THE WRITING CENTER
GEORGETOWN UNIVERSITY LAW CENTER

A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES[1]

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Purpose

Whether you are working in a law firm, a government agency, or a public interest organization, there is a strong chance that you will be required to analyze and interpret statutes for your clients. For example, your client may want you to determine whether a particular statute will provide the client with a cause of action given a particular set of circumstances. Or perhaps your client is a corporation trying to determine how a recently enacted statute would affect its long term business plans. Understanding the tools and techniques of statutory interpretation will help you to understand the possible implications a statute may have on your client's interests. Although the task of statutory interpretation can be quite nuanced and complicated, this handout will provide you with a few handy tools that will help you to discern the meaning of a statute, even when the terms of the statute seem unclear or ambiguous.

This handout will address what to do before you begin interpreting a statute (page 1), tools for analyzing a statute (page 2), additional helpful interpretive suggestions (page 10), and theories of statutory interpretation (page 13).

Before You Begin

1. "Read the Statute, Read the Statute, Read the Statute!"[2]

The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[3] To properly understand and interpret a statute, you must read

[1] To prepare this handout, we consulted William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (3d. ed. 2001).
[2] Quote widely attributed to Professor Felix Frankfurter of Harvard Law School. Cf. Felix Frankfurter, SOME REFLECTIONS ON THE READING OF STATUTES, 47 Colum. L. Rev. 527 (1947).
[3] Eskridge, supra note 1, at 819.

the text closely, keeping in mind that your initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.[4]

2. Understand Your Client's Goals

Make sure that you have a firm grasp of your client's goals and the underlying facts of your client's legal problem so that you will be able to determine which statutes are relevant to your case.

3. Shepardize (or KeyCite) the Statute

As time passes, lawmakers sometimes revise and rewrite the text of a statute in response to changing legal or political realities. When undertaking an assignment or research project that requires you to analyze a statute, be sure to Shepardize (or KeyCite) the statute to determine:

(a) whether the statute parts of the statute have been repealed or otherwise invalidated;

(b) whether the statute has been amended; and

(c) whether there are any court decisions that can guide your analysis of the statute.

Tools for Analyzing a Statute

Although some statutes appear simple and straightforward at first glance, you may find, upon further examination, that the terms of the statute do not directly address your legal issue. Statutory terms may be ambiguous because the enacting legislature did not consider the exact factual situation that you are analyzing when the statute was being drafted and debated. Additionally changing circumstances might require that an old statute be applied to new issues that the enacting legislature did not expect or could not have foreseen.[5]

There are several tools that can help you to determine the meaning of an ambiguous statute, or to choose between multiple plausible interpretations of the same statute.

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[4] Christopher G. Wren and Jill Robinson Wren, THE LEGAL RESEARCH MANUAL: A GAME PLAN FOR LEGAL RESEARCH AND ANALYSIS (2d. ed. 1986) (hereinafter "Wren & Wren").

[5] Changed circumstances might also make a statute more relevant than it at first glance appears because the statute might seem to address an issue directly that the enacting legislature could not have possibly have foreseen. For example, old statutes may apply to new technologies that developed after the statute was enacted.

1. Plain Meaning[6]

Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[7] Moreover, some courts adhere to the principle that if the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.[8] While you should always begin with your own experience and understanding of language and grammar, it is a good idea to consult other sources of authority to determine the meaning of an ambiguous word or phrase, or to determine whether a particular word or phrase has a specific meaning. We suggest beginning with "primary sources" (i.e., the statute itself, case law, administrative regulations) before looking beyond to "secondary sources" (i.e., dictionaries, legal encyclopedias). These are among the least contentious places to look for aid in interpreting a statutory word or phrase.

A. Primary Sources

"Primary sources" such as statutory definitions, case law, and administrative regulations often contain specific instructions on how the terms and provisions of a statute should be interpreted and applied. Once you have determined which statutory terms and provisions are relevant to your legal problem, you may find it helpful to consult one or more of the following sources of authority as you construct your own interpretation of the statute.

Statutory Definitions

Many statutes contain a "definitions" section that sets forth and defines the key terms used in the statute. You might find these definitions either in the section of the statute you are analyzing, or more likely, in one of the first sections of the act. Sometimes these specific terms are codified as definitions for a chapter or title of the relevant statute, meaning that they are intended to apply to the entire chapter or title (unless otherwise specified). These definitions are important because they suggest that Congress intended for a term to have a specific meaning that might differ in important ways from its common usage.

Case Law

Oftentimes you will find that the statute you are analyzing has already been analyzed and interpreted by a court. Additionally, court decisions may also discuss what alternative interpretations of the statute were plausible (or at least considered) and why the court either approved or rejected those alternatives. You can find references to case law in the case annotations of an annotated statute, by Shepardizing the relevant section

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[6] Plain meaning should not be confused with the "literal meaning" of a statute or the "strict construction" of a statute both of which imply a "narrow" understanding of the words used as opposed to their common, everyday meaning. Eskridge, supra note 1, at 820.

[7] Eskridge, supra note 1, at 819.

[8] Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

of the statute, or through Computer Aided Legal Research (i.e., through Lexis and Westlaw). Moreover, the court opinions themselves may be able to point you to legislative history and other helpful sources of authority that will help you decide how the statute applies to your legal problem.

Administrative Regulations or Decisions

Sometimes the agency in charge of administering the statute has issued regulations to clarify how that statute should be interpreted and applied. Administrative regulations can be found in the Code of Federal Regulations (CFR) and can be helpful in determining both the meaning of a particular term or phrase and sometimes, the policy concerns that underlie the statute. The regulations are often cross-referenced in annotated statutes as well.

B. Secondary Sources

Sometimes primary source materials are insufficient, and you must look to other sources of authority to discern the meaning of a statute. Secondary sources such as dictionaries, legal encyclopedias, and legislative history documents can provide you with additional guidance on how to interpret a statute.

Dictionaries

Suppose you are analyzing this statute governing the Federal Communication Commission's authority to determine the tariff reporting requirements of common carriers:

> (2) The Commission may, in its discretion and for good cause shown, **modify any requirement** made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.[9]

If you want to determine the scope of the FCC's authority over the requirements set forth in this section, you might want to know the meaning of the word "modify." If you are unable to track down an authoritative interpretation of the word using primary source materials, then a dictionary or an encyclopedia may prove useful.[10] For example, the American Heritage Dictionary defines the word "modify" as:

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[9] 47 U.S.C. § 203 (emphasis added).

[10] It might also be helpful to compare and contrast definitions from multiple dictionaries to obtain a broader consensus on the meaning of words. Analyzing interpretations from multiple sources will help you to reduce the risk of choosing an interpretation that may have been approved by one source but rejected by many others. See MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 224-26. If you are asked

"1. To change or become changed; alter" and

"2. To make or become less extreme, severe, or strong."[11]

On the basis of this definition, you might conclude that although the presence of the word "modify" in subsection (2) allows the FCC to make minor changes to a common carrier's reporting requirements (listed elsewhere in the statute), subsection (2) does not allow the FCC to **completely eliminate** a reporting requirement.

Be aware however, that if a statute deals with a technical or specialized subject (e.g., ERISA, tax, telecommunications, etc.), the words in the statute may have meanings that differ from their ordinary usage. In such circumstances, courts have been known to interpret the words in a statute dealing with a technical or specialized subject in a way that is consistent with the way those words are used in the relevant industry or community.

Legislative History

Legislative history (i.e., committee reports and hearings, floor statements from Congressmen, proposed amendments, etc.) can provide useful guidance for determining the meaning of an ambiguous. Despite the deep disagreement among judges and scholars about whether legislative history ought to guide one's interpretation of a statute, a lawyer does her client a serious disservice by not consulting legislative history to see what a statute's history might suggest about the meaning of a word or phrase. Because there is a hierarchy of legislative materials and a number of places where these documents can be found, you should review the "Legislative History Research Guide" available through the Williams's Library or online at:

http://www.ll.georgetown.edu/guides/legislative_history.cfm.

Legislative history is discussed further in the second section of this handout.

C. The Whole Act Rule

The whole act rule is an approach to statutory interpretation that assumes that when a certain term or phrase is used multiple times throughout a statute, that term or phrase should be interpreted in a consistent manner. This rule assumes that the legislatures draft statutes in a way that is "internally consistent in its use of language and in the way its provisions work together."[12] Below are several tools you might use to preserve consistency and coherence in your interpretation of a statute.

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to interpret a statute that was enacted a long time ago, you might consider digging up dictionary definitions (as well as other sources such as encyclopedias) from the era in which the statute was enacted. This might help to determine what that particular legislature might have intended the words of the statute to mean. Eskridge, supra note 1, at 820.

[11] AMERICAN HERITAGE DICTIONARY 545 (4th ed. 2001).

[12] Eskridge, supra note 1, at 830.

Preambles and Purpose Clauses

Many statutes begin with a preamble or a purpose clause. For example, section 1 of the Age Discrimination in Employment Act begins with the following:

> ***29 U.S.C. § 621. Congressional statement of findings and purpose***
>
> (b) **It is therefore the purpose of this Act** [*29 U.S.C. §§ 621* et seq.;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.[13]

Preambles and purpose clauses can be helpful in discerning the intent of the legislature with respect to ambiguous terms of the statute.[14] Thus, when choosing between multiple plausible interpretations, you might refer to the statute's purpose in deciding which interpretation is superior.

However, be aware that if a court determines that the terms of the statute are clearly expressed in the part of the statute you are analyzing, the preamble or purpose clauses may not persuade a court to adopt a contrary interpretation.[15]

Rule to Avoid Surplusage

This rule is based on the principle that each word or phrase in the statute is meaningful and useful, and thus, an interpretation that would render a word or phrase redundant or meaningless should be rejected.[16] For example, the Securities Act of 1933 defines the term "prospectus" as "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security." If the term "communication" was interpreted to include any type of written communication, the words "notice, circular, advertisement, letter" would serve no independent purpose in the statute.[17] However, if "communication" were interpreted to include oral statements made through radio or television, then all the words in this section of the statute would contribute something to it's meaning, and none would considered "surplusage."

Presumption of Consistent Usage (and Meaningful Variation)

The presumption of consistent usage means that the legal reader should assume that "the same meaning is implied by the use of the same expression in every part of the

[13] 29 U.S.C. § 621 (2005) (emphasis added).
[14] Eskridge, supra note 1, at 832.
[15] Id.
[16] Id. at 833.
[17] Gustafson v. Alloyd Co., 513 U.S. 561, 577-78 (1995).

act."[18] For example, the provisions in section 77j of the Securities Act require that certain information be included in a "prospectus" and that certain information can be omitted from a "prospectus." The presumption of consistent usage suggests that each time the word "prospectus" is used in the above provisions, it should be interpreted in a way that is consistent with the way the term is interpreted in other parts of the statute.[19]

2. Context

The following tools of statutory construction require the reader to use contextual clues to interpret the meaning or scope of a particular word or phrase. Although there are several ways of using context, a few of the most common tools are listed below.

A. Noscitur a Sociis ("it is known from its associates")

This doctrine of statutory construction suggests that you can determine the meaning of an ambiguous term by reference to the words associated with it.[20] This doctrine is useful when the term you are trying to interpret is grouped together with two or more terms that have similar meanings. These terms may provide clues on how broadly or narrowly a term should reasonably be interpreted.[21] For example, suppose you are trying to determine the scope of the term "any election" in the statute below:

> ***48 U.S.C. § 1422 (2005)[22]***
>
> The executive power of Guam shall be vested in an executive officer whose official title shall be the "**Governor of Guam**". The **Governor of Guam**, together with the **Lieutenant Governor**, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The **Governor and Lieutenant Governor** shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in **any election**, on the fourteenth day thereafter a runoff election shall be held between the candidates for **Governor and Lieutenant Governor** receiving the highest and second highest number of votes cast. The first election for **Governor and Lieutenant Governor** shall be held on November 3, 1970.

Based on the repeated references to the "Governor of Guam" and "Lieutenant Governor" the Supreme Court concluded that the phrase "any election" referred only to gubernatorial elections (an election specifically for a Governor and Lieutenant Governor)

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[18] Eskridge, supra note 1, at 833.
[19] Gustafson 513 U.S. at 567-69. The presumption of meaningful variation, the counter part to "the presumption of consistent usage," suggests that when the legislature has departed from the consistent usage of a particular term, the legislature intended for that particular term to have a different meaning. Eskridge at 834.
[20] Eskridge, supra note 1, at 823.
[21] Id.
[22] "Governor and Lieutenant Governor; term of office; qualifications; powers and duties; annual report to Congress."

and not to general elections in which voters cast ballots for a slate of candidates.[23] Thus, the words surrounding the term "any election" played a key role in determining the scope of a term whose plain meaning *could* suggest a broader meaning.

B. Ejusdem Generis ("of the same kind, class, or nature")

This doctrine is useful when a statute has explicitly set forth a series of terms to which the statute applies, and you are trying to determine whether the statute also applies to other people, things or situations not explicitly mentioned in the statute. According to this doctrine of statutory construction "general words [that] follow specific words in a [statute] are construed to embrace only objects similar in nature to those objects enumerate by the preceding specific words."[24] In other words, you should use the specific objects or things explicitly set forth in the statute to determine what other objects or things the legislature intended to include.

For example, in Heathman v. Giles the Supreme Court of Utah used this doctrine to interpret the following statute:

> ***Utah Code Ann. § 78-11-10[25]***
>
> Before any action may be filed against **any sheriff, constable, peace officer, state road officer, or any other person charged with the duty of enforcement of the criminal laws of this state** […] the proposed plaintiff, as a condition precedent thereto, shall prepare and file with, and at the time of filing the complaint in any such action, a written undertaking with at least two sufficient sureties in an amount to be fixed by the court…

To determine whether Congress intended to include *prosecuting attorneys* in the phrase "other person charged with the duty of enforcement of…criminal laws," the court looked at the preceding words ("any sheriff, constable, peace officer, state road officer"). The court concluded that Congress did not intend to include prosecuting attorneys under this statute because prosecuting attorneys were not of the "class" of officers who "are in the front line of law enforcement [and] in immediate contact with the public."[26]

C. Expressio unius ("inclusion of one thing implies the exclusion of the other")

Where certain terms have been explicitly set forth in a statute, that statute may be interpreted not to apply to terms that have been excluded from the statute. For example, one could argue that a statute that prohibits **"any horse, mule, cattle, hog, sheep, or**

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[23] Gutierrez v. Ada, 528 U.S. 250, 254-55 (2000).
[24] Eskridge, supra note 1, at 823.
[25] "Actions against officers -- Costs and attorneys' fees."
[26] Heathman v. Giles, 374 P.2d 839, 840 (Utah 1962).

goat" from running upon lands enclosed by a fence does not apply to **turkeys** because the statute does not explicitly proscribe turkeys.[27]

Be aware however, that this doctrine assumes that the enacting legislature thought through the statutory language "carefully, considering every possible variation."[28] In real world however, legislatures often omit terms from a statute because

> (a) the lawmakers do not have sufficient time to consider every specific application of a bill during the rush to pass legislation, or
>
> (b) legislatures expect the courts to "fill in the gaps" and to adapt the statute to new and unforeseen situations.[29]

In such cases, you might look to other statutory interpretation tools to extend the statute to cover terms not explicitly provided for in the statute.

3. Canons of Construction

Certain techniques of statutory construction have been used so often that they have become "formalized" into "canons." Unlike the tools provided in this handout, the canons are not particularly useful for discerning the meaning of a statute. However, many courts still find them persuasive, and you may use these canons to justify and provide support for a particular interpretation of a statute.

A few of the many recognized canons are set forth below. [30] You will notice that some of the canons are similar to other tools that are presented in this handout.[31] Additionally, be aware that that for each canon that supports your interpretation ("rule"), there is often an "opposite" canon that can be used to defeat your interpretation or to support an alternative interpretation of the statute in question ("counter rule").[32]

Rule	**Counter-rule**
➢ IF the language of a statute is plain and unambiguous it must be given effect	➢ UNLESS a literal interpretation would lead to absurd or mischievous consequences or thwart the manifest purpose
➢ IF the terms of the statute have received judicial construction before enactment the terms should be understood according to that construction	➢ UNLESS the statute clearly requires them to have a different meaning

[27] Tate v. Ogg, 195 S.E. 496, 499-500 (Va. 1938).
[28] Eskridge, supra note 1, at 824.
[29] Id.
[30] Id. at 909-12.
[31] Wren & Wren, supra note 4, at 88.
[32] A few of these canons, such as the "rule of lenity" or "avoidance of constitutional issues" appear quite frequently in judicial decisions. See generally Eskridge, supra note 1, at 909-915.

➢ Every word and clause must be given effect	➢ UNLESS inadvertently inserted into the statute or if repugnant to the rest of the statute, certain words may be rejected as "surplussage"
➢ Words are to be interpreted according to the proper grammatical effect of their arrangement within the statute	➢ UNLESS strict adherent to the rules of grammar would defeat the purpose of the statute
➢ A statute cannot go beyond its text	➢ To effect the purpose of the statute, the statute may be implemented beyond its text

Helpful Suggestions

1. Look for Cross-references

When reading complex statutes, be aware of references to other statutes. These references may lead you to other statutes that will effect the meaning and function of the statute you are trying to analyze. For example, such references might also help you to determine the meaning of ambiguous terms in the Age Discrimination in Employment Act:

> ***29 U.S.C. § 623***
>
> (1) It shall not be a violation of subsection (a), (b), (c), or (e) solely because--
>
> (A) an **employee pension benefit plan (as defined in section 3(2) of the Employee Retirement Income Security Act of 1974 (*29 U.S.C. 1002(2)*))** provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits;[33]

When you look at the corresponding section in the Employee Retirement Income Security Act (ERISA), you are provided with a precise definition of the term "employee pension benefit plan."

[33] Emphasis added.

2. Be Mindful of Commonly Used Terms

Below are a few important terms that are commonly found in statutes.

AND v. OR

The words "and" and "or" are important for discerning the scope and function of a statute.[34] For example, consider this federal criminal statute:

> ***18 U.S.C. § 2114 (2005).***[35]
>
> (a) Assault. A person who assaults any person having lawful charge, control, **or** custody of any mail matter **or** of any money or other property of the United States, with intent to rob, steal, **or** purloin such mail matter, money, **or** other property of the United States, **or** robs **or** attempts to rob any such person of mail matter, **or** of any money, **or** other property of the United States, shall, for the first offense, be imprisoned not more than ten years; **and** if in effecting **or** attempting to effect such robbery he wounds the person having custody of such mail, money, **or** other property of the United States, **or** puts his life in jeopardy by the use of a dangerous weapon, **or** for a subsequent offense, shall be imprisoned not more than twenty-five years.

The repeated use of the term "or" in this section of the criminal statute appears to provide multiple grounds for a criminal violation. By separating the terms "mail matter," "money," or "other property of the United States" with the disjunctive "or" the legislature probably intended to criminalize each of the three activities, even though the original purpose of the statute might have been primarily to prevent the robbery of mail carriers.[36]

MAY v. SHALL

Generally, the word "shall" signifies that certain behavior is mandated by the statute, while the word "may" grants the agent some discretion.[37] Consider the following Federal Rule of Civil Procedure:

> ***Rule 11.***[38]
>
> (a) Signature. Every pleading, written motion, and other paper **shall** be signed by at least one attorney of record in the attorney's individual name,

[34] The word "and" is a conjunctive connector and the word "or" is a disjunctive connector. Eskridge, supra note 1, at 827.
[35] "Mail, money, or other property of United States."
[36] The term "and" can also mean "joint" or "several" while the term "or" can mean "only A or B" but not both, or it can mean "A or B or both."
[37] If you look back at the other statutes we have excerpted in this handout, you will notice that the words "may" or "shall" appear quite often in statutory language.
[38] "Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions."

> or, if the party is not represented by an attorney, **shall** be signed by the party. Each paper **shall** state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper **shall** be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.
>
> […]
>
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court **may**, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Among other things, subsection (a) of Rule 11 mandates that the party or the party's attorney must sign every pleading and written motion in a civil action. In contrast, subsection (c) of Rule 11 provides a federal court with the discretion to decide whether or not to impose a sanction upon "attorneys, law firms, or parties" who have made false representations to the court.

Additionally the following terms are often used purposefully to change the scope and function of the statute:

Term	**Function**
Unless *Except*	These terms usually signify an exception to the statute
Subject to… *Within the meaning of* *For the purposes of*	These terms may limit the scope of the statute, or may indicate that a certain part of the statute is controlled or limited by anther section or statute
If…then… *Upon* *Before/After* *Provided that…*	Generally, these terms indicate that for one part of a statute to take effect, a precondition or requirement must be satisfied
Notwithstanding	Literally, "In spite of," this term usually signifies that a certain term or provision is not controlled or limited by other parts of the statute, or by other statutes
Each/Only *Every/Any/All*	These terms commonly limit the class of objects that are either included in or excluded from the statute

Theories of Statutory Interpretation

Why Learn About the History and the Theories of Statutory Interpretation? In an academic or employment setting, your professor or supervisor may require you to explain why you think a statute means one thing as opposed to another. You may need to describe which tools of statutory interpretation you used to produce your result. Some readers are more persuaded by certain tools of statutory interpretation over others, so knowledge of interpretive theories can help you anticipate your reader's reaction to your use of a particular tool for finding the meaning of statutes.

A Caveat: Legal scholars and other very smart people have written hundreds of pages about the theories of statutory interpretation; this handout merely skims the surface of these works. If you want to learn more about statutory interpretation, we suggest you begin by consulting a legislation textbook or by talking with a Georgetown Law legislation professor.

Objectives of this Portion of the Handout

- To describe and demonstrate theories of statutory interpretation that can help students justify their use of any of the statutory interpretation tools we mentioned above
- To provide a bit of extra historical background for students who want to know how others have found the meaning of statutes in the past
- To show you that statutory interpretation is a dynamic process, and that reasonable people can differ over the meaning of a particular statute

The Theories

I. Textualism:

A. **WHAT IT IS**: Textualism focuses on the words and phrases of the statute and de-emphasizes the role of the reader (usually, the judge) in creating meaning.

Tools: Textualists believe that reading statutes according to their plain meaning will produce an interpretation that is neither lenient nor strict, but which should "contain all that [the statute] fairly means."[39] Textualists generally oppose the use of legislative history as a tool of statutory interpretation. Textualists employ a variety of strategies to determine the plain meaning of terms in a statute, and not all textualists agree about which sources of plain meaning to consider. Even a textualist like Justice Scalia, who advocates the use of dictionary definitions to determine plain meaning, could arrive at different meanings of a word depending on which dictionary he used.

[39] Antonin Scalia, A MATTER OF INTERPRETATION 23 (Amy Gutmann, ed., 1997) cited in Eskridge, supra note 1, 756.

B. INTELLECTUAL AND HISTORICAL ROOTS -- Associated Historical Movement(s) in Legal Analysis: Formalism

Textualism traces its intellectual roots back to formalism, which arose in the late nineteenth century and remained popular through the 1940s. Formalists aim for vertical coherence[40] as they interpret statutes. That is, they try to keep their interpretations consistent with "authoritative sources situated in the past: the original intent of the enacting legislature, previous administrative or judicial precedents interpreting the statute, and traditional or customary norms."[41] Because formalists value the doctrine of stare decisis, which holds that courts should treat prior decisions as "presumptively correct," they would find case law interpretations of previous statutory terms persuasive.[42]

Like the formalism of the early twentieth century, today's textualism assumes the existence of a determinate plain meaning of a statute's text. Textualists like Justice Scalia believe that judges should use only the plain meaning of the statute's text in their process of interpretation and should not use legislative history to interpret statutes.[43] However, unlike formalists, textualists are more willing to adopt a plain meaning interpretation of a statutory term or phrase even if a plain meaning interpretation does not comport with how that term or phrase has been interpreted in case law.

C. MANIFESTATIONS IN TODAY'S SOCIETY

1. Common Practical Consequences:

Textualists often maintain that they can produce an “objective” and apolitical interpretation of statutes by limiting their analysis to an investigation of plain meaning.

2. Example of a Textualist Analysis of a Statute:

Section 237 of the Immigration and Nationality Act (INA) explains when the Department of Homeland Security can deport an alien (someone who is not a U.S. citizen or national[44]). Section 237(a)(2)(B)(i) of the INA states that:

> Any alien who at any time after admission has been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act

[40] Eskridge, supra note 1, at 599 (I have used citations at the beginning of some sections to indicate that all or substantially all of the material in that section came from the cited source. I have provided citations to particular pages of the sources used when I use direct quotations).
[41] Id. at 599.
[42] Id. at 600.
[43] Scalia, supra note 39, at 755-58.
[44] 8 U.S.C. § 1101(a)(3) (2006).

> (21 U.S.C. 802)), other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable.

Suppose an alien has been convicted of possessing five pounds of marijuana. It is clear that his conviction is a conviction under a U.S. law that relates to a controlled substance and that the conviction involves more than thirty grams of marijuana. One question would remain: did that conviction occur after the alien's admission?[45]

A textualist would not ask when the legislature intended for controlled substances offenses to provoke deportation or when deportation for controlled substances offenses would be good public policy. Instead, a textualist would focus on the meaning of the word "admission," because that word comes from within the text of the statute itself. A textualist would not ask what the legislature intended the word "admission" to mean or whether a particular definition of "admission" would produce good public policy. Instead, a textualist would look for the plain meaning of "admission."

A cautious textualist would consider the possibility that the word "admission" could have a specific, technical meaning in the immigration context. Therefore, he or she would turn to the definitions section of the INA Section 101(a)(13), which states that:

> (A) The terms "admission" and "admitted" mean, with respect to an alien, any lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

Based on this definition of "admission," a textualist probably would conclude that an alien who had never entered the United States lawfully, but who committed a controlled substance offense after unlawful entry into the U.S., could not be deported under Section 237(a)(2)(B)(i) of the INA, because the word "lawful" **plainly means** "legal," not "illegal." A textualist would not make an exception even if he or she thought that Congress intended Section 237(a)(2)(B)(i) to apply to illegal as well as legal entrants into the United States. Nor would a textualist interpret Section 237(a)(2)(B)(i) to apply to illegal entrants because the textualist thought that such application would produce good public policy.[46]

This textualist interpretation also makes use of three of the **canons of construction** (see above, Tool #3):

1. If the language of a statute is plain and unambiguous it must be given effect: The statute clearly addresses the meaning of "admission."

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[45] The alien probably could be removed under another section of the Immigration and Nationality Act, but this textualist analysis merely asks whether he could be removed under the quoted section.

[46] In this statute and fact scenario, a textualist interpretation produces relatively predictable results: the statute does not apply. However, textualism is not always so predictive. Textualism gives the interpreter a narrower set of rhetorical tools to use. Supposedly, this narrowing will make statutory interpretation more predictable, but not all scholars of statutory interpretation agree that the narrowing strategy actually produces more predictable results.

Additionally, the word "lawful" in the definition of "admission" clearly excludes its opposite (unlawful entrants).

2. Every word and clause must be given effect: A textualist would not find a reason to avoid giving effect to the phrase "any time after admission" in Section 237(a)(2)(B)(i) or to the word "lawful" in Section 101(a)(13).

3. A statute cannot go beyond its text: A textualist would not look to the dictionary for another definition of "admission" *when the text of the statute itself provides a definition.*

II. Intentionalism:[47]

A. WHAT IT IS: Intentionalism focuses on the meaning that the legislature intended to give the statute. This strategy emphasizes plain meaning and judicial interpretation only insofar as these tools are helpful for determining the will or intent of the enacting legislature. However, intentionalism is like textualism in that it assumes that it is possible to find an objectively correct meaning for a particular statute.

1. Commonly Used Tools for Reading Statutes: Legislative history

If the interpreter has evidence of the specific intent of the enacting legislature "about what the statute should mean in the context under consideration, the interpreter should, of course, follow it."[48]

Intentionalists disagree about whether to consider the general intent of the legislature as well by asking what problem the statute was originally intended to remedy and extrapolating from that intent to an imagined legislative intent for the problem the judge now faces. The extrapolation process is called "the *imaginative reconstruction of legislative intent*."[49] This process requires the interpreter to put himself or herself "in the position of the enacting legislature and, like a historian, examine the available historical evidence against a background of assumptions about the legislature ... that are commonplace to our legal system, but can be rebutted by evidence that this enacting legislature had a different view."[50]

2. Disfavored Tools:

Intentionalists may use any of the tools mentioned above to find the meaning of the statute. A tool can help a reader find the statute's meaning if that tool provides evidence of the legislature's intent. For example, an intentionalist reader might use the tool of

[47] There is a related approach, Purposivism, which focuses on the purpose of a statute as a guide to its interpretation.
[48] Eskridge, supra note 1, at 684.
[49] Id.
[50] Id.

Noscitur a Sociis (see Tool #2A, above) in the following way: if a legislature placed one word near another, the second word should be read in light of the first word because this word placement indicates the legislature's intent for readers to interpret those words together (not merely because plain meaning favored this interpretation of the statute).

B. INTELLECTUAL AND HISTORICAL ROOTS -- Associated Historical Movement(s) in Legal Analysis: Process Theory[51]

Process theorists generally hold that law is not easily transparent, but it does have a purpose. Process theorists believe that legal analysts should read statutes to conform to the purposes or policies the legislature had in mind when it enacted the statutes. According to most process theorists, interpreters of statutes can produce justice by interpreting statutes to enhance fair legal procedures and promote respect for the institutions in which those procedures operate.[52]

Process theory urges legal analysts to read statutes to mean what the groups affected by those statutes and the majority of the public would want the statutes to mean.[53] Process theorists also urge legal analysts to consider the recommendations of experts and critics in finding the meaning of statutes.[54] Process theorists may believe that a statute's meaning has changed if that statute has lost the support of the majority of the public.[55]

C. MANIFESTATIONS IN TODAY'S SOCIETY

1. Common Practical Consequences:

Intentionalist interpretations allow readers to find meaning in statutes that do not appear obvious from the statutory text, if those meanings are supported by the legislative history that shows what social purposes the statutes were designed to serve.

2. Example of an Intentionalist Analysis of a Statute:

In 1959, the Attorney General interpreted the then-current version of the statute that made aliens deportable for controlled substances offenses. In 1959, that statute was Section 241(a)(11) of the 1952 Immigration and Nationality Act, which required the deportation of any alien

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[51] Process theory really supports Purposivism more closely than Intentionalism, because it looks at the general purpose of the statute and asks whether a given interpretation would help fulfill that general goal, rather than looking at the specific problem the statute originally addressed.
[52] Henry M. Hart, Jr., & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William Eskridge, Jr. and Philip Frickey, eds., 1994) (1958 Tentative Edition).
[53] Id. at 694-95.
[54] Id.
[55] Id.

> "who has been convicted of a violation of ... any law ... controlling the ... sale ... of ... marihuana."

The Attorney General had to decide whether an expunged conviction counted as a conviction for purposes of this section of the INA. The Attorney General noted that neither the Congress nor the statute itself defined the word "convicted" as it was used in Section 241(a)(11).[56] The Attorney General then went on to produce an intentionalist interpretation of the statute. This interpretation supported his conclusion that the expungement of a conviction did not prevent that conviction from serving as the basis for deportation under Section 241(a)(11).

The Attorney General considered "[t]he history of § 241(a)(11)" as he concluded "that Congress did not intend that aliens convicted of narcotic violations should escape deportation because, as in California, the State affords a procedure authorizing a technical erasure of the conviction."[57] The Attorney General recounted various measures Congress had taken to strengthen laws that required deportation for controlled substances offenses.[58] The Attorney General highlighted the "Congressional purpose and policy" of punishing narcotics offenses.[59]

The Attorney General's interpretation fit the intentionalist mold because he did not rely on a dictionary definition of "convicted," and he did not purport to make his own policy judgments about the costs and benefits of defining an expunged conviction as a conviction for the purposes of this statute. Rather, he relied on the legislative history of narcotics-related immigration statutes, and he tried to divine the policies the Congress intended to promote by passing Section 241(a)(11). This focus on legislative intent and history over plain meaning and independent policy judgments demonstrates the intentionalist nature of the Attorney General's interpretation.

III. Pragmatism:

A. **WHAT IT IS**: Pragmatism focuses on the role of the reader in giving meaning to the statute by interpreting it. Unlike intentionalism and textualism, pragmatism assumes that there is no single, objectively correct meaning of a statute. The existence of multiple interpretations are permissible, and it is inevitable that interpreters to bring "preunderstandings" to their interpretation; some Pragmatists approve of this use of preunderstandings because they believe that the influence of the prior knowledge of the statute's reader will link his or her interpretation to tradition.[60] Other interpretations, including Eskridge's Dynamic Interpretation strategy, are not concerned with tradition.

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[56] Matter of A-F-, 8 I&N Dec. 429, 438 (A.G. 1959).
[57] Id.
[58] Id.
[59] Id.
[60] William James, Pragmatism, cited in Eskridge, supra note 1, at 803 (1907).

1. **Commonly Used Tools for Reading Statutes:** Pragmatists use any of the common tools of statutory interpretation if they believe those tools can produce an results that balances factors like tradition and the public interest.

2. **Disfavored Tools:** Pragmatists may be reluctant to claim that a single plain meaning exists for a statute.

B. INTELLECTUAL AND HISTORICAL ROOTS -- Associated Movement(s) in Legal Analysis: The intellectual movements of Legal Realism[61], Critical Legal Studies[62], and Law and Economics[63] provided critiques of the Textualist and Intentionalist interpretive methods. Intellectual notions from within these critiques helped others synthesize a positive agenda for statutory interpretation.

C. MANIFESTATIONS IN TODAY'S SOCIETY

1. Common Practical Consequences:

Because pragmatists hold that a text has no meaning until it is interpreted,[64] this theory, like Textualism and Intentionalism, does not always produce predictable outcomes. Pragmatist statutory interpreters are driven by multiple motives; they all consider the demands of a democratic majority, encouraging private reliance on statutory commands, and modern policy to different degrees at different times.[65]

2. Example of a Pragmatic Analysis of a Statute:

Section 212(a) of the Immigration and Nationality Act states that:

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[61] In the early twentieth century, Legal Realists began to challenge Formalism. These theorists saw law as the product of struggles between social forces in the legislature. See, e.g., Oliver Wendell Holmes, Jr. *The Path of the Law*, 10 Harv. L. Rev. 457, 1897. Legal Realists challenged the Formalist idea of vertical coherence. See § Theories, I.B., supra. Instead of looking for coherence between statutes over time, Legal Realists looked for horizontal coherence by comparing statutes to other statutes in effect at the same time and the policies behind those statutes. Eskridge, supra note 1, at 599.

[62] In the mid-1970s, some theorists began to assert that law was "arational, subjective, and political" (Eskridge at 595). These theorists claimed that there was no such thing as a plain meaning of a term in a statute. Because any interpretation of a statute would harm some and benefit others, these theorists posited, statutes should be interpreted to increase the oppressed groups' access to the political system. Eskridge, supra note 1, at 596).

[63] Also in the mid-1970s, some theorists proposes that interpreters of law should aim for efficient results when they chose between possible interpretations of statutes. Generally, interpreters should minimize the impact of laws that turned out to be "inefficient," whatever the intentions of the legislature (Eskridge at 594).

[64] James, supra note 60, at 801.

[65] Id. at 802.

> Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States.

Section 212(a) then lists many reasons why aliens would not be admissible. Aliens who are inadmissible under Section 212(a) can be deported as well.[66]

Before 1996, Section 212(c) of the Immigration and Nationality Act allowed aliens to obtain a waiver of inadmissibility. This waiver prevented them from being deported. Section 212(c) stated:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General.

The immigration laws were reformed in 1996, and the 212(c) waiver provision was eliminated.

In 1997, the Immigration and Naturalization Service attempted to deport an alien because he was inadmissible under Section 212(a) based on a conviction for selling drugs.[67] The alien wanted to apply for a 212(c) waiver despite the repeal of 212(c), because he entered his guilty plea before 212(c) was repealed.[68] In 2001, the Supreme Court decided that the alien was eligible for relief under Section 212(c).[69]

The Court reached this conclusion in part by interpreting Section 212(c) and its repeal pragmatically. The Court opined that it might be *unfair* to apply the repeal of 212(c) retroactively to cases where aliens entered guilty pleas before the statute was repealed, because these aliens might have entered their plea without believing that it would prevent them from applying for relief from deportation.[70] The Court used *statistical evidence* to show that the vast majority of criminal convictions resulted from guilty pleas, so many of the aliens who would be deportable after the repeal of Section 212(c) would have become deportable as a result of a guilty plea.[71] To show that aliens often relied on the availability of relief under Section 212(c) when they entered their guilty pleas, the Court referred to *the wisdom of those who had worked in the area* of applications for relief under Section 212(c).[72]

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[66] 8 U.S.C. § 1227(a)(1)(A) (2006).
[67] INS v. St. Cyr, 533 U.S. 289, 293 (2001).
[68] Id.
[69] Id. at 326.
[70] Id. at 323.
[71] Id. at 324.
[72] Id.

The Court considered *legislative intent* as well as *policy* in interpreting the repeal of Section 212(c).[73] The Court found no evidence that Congress intended that the repeal of Section 212(c) would apply retroactively; rather, the Court looked to other portions of the 1996 immigration reform law to show that, when Congress intended for provisions to apply retroactively, it explicitly provided for retroactivity.[74] This attempt to divine the legislature's intentions also represents an application of the Whole Act Rule (See Tool #3, above).

This interpretation is an example of pragmatism because the Supreme Court used a large variety of interpretive techniques, including explicitly policy-based and statistical reasoning, to reach its result. The Court considered the public interest and the legislature's intent, and the Court admitted that it was making judgments about fairness in reaching its decisions. The Court did not contend that any portion of the statute was unambiguous, and it did not contend that its judgments about fairness were objective. In his dissent in St. Cyr, Justice Scalia argued against the subjectivity of the majority's fairness assessment and noted the opposition of Textualists to the majority's more pragmatic approach to statutory interpretation. Scalia opined that, "[i]t has happened before -- too frequently, alas -- that courts have distorted plain statutory text in order to produce a "more sensible" result. The unique accomplishment of today's opinion is that the result it produces is as far removed from what is sensible as its statutory construction is from the language of the text."[75]

Conclusion

The interpretive techniques offered in the Tools and Suggestions sections of this handout can help you get closer to the meaning of each statute. The theories presented in this section of the handout show you that some of your readers will respond better to your use of certain tools that to your use of other tools.

If your audience is more likely to be persuaded by one theory of statutory interpretation, be aware of that likelihood *before* you try to interpret the statute for that audience. Choose your interpretive tools wisely.

[73] Id. at 316-20.
[74] Id. at 319-20.
[75] Id. at 334.