, and motivation to report the details of the legislation accurately; (2) communications staff of individual members have little expertise in the subject matter of legislation and an incentive to draft statements that serve the members' political interests in re-election, rather than reporting the details of the legislation accurately; and (3) legislative staff of individual members have an intermediate level of expertise in the subject matter of legislation and may have some incentive to spin the legislative history in the same manner as communications staff of individual members.[102] Professor Cross then proposed a new ***hierarchy of reliability*** of legislative history materials, based on the identity of the author; the competence and expertise of the author; the author's actual knowledge of the details of the legislative "deal"; and the professional motivation or incentive of the author to report the "deal" accurately.[103] The new hierarchy that he proposed follows.[104]

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101 *Id.* at 126-138.

102 *Id.* at 96. Regarding legislative staff of committees, Cross concluded that "a focus on policy development leads these staffers to possess high levels of: (1) policy specialization; (2) policy expertise; (3) knowledge of particular bills; and (4) motivation to draft precise and accurate legislative products." *Id.* He concluded that legislative staff of individual members performed less well on those dimensions because of "a hybrid focus that straddles policy development and reelection efforts." *Id.* Regarding communications staff of individual members, Cross concluded that "[b]ecause member communications staff adopt an exclusive focus on constituent relations and reelection efforts, they perform particularly poorly on each of these dimensions." *Id.*

103 *Id.* In determining what factors to consider in creating a hierarchy of reliability, Professor Cross was guided by the work of Professor William Eskridge, who associated reliability of legislative history with the following questions: "How likely does this source reflect the views or assumptions of the enacting Congress? Is there a danger of strategic manipulation by individual Members or biased groups seeking to "pack" the legislative history? How well-informed is the source?" *Id.*

104 *Id.* In addition to the reliability of the drafters, Professor Cross argues that opposing party review of committee reports provides an important institutional check on committee reports, further justifying including them at the top of the hierarchy of legislative history. *Id.*

Questions and Comments

1. **Legislators do not read or write the legislative history**: As noted above, some critics argue that courts should not consult legislative history to interpret statutes because members of the legislature generally do not read, are not aware of, and do not write legislative history. However, legislators frequently do not read and hardly ever write the statutory text, *see* Ganesh Sitaraman, *The Origins of Legislation*, 91 Notre Dame L. Rev. 79, 121 (2015), so legislative history supporters argue that it makes little sense to discount the reliability of legislative history on those grounds.

2. Ideology and reliance on legislative history: Professors Stuart Minor Benjamin and Kristen Renberg reviewed all the federal appellate court majority opinions published between 1965 and 2011 (over 240,000 opinions) to determine whether the political affiliation of judges or the longevity of service of judges correlated to their willingness to rely on legislative history in the wake of the anti-legislative history movement. *See* Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History,* 105 Cornell L. Rev. 1023 (2020). Not surprisingly, they found that Republican judges and judges appointed in the 1980s and later were less likely than their counterparts to cite floor statements and committee hearings, which are generally viewed as less reliable sources of legislative history. *Id.* at 1027. Paradoxically, though, they found that those same judges were ***more likely*** than their counterparts to cite committee reports. *Id.* at 1028. Thus, Benjamin and Renberg concluded that the post-1980s attacks on legislative history had the paradoxical effect of encouraging Republican and post-Reagan judges to increase reliance on reliable forms of legislative history, rather than jettisoning reliance on all forms of legislative history. *Id.*

Chapter Quiz

Now that you've finished Chapter 3, why not try a CALI lesson on the material at: https://www.cali.org/spl/19068 It should take about 30 minutes to complete.