1-1-2009

Insurance Policy as Statute, The

Jeffrey W. Stempel
William S. Boyd School of Law, University of Nevada Las Vegas

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr
Part of the Insurance Law Commons

Recommended Citation
Available at: https://scholarlycommons.pacific.edu/mlr/vol41/iss2/1

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.
The Insurance Policy as Statute

Jeffrey W. Stempel*

TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 204
II. THE ANALOGY BETWEEN INSURANCE POLICIES AND LEGISLATION .......... 206
III. IMPLICATIONS OF VIEWING POLICY LANGUAGE AS SIMILAR TO
    STATUTORY LANGUAGE ........................................................... 215
    A. The “Legislative Intent” of an Insurance Policy ............................ 215
    B. Appreciating the Background of Statutes and Policy Forms:
       The Analogy to Legislative Purpose ......................................... 223
    C. Applying Statute-Like Purposive Analysis to Insurance Policies:
       An Illustration ........................................................................ 233
    D. Appreciating the Statutory Perspective Logically Creates Greater
       Receptiveness to Other Considerations Bearing upon Insurance
       Policy Meaning ...................................................................... 236
    E. Interpreting Insurance Policies as Legal Process ........................... 238
    F. Insurance Applications of Statutory Construction Perspectives ........ 239
    G. The Statutory Perspective on Insurance Policies Logically Leads to
       Greater Consideration of Administrative Agency Inputs ............. 244
    H. Appreciating Colloquy Regarding Policy Design, Text, and Meaning ...................................................... 247
    I. The Potential Utility of Canons of Statutory Construction ............... 250

IV. UTILIZING THE STATUTE-LIKE CHARACTERISTICS OF INSURANCE
    POLICIES FOR SOUNDER CONSTRUCTION .................................. 266

V. CONCLUSION .............................................................................. 268

* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Jill Anderson, Hazel Beh, David Gardner, Randy Maniloff, Jay Mootz, Adam Scales, Dan Schwarcz, Larry Solan, and Jeff Thomas for ideas on this issue and to Bill Boyd, Doris and Ted Lee, Ann McGinley, Jim Rogers, Steve Johnson, and John White for continuing support. Thanks also to Jeanne Price, Jennifer Gross, Annette Mann, Shannon Rowe, and Chad Schatzle for research and logistical support. © Copyright 2010 McGeorge Law Review; Jeffrey W. Stempel.
I. INTRODUCTION

Insurance policies are classified as a subspecies of contract. Although the taxonomy is correct, rigid adherence to this classification system limits the legal system's ability to deal with some of the most problematic and frequently litigated questions of insurance coverage. Restricting conception of insurance policies to the contract model unduly limits analysis of the meaning and function of the policies. In addition, restricting characterization of insurance as a matter of "contract" does not necessarily produce swift, inexpensive, efficient, or uniform decisions (to say nothing about accuracy, justice, or fairness). Within contract law, scholars, and courts differ over the respective primacy of text, party intent, contractual purpose, extrinsic evidence, policyholder and insurer expectations, and public policy in determining interpretative outcomes. Even where


2. See Stempel on Insurance Contracts, supra note 1, §§ 4.01-4.03 (noting a range of judicial styles in application of contract construction principles, including the significant degree to which courts differ in their application of the principle of contra proferentem (ambiguous contract language should be construed against the drafter)); E. Allan Farnsworth, Contracts, at ch. 7 (4th ed. 2000) (noting differing applications of basic contract construction principles in the courts and varying emphases on contract text, party intent, and contract purpose across judicial decisions); Fischer, Swisher & Stempel, supra note 1, at ch. 2 (reviewing basic contract interpretation principles and factors used in construing insurance policies); id. at chs. 10-11 (juxtaposing cases attributing different meaning to identical language contained in standardized insurance policies).

Competing for primacy in construing contracts, in rough presumptive order of hegemony, are text, party intent, the purpose of the contract, rules of textual interpretation (e.g., ambiguities are construed against the drafter), and public policy. The text of the contract documents, an indicator of contract meaning that is alternately enshrined in the "plain meaning" and "ordinary meaning" approaches and indirectly regulated through the contra proferentem principle of construing unclear contract language against the drafter. See
interpreters focus on a single dimension of the meaning of contract (e.g., the text of the contract documents), they often disagree both as to the meaning of the text in question and over the general approach to construing text (e.g., broad versus narrow, plain meaning versus ordinary meaning, etc.).

The contract model is not the only lens through which to view and assess insurance. One may also profitably view insurance policies as akin to statutes. This Article attempts to move toward sounder construction and application of insurance policies and to improve the resolution and consistency of disputes over insurance coverage by expressly applying the notion that insurance policies are quite similar to statutes regulating the activity, expectations, and conceptions of

FARNsworth, CONTRACTS, supra, at ch. 7. Contract interpretation is considered a question of law rather than a question of fact, which, as a practical matter, means that courts decide the meaning of contracts and contract text, even if a jury must resolve certain factual disputes bearing on contract meaning. See FISCHER, SWISHER & STEMPEL, supra note 1, § 2.10. Further, a trial court's construction of a contract and assigned meaning, being a question of law, is reviewed de novo on appeal, with no deference to the trial court's contract analysis (although, as a practical matter and out of necessity, appellate courts will grant some weight to the trial judge's close position for observation and will defer to fact findings bearing on the question of contract meaning).

In determining textual meaning, courts often use, sometimes implicitly, canons of construction or presumptions about language. For example, words are generally to be given their "ordinary meaning rather than any specialized meaning," unless the facts and circumstances suggest that a specialized meaning was intended. See FISCHER, SWISHER & STEMPEL, supra note 1, § 2.10. In addition, the entire policy or contract (and not only the term in dispute) is to be examined, with more weight accorded to customized language or endorsements than is accorded to the standard form "boilerplate" of the insurance policy. Id. The structure and organization of the policy may also have a bearing on the weight and interpretation accorded to policy text. See FARNsworth, CONTRACTS, supra, § 7.8; STEMPEL ON INSURANCE CONTRACTS, supra note 1, § 4.08; Kenneth S. Abraham, A Theory of Insurance Policy Interpretation, 95 Mich. L. Rev. 531 (1996) (finding the ambiguity principle to be the touchstone for insurance policy construction); E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 Yale L.J. 939 (1967) (addressing the types and nature of contractual ambiguity and its consequences).


3. An additional valuable perspective on insurance policies and coverage questions is provided by viewing insurance policies, which are highly standardized and purchased to accomplish particular goals, as a type of product or "thing," rather than the type of negotiated transaction that spawned the law of contract. See Jeffrey W. Stempel, The Insurance Policy as Thing, 44 Tort Trial & Ins. Prac. L.J. 813 (2009); Daniel Schwarcz, A Products Liability Theory for the Judicial Regulation of Insurance Policies, 48 Wm. & Mary L. Rev. 1389 (2007); Timothy Stanton, Comment, Now You See It, Now You Don't: Defective Products, the Question of Incorporation and Liability Insurance, 25 Loy. U. Chi. L.J. 109 (1993). Like the statutory perspective, the insurance-policy-as-thing approach has much to recommend it and much to contribute to a sounder understanding of insurance policies and better, more consistent resolution of insurance coverage disputes. In addition, insurance policies can profitably be viewed as social instruments or social institutions in assessing their scope and limitations for interpretative purposes. See Jeffrey W. Stempel, The Insurance Policy as Social Instrument and Social Institution, Wm. & Mary L. Rev. (forthcoming 2010). It is my contention that optimal construction of insurance policies can be facilitated by looking at insurance policies through the quadrangular prism of all four views and that this multi-perspective approach is worth the additional investment of judicial resources, particularly for difficult coverage questions. See Jeffrey W. Stempel, Construing Insurance Policies: Four Views of the Cathedral (Jan. 2009) (unpublished manuscript, on file with the McGeorge Law Review). At the risk of ignoring the benefits of quadrangulation, this Article concentrates on the manner in which analogizing insurance policies to statutes illuminates their meaning and application.
insurers and policyholders when insurance is purchased, at least for common
insurance products and situations. Fully appreciating this trait of the insurance
policy and the insurance relationship can assist courts in better determining the
contours of coverage in disputed cases.

II. THE ANALOGY BETWEEN INSURANCE POLICIES AND LEGISLATION

Insurance policies, which are largely standardized and crafted by the
insurance industry as a whole, are akin to private legislation, resemble
manufactured products, and, of course, constitute agreements between
policyholder and insurer.\footnote{See Stempel, The Insurance Policy as Thing, supra note 3 (explaining that policies may be profitably viewed as products designed to perform intended risk management functions); Schwartz, supra note 3 (same). Nearly 100 years ago, Williston noted that insurance policies are akin to chattel purchased for necessary uses by the policyholder and sold by the insurer with this in mind. See 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 34, at § 900 (Walter H.E. Jaeger ed., 3d ed. 1963) (1920) ("The typical [insurance] applicant buys 'protection' much as he buys groceries."). This is an insight that has too often been overlooked in the intervening century until the concept was revitalized and explicated in some detail in Professor Schwartz's article, supra note 3. See HENDERSON & JERRY, supra note 1, at 18 (excerpting Williston on this point); C&J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 178 (Iowa 1975) ("[A] reasonable consumer... depends on an insurance agent and insurance company to sell him a policy that 'works' for its intended purpose in much the same way that he depends on a television salesman and television manufacturer.").
}
The most obvious similarity between legislation and insurance takes place in the realm of property and casualty insurance. Most property or general liability insurance issued in the United States is written on policy forms authored by the Insurance Services Office (ISO), a company that is essentially in the business of drafting standardized insurance policy forms. The insurance industry effectively controls ISO and supports ISO through its patronage. ISO works closely with the insurance community in designing and modifying policy forms. Prior to ISO, which resulted from a merger of National Bureau of Casualty and Surety Underwriters and the Mutual Insurance Rating Bureau, other predecessor groups served much the same function.\footnote{For additional information regarding ISO, see STEMPEL ON INSURANCE CONTRACTS, supra note 1, § 4.05[A], and for extensive discussion of the role of the ISO and predecessors in the creation, design, and maintenance of the standard commercial general liability (CGL) policy, see id. § 14.01. See also ABRAHAM, supra note 1, at 34-36 (examining ISO background and function).
}

The ISO drafting process often resembles the passage of legislation. For example, the major revisions of the standard commercial general liability (CGL) policy\footnote{The major revisions of the CGL policy occurred in 1943, 1955, 1966, 1973, and 1986. See ANDERSON, STANZLIER & MASTERS, supra note 1, at app. A (reproducing primary elements of these CGL policy form revisions).} all involved drafting groups that included both ISO employees and representatives of the insurance industry. Minor or ongoing policy revisions and the drafting of endorsements for possible addition to standardized policies are more often done by ISO in-house staff. When working on policy revisions, ISO staff takes action aware of industry concerns that animate inquiry into possible revision of endorsements or creation of new endorsements.
In this regard, ISO acts a lot like Congress or a state legislature responding to lobbyists seeking favorable legislation. Insurers come to ISO noting a problem with the current standard forms and available endorsements. For example, as the year 2000 approached, questions arose over whether the losses related to computer difficulty reading dates beyond 1999 would be covered under standard property and liability coverage. Many insurers were confident that existing policy language would allow them to successfully avoid these “Y2K” claims. However, because the possibility of Y2K coverage under existing forms could not be foreclosed, insurers wanted a particularized exclusionary endorsement that would not leave any doubt. Insurers were united in their view that the standard property and liability policies were not intended to cover such losses, which they viewed as far beyond the contemplation of the parties at the time the policy forms were drafted. Working with the insurance industry, ISO produced a broadly worded, ironclad electronic data exclusion that insurers could then insist on including in their commercial policies (and sometimes consumer policies as well) to bar Y2K coverage.

Terrorism presents a similar issue. Historically, the “war” exclusion contained in most standardized policies has been interpreted to apply only when there are relatively formal hostilities perpetrated by sovereigns against one another. Losses inflicted by politically motivated armed thugs or isolated bombers generally did not qualify under the war exclusion. In one prominent case, a court held that the hijacking and destruction of a commercial airliner was not within the war exclusion, because the perpetrators, although supporters of a Palestinian state in the Middle East, were not part of any official government or army and were not acting pursuant to the foreign policy of any recognized sovereign. In perhaps the apogee of pro-policyholder construction of the war exclusion, another court held that the war exclusion did not apply to the destruction of the Holiday Inn Beirut, which was alternately held by warring Muslim and Christian factions during Lebanon’s multi-year civil war in the 1980s. Although the two militias were behaving a lot like armies conducting a civil war, using the hotel as a fortress and rocket-launching area (which in turn


9. See Stempel on Insurance Contracts, supra note 1, § 23.02[K].


made the hotel a target for return missiles), neither militia was a recognized sovereign.

For the most part, insurers lived with this situation. There were various explicit "terrorism" exclusionary endorsements available, particularly from the Lloyd's and London Market carriers, but American insurers showed relatively little interest in broadening or tightening their policies' war exclusion language into a terrorism exclusion. Then came September 11, 2001. In light of the established jurisprudence and the overwhelming public sentiment in favor of insurance coverage for 9/11 victims, insurers quickly agreed not to litigate the issue of the war exclusion. But insurers realized that terrorism presented significantly higher risks of catastrophic loss than in the past. ISO worked with insurers to draft a broader terrorism exclusionary endorsement for use with standardized policies.

During the 1980s, when litigation against builder-policyholders received greater attention, the insurance industry moved in a more expansive direction when faced with a coverage question. Then, as now, the standard form CGL policy contained an exclusion for coverage of damage arising out of the policyholder's own defective work. Although there were ways of avoiding the reach of the exclusion, most courts easily interpreted the exclusion as barring coverage for construction defect claims against a builder-policyholder. This raised concerns in the construction industry, which was a major purchaser of CGL coverage.

Responding to these concerns, the insurance industry was willing to restore coverage for construction claims where the losses resulted from work performed on the builder-policyholder's behalf by a subcontractor. To institute this agreement between the policyholder and the insurer community, insurers working with ISO revised the "your work" exclusion to include an express subcontract exception. This exception became part of the 1986 revisions to the CGL form.

In this instance, ISO and the insurance community behaved similar to a legislature enacting legislation in response to the concerns of constituents.

12. It seems clear to me that insurers would have lost in court if they had attempted to rely on the exclusion in the aftermath of the 9/11 attacks. Osama bin Laden and his organization are nefarious forces, but they are not government or military forces. Their actions are less like standard warfare and more like an extension of the airline hijacking that was ruled not to fall within the exclusion in Pan Am. World Airways, Inc., 505 F.2d 989. See STEMPEL ON INSURANCE CONTRACTS, supra note 1, § 24.06; Stempel, supra note 10. Other commentators think the war exclusion could have been used successfully to avoid coverage for 9/11 claims. See Randy J. Maniloff, The "War Risk" Exclusion: Distinguishing Between "War" and "Terrorism" After September 11, 16-6 MEALEY'S LITIG. REP.: INS. 13 (2001).

13. Of course, having the endorsement does not mean that the endorsement has to be used. Many insurers covering risks thought not to be particularly vulnerable to terrorism (e.g., an apartment building in Dubuque, Iowa) may not insist on including the terrorism exclusion in a policy covering the property or providing liability coverage to its owner. In other situations, insurers may first attempt to include a broad terrorism exclusion in the policy but may be willing to let the policyholder "buy back" coverage for a relatively small additional premium.

14. See STEMPEL ON INSURANCE CONTRACTS, supra note 1, § 25.05[B][2][b] (describing the background of the subcontractor exception to the "your work" exclusion in standard ISO CGL policy);
The same analogy holds regarding the insurance industry’s reaction to perhaps the most significant mass tort in history: asbestos litigation. Although medical literature had noted the dangerous properties of asbestos for some time, it was not until the 1970s, culminating with the watershed 1973 decision of Borel v. Fibreboard, that successful tort suits by victims of asbestos inhalation occurred.\(^{15}\) Buoyed by the success of the Borel litigation, other plaintiffs’ lawyers followed suit, resulting in a boom in asbestos liability litigation over the next dozen years. Following close on the heels of asbestos litigation came insurance coverage disputes between asbestos defendants and their insurers.\(^{16}\)

For the most part, the coverage litigation did not go well for insurers. The courts tended to adopt an actual injury/continuous trigger, which implicated each policy in effect while a victim’s lungs were damaged by asbestos, even if the injury was not visible or easily diagnosed.\(^{17}\) Although insurers have had some success apportioning coverage and forcing policyholders to bear some of the liability costs for periods of self-insurance or where insurance was insolvent or exhausted,\(^{18}\) the net effect was to make CGL insurers responsible for defending most of the asbestos litigation and paying billions of dollars in asbestos liability claims up to their respective policy limits.

To make matters worse for insurers, many of the policies at issue had only “per occurrence” limits, not aggregate limits on the amount for which the policy was responsible, and had very low deductibles or retentions for which the

---


15. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973) (applying Texas law and affirming the jury verdict in favor of asbestos plaintiff on the grounds that the danger from inhaling asbestos dust was not, as a matter of law, sufficiently obvious to relieve the manufacturer defendants of a duty to warn); see also Jeffrey W. Stempel, Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute, 12 CONN. INS. L.J. 349 (2006); Symposium, Asbestos Litigation and Insurance Coverage, 12 CONN. INS. L.J. 1 (2006).


17. See ANDERSON, STANZLER & MASTERS, supra note 1, §§ 4.01-4.06; FISCHER, SWISHER & STEMPLE, supra note 1, § 11.10; OSTRAGER & NEWMAN, supra note 1, § 9.03[b][1]; STEMPLE ON INSURANCE CONTRACTS, supra note 1, § 14.09; Davis J. Howard, “Continuous Trigger” Liability: Application to Toxic Waste Cases and Impact on the Number of “Occurrences,” 22 TORT & INS. L.J. 624 (1987); James M. Fischer, Insurance Coverage for Mass Exposure Tort Claims: The Debate over the Appropriate Trigger Rule, 45 DRAKE L. REV. 625, 634 (1997) (“[C]overage would be provided for ‘occurrences’ resulting in bodily injury or property damage within the policy period.”); Stempel, Assessing the Coverage Carnage, supra note 15.

policyholder was responsible. Further, most courts took the view that each asbestos victim's injury was a separate occurrence, thereby rejecting the insurance industry's argument that there was only one occurrence (i.e., the defendant policyholder's decision to deploy asbestos containing products without adequate warning). Feeling significant economic pain, insurers acting through ISO returned to the drafting table and, in the 1986 revision to the standard CGL form, included a broad exclusion of any coverage for asbestos-related liability. Nearly the same scenario took place regarding pollution liability, with the 1986 ISO form moving from the so-called "qualified" pollution exclusion to an "absolute" pollution exclusion.

As these examples reflect, changes in the language of a form policy or the creation or revision of standardized endorsements have much in common with the legislative drafting process. First, a perceived problem arises. Second, the drafter learns of the problem through constituent lobbying or the notoriety of an event reflecting the problem. Third, the drafter (ISO and its core "membership" of insurers) considers the problem and interest group sentiment and responds as best it can consistent with the drafter's assessment of overall interests, including self-interest. Fourth, the drafter issues a response, usually in the form of new or revised policy language. When similar matters take place in Congress or respective state legislatures, the response is a statute or an amendment to a statute. Regarding insurance, the response takes the form of a revised standard policy form or a revised or new endorsement.

20. See id. at 377; see, e.g., Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 2009 WI 13, 315 Wis. 2d 556, 759 N.W.2d 613 (following majority approach that each injury to third party injuriously exposed to asbestos constitutes an "occurrence" and reviewing asbestos occurrence precedent).
21. See ISO, Commercial General Liability Coverage Form, CGL Policy No. CG 00 01 10 01 (2000) (on file with the McGeorge Law Review) (containing exclusionary language first introduced in 1986 that excludes coverage for any liability of policyholder "arising out of" use of asbestos or asbestos containing products); Stempel, Assessing the Coverage Carnage, supra note 15, at 376 ("Aggregate limits were not the norm for general liability claims until the 1986 ISO revision of the standard CGL policy form.").
22. See ANDERSON, STANZLER & MASTERS, supra note 1, at ch. 15; OSTRAGER & NEWMAN, supra note 1, § 10.02; STEMPLE ON INSURANCE CONTRACTS, supra note 1, § 14.11; Jeffrey W. Stempel, Reason and Pollution: Correctly Construing the "Absolute" Exclusion in Context and in Accord with Its Purpose and Party Expectations, 34 TORT & INS. L.J. 1, 2 (1998) ("Since the mid-1980s, the standard form CGL has included the so-called absolute pollution exclusion, which provides that the insurance does not apply to bodily injury or property damage 'arising out of the actual alleged or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants.'"); see also Kenneth S. Abraham, The Rise and Fall of Commercial Liability Insurance, 87 VA. L. REV. 85 (2001) (noting a shift from the qualified pollution exclusion to absolute pollution exclusion as an example of an industry shift to more restrictive coverage in response to adverse court decisions); Kenneth S. Abraham, Environmental Liability and the Limits of Insurance, 88 COLUM. L. REV. 942 (1988) (same).

The qualified pollution exclusion provided that pollution liability was not within the scope of CGL coverage unless the discharge of the pollutant leading to liability was "sudden and accidental." By contrast, the absolute pollution exclusion provided that any liability arising out of discharge of a pollutant was excluded from coverage, with "pollutant" broadly defined to include any chemical or irritant. See STEMPLE ON INSURANCE CONTRACTS, supra note 1, § 14.11; Stempel, Reason and Pollution, supra.
The insurance policy text has characteristics of positive law even though it is not positive law in the same way that a statute is. The form policy text is designed to set forth legally binding rules of coverage across a wide range of activity. Once standardized language is in place and widely used, it largely governs the scope of the insurance available for certain losses. If the standard form text is ambiguous or unenforceable, its impact is limited or inconsistent. However, to the extent the standard form text is effective, its sweeping impact is similar to that of a statute.

While the ISO drafting process shares many similarities with the drafting of legislation, it is significantly different than unilateral revision of contract text, the paradigm more commonly used to analyze insurance form text. In the prototypical bilateral contract, each party has unfettered autonomy to create, revise, or eliminate language as it chooses. This is not so with an ISO standard form insurance policy text. The standard form, like legislation, reflects the participation of various entities and some degree of compromise and consensus. It is not the particular product of any one entity or individual, but instead represents the insurance industry position as to what constitutes standard insurance coverage for the most common types of insurance: commercial general liability, commercial property, homeowners (a fusion of property and liability for consumers, but with property protection as the main objective), and auto (also a fusion of liability and property, but with liability as the primary focus).

Although the standard ISO forms are frequently supplemented and varied by endorsements, including state-specific endorsements required by state regulation or controlling judicial decisions, basic insurance products retain their similarity to legislation or administrative regulation. The variance in coverage is funneled into regularized patterns rather than manifesting as highly individualized customization of negotiated policies. The ISO endorsements, although numerous, are themselves the standardized product of collaboration between insurers and the organization, with consultation from brokers, policyholders, regulators, and other constituent groups.

The variance between insurance policies thus tends to resemble statutorily or administratively authorized deviance from the overall statutory command—something like zoning variance rather than a different type of contract. Standardization and replication both cross broad categories and tend to be the order of the day in niche market categories. A basic insurance product designed by the insurance infrastructure is sold to an identified group of policyholders to cover an identified scope of risk. The jurisdictional reach of the policy is wide

23. By "positive" I do not mean that the text in question is necessarily accomplishing anything particularly beneficial. I use positive in the sense of positive law or legal positivism, which defines law as the authoritative command of a legitimate sovereign that is therefore binding on the populace. While insurers are not sovereigns in the sense that a government is sovereign within its territory, insurers acting in concert have similar characteristics and power in regulating human behavior. See RICHARD V. ERICSON, AARON DOYLE & DEAN BARRY, INSURANCE AS GOVERNANCE (2003).
and consistent. Where there is variance, it is consistent (defined by the parameters of the endorsement) and implicitly approved by the “sovereign” authority of the insurance industry, acting through ISO, as well as by individual insurers. In this way, the implementation of a policy follows a standardized approach similar to the way that government entities apply a statute or administrative regulation.

Even in areas not formally dominated by the ISO process (e.g., life and health insurance), there may be other entities producing standardized policies for insurer use. In the absence of such organizational control, policy forms tend toward a standard type due to years of industry development and regular company use. For example, almost all life insurance policies contain a suicide exclusion as well as an incontestability clause providing that coverage will not be denied based on misrepresentation in the application process after the policy has been in effect for more than two years.24

An insurance form policy also resembles another type of positive law—litigation rules. In the federal system (which many states parallel), rules of civil procedure, criminal procedure, evidence, bankruptcy, and appellate procedure are drafted by a succession of cooperative groups: an advisory committee, a standing committee, the Judicial Conference of the United States, and, finally, the U.S. Supreme Court.25 After promulgation, Congress has up to 180 days to act and has the power to modify or disapprove proposed rules. Eventually, this drafting product becomes part of the relevant rules and has the force of statutory law. The ISO drafting process could be considered similar to rule promulgation as well as conventional legislation that is proposed, investigated, introduced, studied, revised, and compromised (often through House and Senate conference committees).

In the world of insurance policy drafting, there is even an informal version of the presidential veto. A proposed change to an ISO form is unlikely to take place over the strong opposition of any of the major insurers or reinsurers. For example, if Lloyd’s informs ISO that its syndicates are unwilling to write coverage above or provide reinsurance to a proposed form, the form is unlikely to become official. Similar lack of support from large reinsurers such as Munich Re, Swiss Re, or perhaps even the somewhat smaller Hannover Re, would likely have the same effect.

24. The incontestability clause itself is a product of laws in most states requiring incontestability after the policy has been in force more than two years. These laws were enacted to prevent insurers from taking opportunistic advantage of the fact that, by definition, the person whose life was insured under the policy would not be available during litigation to refute insurer allegations of misrepresentation. Consequently, insurers were not making the incontestability clause a standard part of the typical life insurance policy out of magnanimity, but instead were privately legislating what would otherwise be publicly imposed upon them by actual statute or regulation.

An example of this was highlighted in the state attorney generals’ antitrust action against the insurance industry in connection with the alleged conspiracy of the industry to force a switch from the occurrence-based to the claims-made CGL form. According to the allegations, four major insurers were instrumental in determining, in concert with reinsurers, that the hard product liability insurance market of the mid-1980s required a massive switch to the claims-made form in order to stabilize the industry. According to the lawsuit, four prominent insurers (Aetna, Allstate, Cigna, and Hartford) were successful in getting ISO to work closely with them toward this goal. By implication, it also seems certain that had any one of these four insurers objected to a proposed form change, the revision would never have succeeded.

This episode also illustrates that even though legislation, rules, and standardized forms emerge from the efforts of many, a smaller group often is identified as the major drafter of the text in question. For example, the chief drafter of the 1966 ISO form is generally acknowledged to be Gilbert Bean, then with Liberty Mutual. Consequently, when Bean’s deposition was taken in connection with asbestos coverage litigation, it needed to be conducted in an auditorium and was attended by scores of attorneys. But one need not denigrate the efforts of Bean or other primary drafters to realize that they do not have nearly the authority over text that is possessed by a single merchant wishing to dicker with another merchant about precise contract terms. Rather, primary drafters of insurance policies are in a position similar to that of legislators or legislative staff, who may have done much of the work in drafting a statute or rule, but cannot control the ultimate content of the language that is enacted through the institutional process.

ISO, as an institution, acts much like a private legislature for the insurance industry, and the standard insurance forms it issues resemble the statutory product of legislatures or the administrative rules of government agencies. Outside the arena of primary property and casualty coverage, there is a less obvious concentration of policy drafting power and less uniform standardization. However, excess property, liability, or umbrella liability insurance will usually follow form to the underlying primary coverage, making this area of insurance similarly uniform and statute-like.

The use of reinsurance (either facultative or treaty and regardless of whether written as quota/share or excess-of-loss) buttresses the statute-like uniformity in that reinsurers generally want the insurance products they reinsure to use the same standardized language with which reinsurers are most familiar. The nature


of the reinsurance market thus exercises a standardizing uniformity on insurance policies outside the property/casualty sphere.

Even though they are not formally coordinated as property and casualty insurance policies are, insurance policies in areas such as life, health, or other areas tend to be highly standardized, particularly in substantive scope, even if various insurers act in less coordinated fashion and use different language to memorialize the contours of the insurance coverage in the policy form or endorsements. Although there may not be formal coordination between all insurers, as exists for property and casualty insurers, there is an identity of interest among insurers. The nature of underwriting and risk spreading drives the industry toward standardization and consistency of forms and language, resulting in essentially uniform product scope and coverage provisions.

To a degree, this may take place for all areas of contracting. Through years of accumulated experience, most vendors of a particular type tend to gravitate toward having certain basic provisions in their standardized contracts. Consequently, the apartment leases on the west side of town tend to look a lot like those offered by landlords on the east side of town. The same is true for many sales agreements and other vendor contracts. But in general it continues to appear that all insurance policies (not just those subject to ISO) differ far less in content than contracts in other realms of commercial life.28

Just as important, entities outside the insurance industry, as a practical matter, are far more likely to develop company-specific forms and to write customized contracts, particularly for larger, more important customers. Insurers are happy to negotiate the contours of coverage with large commercial policyholders or wealthy individuals. But in doing so, they tend to work with a selection of policy forms and endorsements common to the industry rather than developing their own forms or writing policy language "from scratch."

The net effect of all this is to bring a broad uniformity to insurance policy forms that more closely resembles the broad regulatory power of statutes than the highly varied nature of most bilateral contracts. A perhaps clichéd adage is that in France the educational system is so uniformly regulated at the national level that the minister of education knows exactly what each third grader is being taught at 10 a.m. on a Wednesday morning (something impossible in the U.S. because of local control of schools and considerable academic freedom for teachers, even at the elementary level). In a fashion similar to the French minister of education, an insurance executive considering the number of policies in force of a given type can be reasonably confident of their basic content, even those policies written by

28. There are, of course, exceptions and certain enclaves where merchant contracting is similar to insurance in uniformity and standardization. For example, in most regions it appears that home sales are memorialized through standard form purchase agreements approved and used by the local board of realtors. Of course, in home sales there is usually more dickering over and deviation from preprinted standardized terms than one finds for personal insurance sales to consumers (although various standardized endorsements or riders will often be offered as part of an insurance sale).
competitors. Insurance policy forms have the consistency of a controlling textual template in a manner similar to legislation or government rule. The main difference is that this uniformity has been achieved through formal and informal coordination of the insurance industry rather than through public legislation. Insurance policies act, to a degree, as private legislation by insurers controlling the shape and contour of coverage sold.

III. IMPLICATIONS OF VIEWING POLICY LANGUAGE AS SIMILAR TO STATUTORY LANGUAGE

Recognizing the statute-like properties of standard insurance policy forms leads to a number of interpretative consequences. This section considers the degree to which appreciation of the insurance policy's similarity to statutes argues in favor of incorporating statutory interpretation tools into the process of insurance policy construction.  

A. The "Legislative Intent" of an Insurance Policy

Perhaps most important, if an insurance policy is like a statute, then the "legislative intent" of the insurance industry in crafting the form becomes clearly relevant to proper interpretation of the form. Anglo-American theories of statutory interpretation have traditionally recognized legislative intent as an important factor in statutory interpretation. Of course, the intent of parties to a


30. See DAVIES, supra note 7, at 296 ("The basic rule of statutory interpretation is that statutes are to be read to carry out the intent of the legislature. . . . But determining legislative intent is often difficult, so canons of construction, practical guides, and folklore have grown up around it."). As a result, much of the determination of legislative intent comes not from reviewing the legislature's statute-making process and description, but from attempting to discern legislative intent from the words of the statute or "to seek the underlying purpose the legislature had when it enacted those words." Id.; see also CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 35, 39-48 (2008) [hereinafter CRS REPORT] (on file with the McGeorge Law Review) (identifying legislative history and intent as important determinant of statutory meaning, but also noting dangers of misreading legislative history).

31. See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 971-1035 (noting extensive use of legislative history in statutory construction); POPKIN, supra note 29, at 470-576 (same); Jorge Carro & Andrew R. Brann, The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis, 22 JURIMETRICS J. 294, 304 (1982) (reporting frequent court citation to legislative history, particularly committee reports, in statutory interpretation cases); see, e.g., Regan v. Wald, 468 U.S. 222 (1984) (employing legislative history in assessing
simple contract is also important, although it often takes a back seat in the
dominant objective theory of contract where, to paraphrase a comment about
legislation made by Oliver Wendell Holmes, one asks not what the drafter meant
but what the contract actually provides.32

In contrast, in statutory interpretation jurisprudence, there is a long list of
items of legislative history and statutory background that have historically been
consulted as part of the process of discerning statutory meaning. Legislative
history can, by the count of three noted scholars, include as many as twenty
different considerations or categories of items.33 As with contract law, the facial
text of a statute is a major component in determining statutory meaning, but for

32. See Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 419 (1899)
(“We do not inquire what the legislature meant; we ask only what the statute means.”).
33. The sources of legislative history include:
   1. Floor debate.
   2. Planned colloquy.
   3. Prepared statements on submission of a bill, in committee hearings and at the time of
      floor debates.
   4. Revised and amended statements.
   5. Statements in committees by the relevant executive branch administrators.
   6. Committee reports.
   7. Transcripts of discussions at committee hearings.
   8. Statements and submissions by interested persons, both local or state government and
      private parties.
   9. Committee debates during the “mark-up” of bills.
   10. Conference committee reports.
   11. Analysis of bills by legislative counsel.
   12. Analysis of bills by relevant executive departments.
   13. Amendments accepted or rejected.
   14. Actions on and discussions about separate bills on the same topic, offered by each
      house, or in contrast to a similar composite bill.
   15. Executive branch messages and proposals whether from the President, cabinet
      secretaries or from independent agencies.
   16. Prior relevant administrative action or judicial decisions, with or without
      congressional acknowledgment.
   17. Other subsequent or prior legislation, especially conflicting acts.
   18. Recorded votes.
   19. The status of the person speaking, i.e., a sponsor, committee chairman, floor leader,
      etc.
   20. Actions taken and reports, hearings, and debates on prior related legislation.

Hetzel, Libonati & Williams, supra note 29, at 589.
most courts and commentators it is not the sole component of the interpretative process. Along with text, legislative intent and purpose are considered core foundations to the enterprise of statutory construction. The interpretative similarities between statutes and contracts are apparent in that both involve words. More particularly, there can be ambiguity surrounding the words of either contract or statute. Legal scholars writing in both fields have observed the same types of ambiguity and uncertainty in the meaning of written text.

This approach immediately raises the question of the degree to which policy text conclusively trumps other interpretative factors and the degree to which a reviewing court is comfortable stating that the face of the policy form is unambiguously clear. Certainly, statutory text is important and will be the first thing consulted by those interpreting the statute. Notwithstanding this focus on statutory text and the attention paid to it by legislators and affected interest groups, the meaning of statutory language is not, on its face, always clear and

34. See LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 93-100 (2006) (identifying the three “dominant approaches” to statutory interpretation as textualism, intentionalism, and purposivism).

For purposes of this section, I use the terms “interpretation” and “construction” interchangeably even though many commentators, following a distinction originally posited by Francis Lieber in the Nineteenth Century, regard interpretation as the process of understanding statutory text and construction as the effect given to a statute by an applying court. See FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS (2d ed. 1837), reprinted in CLASSICS IN LEGAL HISTORY VOL. FIVE (Roy M. Mersky & Myron Jacobstein eds., Wm. S. Hein & Co., Inc. 1970); see also Symposium, A Symposium on Legal and Political Hermeneutics, 16 CARDOZO L. REV. 1883 (1995).

35. Compare POPKIN, supra note 29, at 192-97 (statutory ambiguity), with FARNSWORTH, CONTRACTS, supra note 2, at 441 (ambiguity in contracts).

36. For example, Executive Order No. 12,988, issued to provide guidance to executive agencies when drafting proposed legislation, contains a 16-point checklist for the agencies, requiring that they “make every reasonable effort to ensure” that proposed legislation “specifies in clear language” the following:

(A) whether the causes of action arising under the law are subject to statutes of limitations;
(B) the preemptive effect;
(C) the effect on existing federal law;
(D) a clear legal standard for affected conduct;
(E) whether arbitration and other forms of dispute resolution are appropriate;
(F) whether the provisions of the law are severable if one or more is held unconstitutional;
(G) the retroactive effect, if any of the statute;
(H) the applicable burdens of proof;
(I) whether private parties are granted a right to sue, and if so, what relief is available and whether attorney’s fees are available;
(J) whether state courts have jurisdiction;
(K) whether administrative remedies must be pursued prior to initiating court actions;
(L) standards governing personal jurisdiction;
(M) definitions of key statutory terms;
(N) applicability to the federal government;
(O) applicability to states, territories, the District of Columbia, and the Commonwealths of Puerto Rico and the Northern Mariana Islands; and
(P) what remedies are available, “such as money damages, civil penalties, injunctive relief, and attorney’s fees.”

2010 / The Insurance Policy as Statute

undisputed, at least as applied to the dispute in question. This explains the historical willingness of courts to consider legislative history, purpose, and statutory background. In addition, the existence and nature of institutions involved in crafting legislation creates particular traditions, norms, and presumptions when statutes are being enacted. To the degree that institutions are not monolithic or that more than one institution influences the drafting process, there is something of a Madisonian political equilibrium at work. The institutions, like different interpretative theories or factors, may point in opposite (or at least inconsistent) directions. In such cases, courts construing a law will need to coordinate between the various institutional factors and indicia of meaning to reach the most pragmatic construction of the statute in light of the larger context.

One might also analogize the structure of standardized insurance policy forms, which follow a common architecture as well as use common terms, to legislation. Instead of legislation’s title, preamble, provisos, statements of legislative facts, definitions, main directive clause, and subsidiary clauses, insurance policy forms have the declarations sheet, the insuring agreement, exclusions, conditions, definitions, and endorsements. The norm of referring to a written document as “the contract” between the parties is an oversimplification and is technically incorrect. The contract between the parties is their agreement. The piece of paper in question (be it insurance policy, lease, or bill of sale) is simply a memorialization of the agreement that may or may not fairly describe the arrangement into which the parties entered. The piece of paper is evidence of the content of the contract but it is not the contract. Consequently, even where the contract language is seemingly clear, the face of the memorialization or other “contract documents” do not definitively answer the question of whether the text correctly reflects the agreement of the parties.

Related to this is the question of the degree to which reviewing courts should consider the context in which the contract documents or policy form emerged. In

39. See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 99 (noting the different interpretations of the word “discrimination” in Title VII).
40. See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 277-79 (discussing structure commonly used for statutes, including title, preamble, provisos, statements of legislative facts, definitions, and main and subsidiary clauses).
41. See DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, MAKING AND DOING DEALS: CONTRACTS IN CONTEXT 1, 458 (2d ed. 2006).
daily life, language is never interpreted in isolation. The participants in even the most casual conversation are aware of the background leading to the exchange, the physical setting of the exchange, the nature of the speakers' relationships, the goals of the discussion, and the visual cues provided by speakers (e.g., hand gestures, raised eyebrows, smiles).

In real life, words are never construed in isolation but are part of real-time, streaming context. For example, a simple comment like “good move” may communicate an observation about an athletic event, honest praise for a subordinate worker, or sarcasm about a friend’s miscues. The real meaning of these two simple words cannot be definitively determined from their text alone and often require more than an examination of surrounding verbiage to effectively ascertain their meaning. Additional context may be required. This additional context is often readily apparent in daily life but may need to be provided to an adjudicative body attempting to give legal construction to words.

Unfortunately, the oversimplified syllogism of many court discussions of contract overlooks the degree to which interpreting bare text or words in isolation can be misleading. Similarly, courts routinely overstate the degree to which words are capable of definitive interpretation. Compounding the problem, some courts, when faced with uncertainty, too quickly resort to the ambiguity approach and immediately construe problematic language against the drafter without much serious inquiry into other evidence of meaning.

One fairly obvious solution to the problem is greater consideration of party intent, just as courts have historically been willing to turn to legislative intent to resolve statutory questions. Courts often resist this solution out of fear that the evidence of party intent is less reliable than the court’s own interpretation of policy text as well as out of adherence to the objective theory of contract. Since the late Twentieth Century, a focus on text and an unhelpful resistance to both consideration of the actual agreement made (as opposed to its memorialization) and the parties' understanding of the scope of the contract has dominated contract law.

Understanding the statute-like aspects of insurance weighs in favor of a more receptive approach to evidence of intent. Much of the debate about text-versus-context is similar regarding both contracts and statutes. However, in the statutory

---

42. See FARNSWORTH, CONTRACTS, supra note 2, at 454 (“[I]t is questionable whether a word has a meaning at all when divorced from the circumstances in which it is used.”); see also Farnsworth, “Meaning” in the Law of Contracts, supra note 2, at 940-42.

43. See STEMPLE ON INSURANCE CONTRACTS, supra note 1, § 4.08 (discussing various forms of the ambiguity approach); see also FISCHER, SWISHER & STEMPLE, supra note 1, §§ 2.04-2.05 (reviewing mainstream theories of contract construction, including the rule of construing ambiguities against the drafter).

44. See POPKIN, supra note 38, at ch. 5 (describing modern textualism and its resistance to court consideration of other interpretative factors as a doctrine that “giv[es] judges as little to do as possible”); CRS REPORT, supra note 31; ESKRIDGE, FRICKEY & GARRETT, supra note 29; see also POPKIN, supra note 38, at 97 (noting that in the post-Civil War era, courts were particularly likely to give narrow interpretation to statutes in derogation of the common law), ch. 4 (describing purposive interpretation as dominant during 1900-1960 period).
arena, courts have historically been more receptive to considering legislative intent as compared to courts faced with contract party intent. Realizing that insurance policies are like statutes should make courts—even courts wary of considering contracting party intent—more willing to at least glance at reasonably reliable evidence of the intent underlying a policy form. Because insurance forms, particularly in the property/casualty area, develop in a manner similar to statutes, the development of the policy form often leaves a "paper trail" similar to the legislative history of statutes.

In considering at least insurance industry intent (and often policyholder community intent as well), courts are not being asked simply to rely on the potentially self-serving testimony of a party to the contract. Instead, a documentary history of the policy will usually be available. For many policy forms, there will be both ISO background documents and particular insurer documents describing policy forms and industry understanding. For some forms or endorsements, ISO or another organization may have issued an interpretative memorandum discussing the provisions. There will also often be a contemporaneously reported account of the policy changes in the insurance trade press. For example, Best's Review, National Underwriter, Insurance Journal, Business Insurance, and other publications often report on changes to policies or the launching of new policy forms or insurance products.

There may also be extensive scholarly commentary on a new policy provision, often by persons in the industry or very close to the industry (e.g., lawyers who regularly represent insurers in coverage matters and policyholder lawyers acting as watchdogs). Of course, scholarly commentary by observers affiliated with an industry, position, or client must be read with care because of the obvious danger that the author's views and analysis will tilt in the direction of vested interests. Nonetheless, news accounts and scholarly analysis from interested parties or their counsel can still provide valuable insight and, in many cases, is sufficiently reliable to apply in determining policy meaning.

In addition, because insurance forms in most states typically must be approved by state regulators, there may be an actual legislative history of sorts compiled by state regulators in the course of reviewing and approving a particular policy form. One particularly prominent example of this occurred during hearings before the Texas Board of Insurance (since replaced by a single commissioner system) in which the Board quizzed industry representatives about the intent underlying the expanded "absolute" pollution exclusion. This colloquy helped to illustrate that, notwithstanding its broad language, the absolute pollution exclusion was never intended by insurers to negate coverage for the types of non-environmental liability traditionally incurred by CGL policyholders.46

45. See STEMPLE ON INSURANCE CONTRACTS, supra note 1, § 14.11[C] (quoting a representative of Liberty Mutual's testimony that "[w]e have overdrafted the exclusion" and would not enforce it literally but felt broad language was necessary to make a sufficiently clean break from qualified pollution exclusion in use
Appreciating the similarity between standardized insurance policy language and statutes makes it quite clear that courts may legitimately consider the "drafting history" of a provision even if these same courts are reluctant to consider private party assertions of intent unless policy language at issue is facially ambiguous.\(^4\) Determining drafting intent, although not as objectively verifiable as legislative intent, may, depending on the case, be considerably more feasible and less fraught with danger than consideration of party assertions of individualized intent.

More importantly, the legislative intent underlying statutory text arguably is part of the text and part of the statute's meaning. In contrast, contract textualists argue that, under an objective theory of contract, party intent stands apart from what the parties actually said in the text of the contract documents and that the latter should control. Consequently, a legal positivist and formalist may argue, as do many judges, that where the text of contract documents appears clear, this comprises indisputable evidence of what the contract means even if the facts demonstrably show that the text inaccurately reflects the parties' understanding at the time of contracting.

But if the standardized contract form (e.g., an insurance policy) is analogous to a statute, the drafting intent arguably becomes more than extrinsic information that may be used in the event of textual ambiguity. Rather, the drafting history is part of what the words mean, no matter how inartfully crafted.\(^7\) In other words,
appreciating the degree to which insurance policies resemble statutes justifies less judicial inhibition about consulting drafting history and intent as part of the process of ascertaining the meaning of text. Consequently, even where the words of a statute-like standard form policy are not obviously ambiguous, courts should be willing to consider evidence of the drafting history of the form and the intent of the drafters and others involved in the process.\footnote{48}{Courts have been doing this with legislation for some time. \textit{See, e.g.}, \textit{Holy Trinity Church v. United States}, 143 U.S. 457 (1892); \textit{Popkin}, supra note 38, at 121-22 (noting that in \textit{Holy Trinity} the Court "interpreted a statute to avoid criminalizing the importation of a pastor in to the United States" and stating that the decision "is best known for its willingness to trump a clear text to prevent an 'absurd' result and to apply the statute in accordance with its purpose") (also noting that \textit{Holy Trinity} is often criticized for its rhetoric favoring religion, particularly Christianity). Notwithstanding some controversy about the decision, Popkin regards it as "highly important as the most prominent early example of embracing legislative materials to prove legislative purpose. It therefore marks the onset of the use of conventional legislative history to interpret statutes, which was essential to modern purposivism." \textit{See id. at 122. Accord Davies}, supra note 7, at 321-22 (endorsing conventional use of legislative history in statutory interpretation).}

Former law professor and state legislator Davies also notes that some forms of legislative history are not particularly reliable, but that:

\begin{quote}
\textit{O}ne kind of "history" can claim a special legitimacy. That is history in the form of commentary from the drafting organization. It is usually available to the legislature along with the bill and, because it is prepared before the bill is taken up by the legislature, is not subject to manipulation during the process by either opponents or proponents. To the extent the bill is adopted by the legislature without modification, adoption can be viewed as ratification of both the drafting organization’s statutory words and its gloss of commentary on them. The official comments that accompany the uniform acts prepared by the National Conference of Commissioners on Uniform State Laws are an example of this good kind of [legislative] "history."
\end{quote}

\textit{Id.}

Transferred to the realm of insurance policy drafting and “enactment” by the industry, ISO documents regarding policy meaning are an obvious analog to the Uniform Law Commissioners or other organizations pushing legislation in the political arena. For that reason, ISO or similar insurance industry background materials are logically entitled to considerable weight in assessing the intended application of a policy provision. Although policy drafting is less structured outside the property/casualty arena, the history of an insurance policy as reflected in the statements of life/health organizations or individual insurers can shed a legislative history-like light on the objectives of a policy provision.
B. Appreciating the Background of Statutes and Policy Forms: The Analogy to Legislative Purpose

Seeing insurance policies as the product of private statute-making also opens up the possibility of greater consideration of the overall purpose of the policy and its provisions in resolving interpretative disputes. Although purposivist construction is established as a legitimate means of contract interpretation, it is particularly well-established as a means of statutory construction. 49 I am

Unfortunately, relatively few courts have been willing to expressly embrace this approach despite its obvious potential to provide courts with greater certainty of the meaning of policy terms. Some of this resistance may result from the unfortunate use of the term "regulatory estoppel" to describe use of drafting history in a leading case involving the qualified pollution exclusion. See Stemper on Insurance Contracts, supra note 1, § 4.05[C].

In Morton International v. General Accident Insurance Co., 629 A.2d 831 (N.J. 1993), the New Jersey Supreme Court accepted the policyholder's argument that the insurer could not argue for what it claimed was the clear meaning of the text of the policy, because the insurance industry, in response to state regulator inquiries some years earlier, had assured the regulators that the language in the exclusion would not be applied to preclude coverage for unintentional pollution damage. (The language of the exclusion and its exception for injury resulting from a "sudden and accidental" discharge could reasonably be read as requiring that there was no coverage unless the discharge in question was both unintended and abrupt.) The New Jersey Supreme Court found that the insurers in the case before it were bound by the representations of their industry colleagues to the state insurance regulators and that the insurer was therefore subject to "regulatory estoppel." Id. Insurers predictably complained about the holding, as did a number of commentators. In particular, critics of the decision noted that for estoppel to lie, the conduct giving rise to an estoppel must generally be perpetrated by the party who is estopped. See Edward Zampino, Richard C. Cavo & Victor C. Harwood III, The Fiction of Regulatory Estoppel, 24 Seton Hall L. Rev. 847 (1993). But see Thomas M. Reiter & John K. Baillie, Better Late Than Never: Holding Liability Insurers to Their Bargain Regarding Coverage for Unforeseen, Gradual Pollution Under Pennsylvania Law, 5 Dick. J. Env'l L. & Pol'y 1 (1996). But in Morton, the insurer in question had not itself made any specific representations to state regulators. To be estopped by these representations, the insurer at hand logically had to have been represented by the insurers who did address the regulators. But many observers were uncomfortable with the notion that one could be so readily estopped by the representations of another merely because the other entity was part of the same industry.

Although one can argue quite persuasively that there existed sufficient intra-industry cohesiveness to make estoppel apt, it is hardly a proposition subject to universal acceptance. As a result, consideration of the background of policy text became saddled with a label that was problematic. Seizing on the problems of applying the traditional elements of estoppel to industry representations rather than representations by an instant litigant, most courts quickly rejected regulatory estoppel as a theory of coverage. See Stemper on Insurance Contracts, supra note 1, § 4.05[C]. But see Ala. Plating Co. v. U.S. Fid. & Guar. Co., 690 So. 2d 331 (Ala. 1996).

The development was an unfortunate setback to the degree it made courts generally hesitant to consider the background and drafting history of policy text. One need not find an instant insurer litigant estopped in the doctrinal sense of civil procedure to legitimately consider the process leading up to the policy language at issue in helping to render an opinion as to the meaning of the text in question. One can reject "regulatory estoppel" but still find drafting history a legitimate consideration for insurance policy construction.

Not surprisingly, a number of courts have utilized drafting history or industry understanding regarding the meaning of a policy term, but most courts continue to resist utilizing this information in making an assessment of policy meaning. To the extent courts appreciate the similarities between standard policy forms and legislation, they would presumably be more willing to consider this additional, potentially valuable information.

49. See William N. Eskridge, Jr. & Philip P. Frickey, Introduction to Hart & Sacks, supra note 29, at li (discussing the influence of the Hart & Sacks school of thought, which in the main espouses a purposivist theory of statutory interpretation, despite many years in which the manuscript was not officially published).
distinguishing specific party intent or legislative intent from the overall purpose underlying a contract or statute. For example, the understanding of the parties or of a congressional committee that particular language will bar claims of a particular type is an example of party intent or legislative intent. Parties or the legislature may, however, often have a less specific understanding about much of the impact of a contract or statute, but nonetheless possess a basic, broad understanding of what the document or law is expected to achieve. These broader notions of impact reflect an understanding of party or legislative purpose rather than specific party or legislative intent.

Although consideration of contract purpose is a legitimate method of evaluating the meaning of disputed terms, some courts resist its use as too amorphous. Almost all courts will consider contracting purpose if the text of the contract documents is ambiguous or if there are no clear indicia of specific party intent regarding the contract's particular operation or application. However, most courts appear unwilling to use contract purpose as an initial tool for evaluating contract meaning and often resist consideration of purpose as a means of double-checking the court's textual construction of a contract provision.

By contrast, consideration of the goals of legislation is rather widely accepted as a legitimate tool for statutory interpretation. Although it has fallen out of favor to a degree in the face of the modern ascent of textualism, it was the dominant method of statutory construction for much of Anglo-American legal history, particularly during the Nineteenth Century and during the first two-thirds of the Twentieth Century. Purposivism remains (along with textualism

"The most influential attempt to resolve the tension between creative and deferential statutory interpretation is the Hart & Sacks Legal Process materials . . . ." POPKIN, supra note 29, at 103.

50. See POPKIN, supra note 29, at 45-82; see, e.g., JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES (2d ed. 1883); HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS (1896); THOMAS M. COOLEY, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND (3d ed. 1884) (1873); FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION (Platt Potter, J., ed., 1885); G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES (1888); JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW (1857); E. FITCH SMITH, COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION (1848); JOSEPH STORY, LAW, LEGISLATION AND CODES, IN ENCYCLOPEDIA AMERICANA 576-92 (The Lawbook Exchange 2006) (1844).

The first edition of Sutherland on Statutory Interpretation was published in 1891. See J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (1891). Although the above-cited Nineteenth Century treatises are not carbon copies of one another, all express at least solid support for a purposive approach even though many also appear to give even greater support to discerning specific legislative intent. "Common sense and good faith are the leading stars of all genuine interpretation." POPKIN, supra note 29, at 72 (quoting SEDGWICK, supra, at 179). According to Popkin, Sedgwick "sounds almost pragmatic, without any of the passion for black letter rules that we see in some of the post-Civil War treatises." Id.

51. See Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Judge Learned Hand noted that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"); POPKIN, supra note 29, at ch. 3 (citing prominent Second Circuit Judge Learned Hand as "[t]he leading and most articulate judicial exponent of purposivism"); see, e.g.,
and intentionalism) one of the three core schools of statutory interpretation. Consequently, appreciating the similarity between form insurance terms and legislation logically opens the door to greater consideration of the purpose of an insurance policy or provision in the same way that statutory purpose may be more widely accepted than contract purpose as an interpretative tool.

A classic illustration of the role of legislative purpose as a tool of statutory interpretation is Heydon’s Case, which is widely cited and reprinted in statutory interpretation casebooks. More than four centuries ago, when Heydon’s Case was decided, the English judiciary had already established a typology of statutes and classified them according to whether they were “penal or beneficial” or “restrictive or enlarging of the common law.”

Penal statutes, as the name implies, were designed to establish a regime of punishment or to impose a burden (e.g., taxation, tariffs, regulation) upon a certain segment of society. Because these laws imposed burdens on certain elements of the public, they were construed strictly rather than expansively. Today, this notion is captured in the canon of statutory construction known as the rule of lenity, which requires strict construction of criminal statutes. In the post-New Deal regulatory state (a reality even for political conservatives who wish it were not so), regulation not resulting in criminal penalties is more common today and the interpretative force of the rule of lenity appears to have declined.

Beneficial statutes, as the name implies, were those designed to provide rights, privileges, or entitlements to segments of the public or to the public as a whole. Today, such laws are commonly referred to as remedial and are subject to the canon of construction that remedial legislation is to be liberally construed in order to effectuate its purpose. (Canons of statutory construction and their

---

52. 76 Eng. Rep. 637 (Exch. Div.).

potential impact on insurance policy interpretation are discussed at greater length below.)

A law was restrictive of the common law if it revised or overturned common law doctrine. Because of England’s traditional deference to judge-made common law, such statutes were generally given a strict construction so that they would not unduly upset the presumed collective, incremental wisdom accumulated through common law decisions.

A law enlarging the common law was one that largely codified or extended legal rules and doctrine developed by the courts. Such laws were relatively less likely to be controversial and may simply have been enacted to make established court-made law more accessible to the public (by putting it in a statutory form that could literally be “looked up” by those interested) or more consistently applied throughout the country in the interests of national uniformity. As a result, enlarging laws were generally given a broad reading by courts rather than a narrow reading.

Today, the distinction between restrictive and enlarging laws is captured by the canon of statutory construction positing that “statutes in derogation of the common law should be narrowly construed” while statutes confirming or extending the common law are entitled to more liberal construction. As discussed below, some of these canons are in almost direct contradiction. For example, remedial legislation by definition “derogates” the common law. But remedial legislation is to be liberally construed while statutes in derogation of the common law are to be strictly construed. As Karl Llewellyn demonstrated more than a half-century ago, no amount of mental gymnastics can square these approaches and satisfactorily resolve the inconsistency.

Regardless of its imperfections, the typology of statutory types existing since the 1500s and continuing today provides strong evidence of the degree to which statutes are seen as instruments designed to accomplish particular purposes. Although contract doctrine also provides for consideration of contracting purpose in resolving disputes over the meaning and application of an agreement, the

56. See POPKIN, supra note 38, at 97 (noting that canon of strict construction of statutes changing common law was particularly strong from the Civil War to the end of the Nineteenth Century).

57. 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, 401-06 (1950) ( juxtaposing inconsistent canons to show apparent contradictions if each canon is given full literal effect). See generally ESKRIDGE, FRICKEY & GARRETT, supra note 29, at ch. 8 (surveying and assessing canons of statutory construction). See also William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. PA. L. REV. 1007 (1989) (defending canons as reflecting baseline social norms that are implicitly accepted most of the time by legislators); Geoffrey P. Miller, Pragmatics and the Maxims of Interpretation, 1990 Wis. L. REV. 1179 (1990) (defending canons as accurately reflecting philosophical and linguistic traits of statute drafters); Richard A. Posner, Statutory Interpretation—In the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 806-07 (1983) (finding most canons “just plain wrong” in failing to realistically reflect legislative motives and conduct in statute-making); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 507-08 (1989) (defending canons as reflecting presumptive rules of thumb that can intelligently guide courts in cases where facial statutory text is unclear and evidence of specific legislative intent is lacking or in conflict).
recognition of the importance of purpose and goal has been, and continues to be, more express for statutes. To the extent insurance terms resemble statutes, they should be construed with greater regard for their purpose than might otherwise be the case.

Even more important, Heydon's Case declared that regardless of the type of statute at issue, courts should consider four factors in construing the laws.

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3d[.] What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and [after assessing these factors,] then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasion for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.59

In these relatively brief words, a court that wrote centuries before electricity, computers, the Internet, Lexis, Westlaw, Google, development of the modern law school, or sophisticated means of empirical analysis of social problems had grasped the essential task of the judiciary dealing with legislation. Courts should apply legislative law in a manner consistent with its purpose so that the aims of the legislature are achieved to the degree feasible. The court should not read the statute grudgingly but should instead attempt to apply the statute so that it accomplishes what it was designed to do.60

59. Id.
60. In Heydon's Case, the court's task was not particularly difficult in light of the clear factual context surrounding the statute, which provided that:

"[I]f any abbot, [etc.] or other religious and ecclesiastical house or place . . . make any lease or grant for life, or for term of years, of any manors, messages, lands, [etc.] and in the [sic] which any estate or interest for life, year or years . . . then had his being or continuance . . . every such lease, [etc.] shall be utterly void."

Id.

The statute was aimed at preventing the church and clergy from avoiding Henry VIII's edict to seize Roman Catholic Church property as part of the notorious monarch's infamous rift with the church due to his famously chronicled marital problems.

It would be difficult to find an act whose purpose is as evident as this Suppression Act of 1539. This ratio legis, if no other, was known to all, even to the common lawyers, and likewise it was common knowledge that the monasteries were evading the provisions of the act wherever possible. See S.E. Thorne, The Equity of a Statute and Heydon's Case, 31 ILL. L. REV. 202, 215-22 (1936). Although Heydon's Case may have initiated from an unsavory historical episode, its brief for purposive, functional statutory construction remains eloquent
Today, this proposition faces intellectual resistance from many modern textualists and those applying interest group or "public choice" theory (sometimes called "social choice" theory), which posits that much, if not most, legislation is the product of interest group lobbying and compromise and has aspects of private deal-making. As a result, members of these camps often argue that the purpose-based "suppress the mischief, advance the remedy" approach of Heydon's Case is both too simplistic and permits too much judicial activism in crafting statutory meaning. 61

For these critics of traditional purpose analysis, statutes should not be extended beyond their linguistic reach (the textualist perspective), because this puts the courts in the position of enlarging the statute beyond the statement of positive law made by the legislature. 62 In a related but different fashion, public choice/interest group theorists argue that, at least for private-regarding legislation, courts should restrict themselves to enforcing "the deal" made by those responsible for the legislation. 63 This, in turn, tends to become a

and persuasive. See also POPKIN, supra note 29, at 21 (labeling the case a "landmark of statutory interpretation").

61. See generally POPKIN, supra note 38, 115-49 (noting concern but generally praising purposivism as sound school of statutory construction). See also id. at 157-203 (noting the degree to which purposive inquiry has been supplanted by textualism and use of canons of construction and criticizing development).


In general, these works observe that much legislation, perhaps most legislation, is the product of concerted activity by well-placed, well-funded interest groups rather than "the public" or "the people" and that legislators are often more motivated to satisfy powerful interest groups rather than their rank-and-file constituents or the public or nation at large. As a result, much legislation is directed at satisfying interest group concerns rather than effecting public policy that is optimal for the population as a whole.

Public choice insights are now part of everyday political perceptions, as revealed by candidate speeches decrying "the mess in Washington," "Washington insiders," or "government by lobbyists." Without doubt, much of what public choice theorists argue has at least a disturbing kernel of truth. However, a significant number of scholars have convincingly argued that the public choice account of statute-making (and government in general) is unduly pessimistic and that other public-regarding factors militate significantly against the interest group capture model set forth in much public choice literature. See, e.g., FARBER & FRICKEY, supra; Richard H.
prescription for strict construction of text or the application of specific indicia of legislative intent and resists broader, more purposive construction of statutes.

However, one need not be a cynic to argue that, even in the modern era, where Washington and most state capitolis are awash in lobbyists and interest groups often have clout exceeding that of "the people," much legislation remains public-regarding and genuinely designed, however imperfectly, to accomplish something for the nation or state at large.⁶⁴ Although separating the public-regarding "wheat" from the private-regarding "chaff" is not always (if ever) easy, doing so logically permits modern courts to apply the Heydon's Case methodology to public-regarding statutes.⁶⁵

---


⁶⁵ Long-time Minnesota state senator, uniform law commissioner, law professor, and judge, Jack Davies provides a wonderful anecdotal example of the manner in which interest group advantages are hard-wired into the political system. Commenting on his initial years in public office, Davies recalled an incestuous world of insider advantage.

The legislature met for just four and a half months every other year. Staff was sparse. Meeting rooms were so small that observers had no place to sit; lobbyists arrayed themselves around the walls. Because the Twin Cities' [Minneapolis and St. Paul, Minnesota] suburbs were grossly underrepresented [this was before the U.S. Supreme Court's important "one person-one vote" mandate of Baker v. Carr, 369 U.S. 186 (1962)], most legislators came from rural districts and moved into St. Paul hotels for the session, returning home only on weekends. Lacking kitchens, members each weeknight sought out a banquet held by one of the various trade associations. And because the Twin City legislators were mostly beyond child-raising years, they happily joined their rural colleagues at these free, convivial events. The trade associations, in fact, coordinated their banquets so as not to compete with one another for legislator attendance. A bachelor at the time, I took full advantage of these social gatherings, which speeded my acceptance by the senior members of both caucuses.

⁶⁴ Jack Davies, who I observed in action years ago when working at the Minnesota legislature, was a most public-regarding and progressive legislator of unquestioned integrity and political courage. I particularly remember him speaking out against public funding of a new professional football stadium in the face of tremendous pressure supporting the project, which was a high priority of powerful economic interests and was eventually built. A long-time professor at William Mitchell College of Law, Davies also had sophisticated views regarding jurisprudence and legislation. See, e.g., Jack Davies, A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act, 4 VT. L. REV. 203 (1979) (advocating, in manner akin to Guido Calabresi's award-winning A Common Law for the Age of Statues (1983), legislation to make older statutes equivalent to common law to enhance judicial flexibility in resolving disputes). That even a legislator of such talent and stature saw nothing particularly wrong with this picture is rather telling. During the legislative session, he and other legislators were regularly having their ears bent by interest groups and spending relatively little time in contact with their constituents. Because there was little staff, legislators were likely to depend upon interest groups for their information as well. As political scientist E.E. Schattschneider noted in commenting on America's pluralist politics, which was celebrated at the time, "[t]he flaw in the pluralist heaven is that the heavenly chorus [of different group perspectives] sings with a strong upper-class accent." SCHATTSCHEIDER, supra note 63, at 34-35.

⁶⁵ See Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223 (1986); see also HART & SACKS, supra note 29; POPKIN, supra note 29.
Transferred to the realm of insurance disputes, use of the *Heydon's Case* “suppress the mischief, advance the remedy” approach becomes less problematic. Although standardized or industry-wide policy language results from the goal-directed activity of interested parties, insurance policy drafting is not subject to nearly the breadth of polycentric influences affecting the legislative arena. In addition, although logrolling and similar coalition building undoubtedly takes place to some degree regarding insurance policy formulation, it does not appear to be nearly as pervasive for insurance policies as for legislation.

In order to surmount the hurdles to passage, proponents of legislation often engage in drafting legislation that provides different things to different groups in hopes of putting together a collective mass of support. For example, an appropriations bill may include construction funds for roads in urban, suburban, and rural areas in order to obtain passage that could not occur if the bill funded only roads in growing suburbia where the need for new roads was most acute. Or, as took place with the Comprehensive Drug Abuse Prevention and Control Act of 1970, the legislation contained a mix of punitive measures for drug criminals and rehabilitative treatment programs for drug users. The former were designed to appeal to conservatives while the latter were designed to appeal to liberals. In combination, this mix resulted in easy passage of the legislation, while either a punitive bill or a rehabilitation/treatment bill standing alone would likely have failed.

When an insurance policy is drafted or revised, the goals of the revision are usually clear to all observers. Particular applications of the policy to unanticipated future disputes may not have been foreseen, but the general goals of the policy provisions are ascertainable with reasonable certainty. Once this is done, the court need only take a modest step toward more sophisticated insurance

66. Logrolling is the academic term for what might commonly be called “horse-trading” between legislators or other policymaking elites. In classic logrolling, Senator X agrees to support Senator Y’s bill to establish a museum (even if Senator X thinks museums are a waste of money) so that Senator Y will support legislation sponsored by Senator X to increase farm subsidies.

67. See Eskridge, *Vetogates, supra* note 47 (identifying nine “vetogates” at the federal level, so named because each alone is able to stop legislation in the manner of a veto). The nine “vetogates” include: House of Representatives Committee; House Rules Committee; House Floor Consideration; Senate Committee; Unanimous Consent Agreement; Filibusters and Holds; Conference Committee; Conference Bill Consideration by House and Senate; and Presentment to the President for Signature. If any coalition of forces has sufficient strength to stop prospective legislation at any one of these nine junctures, the legislation will not become law. *Accord* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

By contrast, the process of revising a widely accepted standardized insurance policy is no easy walk in the park, but neither is it possessed of so many formal and legal impediments to success. But see Michelle E. Boardman, *Contra Proferentem, The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006) (positing that the major reason that insurers do not revise problematic policy language is the difficulty of effecting industry-wide revision).


policy construction in order to apply the purpose-oriented methodology of \textit{Heydon's Case}. In addition, the problems of separating private-regarding and public-regarding policy provisions are not as problematic as the task of separating private-regarding and public-regarding legislation.

Although, to some degree, the entire enterprise of policy drafting is private-regarding (insurers want policy provisions consistent with insurance axioms which will permit them to make money), there is also an inherently public-regarding aspect to most policy provisions. Insurance policies are designed to be consistent with sound risk management principles and to provide distributed risk protection among a large pool of policyholders. A purpose of the insurance policy is to spread the risk and provide protection along the parameters of the policy's scope. This objective has long been recognized in the aphorism that insurance is a business "affected with a public interest" justifying its regulation as well as supporting well-established contract principles (e.g., the rule of construing ambiguities against the policy drafter, consideration of policyholder expectations) that tend to be more aggressively applied in the insurance context than in other contract disputes.\footnote{See Stempel, \textit{The Insurance Policy as Social Instrument and Social Institution}, supra note 3.}

Adapting the \textit{Heydon's Case} methodology to insurance disputes, a court addressing an interpretation issue would ask:

- What was the commonly understood scope of coverage at the time policy terms in dispute were drafted or issued.
- What was seen as deficient about a policy term that was revised, eliminated, or supplanted by new policy terms.
- What was the objective of the insurance industry and its constituents in drafting and implementing the policy term or terms at issue.
- In particular, what was motivating the insurance industry and its constituents. Was a policy term designed merely to make current coverage matters clearer or was it designed to alter the current understanding regarding coverage. To the extent a policy term or revision was designed to address a particular perceived problem, what was the intended solution that the policy term attempts to embody.\footnote{In deference to the language in \textit{Heydon's Case}, from which this methodology is adapted, I have not used question marks because the Court of Exchequer did not. \textit{See} (1584) 76 Eng. Rep. 637, 638 (Exch. Div.).}

Having made these assessments, a purpose-oriented court would then act in \textit{Heydon's Case} fashion and give the policy term a construction that would suppress the problems the policy term was designed to address and seek to advance the goals, solutions, and objectives of the policy term. As part of this process, the court would seek a construction of the policy term consistent with the larger interests of the affected constituencies in the insurer and policyholder

\footnote{70. See Stempel, \textit{The Insurance Policy as Social Instrument and Social Institution}, supra note 3.}{71. In deference to the language in \textit{Heydon's Case}, from which this methodology is adapted, I have not used question marks because the Court of Exchequer did not. \textit{See} (1584) 76 Eng. Rep. 637, 638 (Exch. Div.).}
communities, rather than reaching a construction that unduly advantages a constituency that was not intended to benefit from the policy term (or may have been expected to suffer some detriment from the policy term).\footnote{See id.}

To the extent a court is willing to embrace a role of attempting to make an insurance policy work as intended (in the manner of a statute) and give it an interpretation that suppresses the mischief the document was designed to correct and advance a remedy, this logically gives courts greater freedom to consider the manner in which an insurance policy should apply in operation and likewise frees the court from particularly slavish adherence to the text of the policy or to any single item of legislative history.\footnote{One criticism of legislative history is that it is subject to manipulation by political actors such that much material falling within the rubric of legislative history is not commonly viewed as a particularly accurate reflection of the sentiments of the legislature as a whole.}

Like statute-making, insurance policy design and drafting is a purposive enterprise. Like statutes, insurance policies should be construed in light of their intended purpose. Arguably, purpose-based construction of policies (and perhaps other contracts) should be the main objective of the interpretative enterprise, even when a purposive construction conflicts with the facial text of a law or document. Jurisprudential debate rages over the degree to which facially clear text may or may not be countermanded by sufficiently strong evidence of legislative (or party) intent and purpose.

A wonderful example of this is found in \textit{Continental Can Co. v. Chicago Truck Drivers, Helpers \& Warehouse Workers Union Pension Fund}, 916 F.2d 1154 (7th Cir. 1990), in which Seventh Circuit Judge Frank Easterbrook, not one normally inclined to delve into legislative history in light of his textualist preferences, essentially concludes that a Senator made an inaccurate floor statement at the behest of an interest group for which he wished to curry favor.

More recently, the George W. Bush Administration has been convincingly accused of doing something similar by making "presidential signing statements" when the President approves legislation that mischaracterize the impact of legislation. See \textit{CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY}, at ch. 10 (2007).

Although this type of posturing undoubtedly occurs with disturbing frequency (dissembling congresspersons need not even deliver misleading remarks in person but can have them inserted into the \textit{Congressional Record} so that no one is actually listening when they misrepresent pending legislation), this very same case also shows that courts can consider legislative history and separate probative legislative history from posturing legislative history.

In \textit{Continental Can Co. v. Chicago Truck Drivers}, Judge Easterbrook correctly identified the inaccuracy of the Senator’s floor statements by comparing them to more reliable reflections of overall legislative intent, including committee reports, the background of the legislation, and the structure and text of the legislation. Although judicial consumption of legislative history requires some caution, the malleability of some aspects of legislative history does not completely preclude informative use of legislative history. See \textit{Continental Can Co.}, 916 F.2d at 1155-59.
Notwithstanding the relatively recent ascent of textualism in the academic and judicial communities, statutory interpretation in practice has had a significant impact, not only for consideration of specific drafting intent, but also for consideration of the overall purpose and objectives of legislation. The similarities between routine insurance policy terms and statutes suggest that purposivism should have a similar place at the interpretative table when insurance policies are being construed and applied.

C. Applying Statute-Like Purposive Analysis to Insurance Policies: An Illustration

The subcontractor exception to the "your work" exclusion contained in the standard commercial general liability (CGL) policy provides a relatively clear example of useful consideration of policy purpose. The "your work" exclusion, a part of the CGL form since 1966, is designed to preclude CGL coverage for third party claims of injury suffered, not from the application of external forces or ordinary negligence, but from the policyholder's substandard performance of its contractual obligations to the third party. Pithily put by one commentator, the CGL is not designed to provide insurance coverage for "the accident of faulty workmanship," but for "faulty workmanship that causes an accident." 74

The "your work" exclusion was designed to give a verbal formulation to this understanding of the scope of CGL coverage. In many cases, the principle and its application are fairly straight-forward and even policyholder counsel can readily agree that denying coverage is not unfair to the policyholder or inconsistent with insurance and risk management principles. For example, in one leading case, the policyholder did a poor job of applying stucco on a home, resulting in discoloration and pitting of the stucco. The court correctly concluded that this was mere faulty workmanship that had not inflicted covered property damage upon the third party suing the policyholder. 75 The unsightly, substandard stucco may have reduced the market value of the home, but it did not physically injure any tangible parts of the home. Conversely, to the extent the poor stucco job was a "physical injury" to the stucco, it was physical injury to the policyholder's own work. In the same way that a window installer policyholder should not have coverage for breaking the window it installed (but inflicting no damage to anything but the window), the stucco vendor did not have liability insurance coverage for its substandard stucco work but was instead required to itself pay for the cost of rectifying its own work.


75. See Weed, 405 A.2d 788. Property damage under the CGL policy is defined as "physical injury to tangible property." See STEMPEL ON INSURANCE CONTRACTS, supra note 1, § 14.04.
However, the breadth of the "your work" exclusion, which prior to 1986 excluded coverage that "arises out of" the policyholder's defectively performed work, could easily produce denials of coverage that were more controversial.\(^7\) For example, if the defective policyholder's work was faulty installation of a roof, the roof might in turn leak and cause physical injury to the tangible property of other portions of the home. Clearly, this is faulty workmanship that causes an accident, rather than simply the accident of faulty workmanship. But applying the language of the pre-1986 "your work" exclusion, it might not be covered under the CGL policy.

Additionally, the required remedy for this problem is much different, more involved, and more expensive than is the case with something like unsightly stucco that damages no other portion of the house. In the stucco case, the remedy is to have the policyholder perform the work again consistent with industry standards and the customer's objectives or to give the customer a refund of the contract price so that the customer can hire a more competent contractor to install good stucco. In the leaky roof case, a mere replacement of the roof by a competent contractor will not cure the problem because there has already been damage to other parts of the home that are not part of the faulty workmanship.

Fixing the problems created by water damage throughout the house will be considerably more expensive than simply re-doing the original substandard work of the policyholder. Instead of a relatively confined breach of contract or breach of warranty case (the ugly stucco), we now have a tort case of some magnitude, because the policyholder's negligence in performing work has caused significantly greater injury to a third party.

But under the pre-1986 "your work" exclusion, many, if not most, courts viewed this later type of case as outside CGL coverage, which both failed to protect the bull-in-a-china-shop shoddy contractor and failed to compensate the contractor's victims. Both results are arguably inconsistent with the objectives of the CGL policy and the overall insurance regime.

In response to this problem, the policyholder community (principally builders) and the insurance industry discussed modifications of the basic CGL form to provide coverage in such situations if it could be done in a manner where the risks borne were acceptable to insurers. The result was the addition in the 1986 standard ISO CGL form of a "subcontractor exception" to the "your work" exclusion in the CGL policy. Under the revised exclusion, coverage that might otherwise be denied because of its connection to substandard policyholder work was restored if the work was performed on the policyholder's behalf "by a subcontractor."\(^7\)

\(^7\) See STEMPBEL ON INSURANCE CONTRACTS, supra note 1, § 25.05[B][2][b].
By adopting this new language, both insurers and policyholders accepted the view that the moral hazard problems that might otherwise be presented by covering injuries stemming from a policyholder's work as broadly defined did not present a sufficient problem where the shoddy work was done by a separate entity, the subcontractor, who was not as readily under the control of the policyholder as work done by the policyholder's own employees or staff.

In addition, the custom and practice of the construction industry is that subcontractors must have their own insurance in place and usually must name contractors, developers, or architects as additional insureds under the subcontractor policies. Given the presence of many subcontractors in most building projects, there was some greater assurance that in the event of construction defect damages to third party property, the contractor's CGL carrier would not be the only source of defense of the policyholder on the merits and payment of settlements or judgments.

In short, the drafting history of the “subcontractor exception” and its apparent purpose strongly suggests that the 1986 standard policy revision reflected an understanding that basic CGL insurance would cover subcontractor-related claims of injury to third party property (and the property of a home or building owner became third party property after it was sold by the developer or contractor to the owner-cum-plaintiff). In return for this expansion of coverage beyond the pre-1986 CGL form, insurers would logically charge higher premiums, which business policyholders were willing to pay in order to receive the enhanced protection.

Insurance regulators and public interest entities had no objection to the expansion of coverage, because it served the goals of enhanced risk distribution and protection of injured home buyers and others. In particular, the tendency of some contractor entities to be under-capitalized, or even to cease functioning after completion of a particular project, made it more attractive as a matter of public policy that there would likely be insurance coverage in such instances.

Consideration of the gestation and purpose of the “subcontractor exception” to the “your work” exclusion perhaps did not add much to the interpretative enterprise of the language of the provision itself. The text of the “subcontractor exception” to the modern “your work” exclusion is straightforward and pretty clearly states that the exclusion is inapplicable when the faulty work in question is done by a subcontractor. But consideration of the purpose of the 1986 changes clearly buttresses the natural reading of the policy language and makes authoritative interpretation of the provision easier.

More important, perhaps, is that knowledge and appreciation of the purpose behind the addition of the “subcontractor exception” to the CGL policy makes it quite clear that the insurance industry expected to be covering construction-related defects in projects involving subcontractors. Appreciating this makes it clear that some defenses interposed to coverage by some insurers (e.g., no coverage because faulty workmanship was not accidental, because construction defect claims are contract or warranty claims rather than tort claims, because of
the "economic loss" rule in breach of warranty cases without bodily injury, etc.) are usually unmeritorious in the context of a typical construction defect claim.\textsuperscript{78}

Where, as is usually the case, a homeowner (or group) complains that a leaky roof wrought water damage to parts of the home other than the roof or that a buckling concrete slab destroyed other parts of the building, the background and purpose of the 1986 addition of the "subcontractor exception" makes it clear that such claims were within the contemplation of the insurance industry in selling the CGL policy. If the 1986 CGL form was not applicable to such claims, the "subcontractor exception" would be superfluous and the enterprise of adding it to the "your work" exclusion would have been a waste of everyone's time.

As with legislative enactments, courts should presume that the legislature acts rationally and does not legislate for no reason or in ways that will have no application to the real world. The private legislation culminating in the addition of the "subcontractor exception" to the "your work" exclusion was not a mere academic exercise by insurers, policyholders, and ISO, all of whom have substantial demands on their time. Rather, it was, like statute-making, a purposive enterprise designed to accomplish something. Appreciating this makes the judicial task of construing the revised exclusion—and the CGL policy as applied to construction defect claims—easier and likely more accurate.

D. Appreciating the Statutory Perspective Logically Creates Greater Receptiveness to Other Considerations Bearing upon Insurance Policy Meaning

Statutory interpretation appears to be generally more receptive to the consideration of a larger variety of theories of statutory construction and a larger number of interpretative factors than is the case with traditional contract interpretation. The latter focuses heavily on the text of contract documents with some nod to the specific intent of the parties and willingness to consider extrinsic evidence if the contract text is unclear. There may also be factors such as illegality, public policy, unconscionability, and the objectively reasonable expectations of the policyholder,\textsuperscript{79} but many courts resist use of these factors or at least subordinate them to contract text or party intent.

By contrast, statutory interpretation appears to be more welcoming to the consideration of interpretative factors of this type. For example, consistent with interest in legislative intent and legislative purpose, courts regularly consider the historical backdrop of a statute as a guide to statutory meaning.\textsuperscript{80} Similarly, courts

\textsuperscript{78} See Stemple on Insurance Contracts, supra note 1, § 25.05[B]; see, e.g., Lamar Homes, 242 S.W.3d at 1 (rejecting these defenses to coverage in a construction defect claim); American Girl, 673 N.W.2d at 65 (same).

\textsuperscript{79} See generally Stemple on Insurance Contracts, supra note 1, §§ 4.01-4.09.

\textsuperscript{80} See, e.g., United States v. Wells, 519 U.S. 482 (1997) (examining the history of federal criminal law provisions regarding false statements generally as a guide to determine the application of 18 U.S.C. § 1014,
also consider legislative inaction in response to judicial construction of a statute and the activities surrounding and leading up to formal legislative consideration of a statutory proposal. Additionally, courts may consider it relevant that a previous or subsequent proposed statute was rejected by the legislature. Although such consideration can be dicey and risk mistaken conclusions, it indicates the degree to which, when assessing statutes, courts are receptive to reflection on the broader context surrounding the statute.

Statutory interpretation also frequently includes the consideration of public values implicated by a statute and whether a given interpretation of a law advances or impedes public values, public policy, and the purpose of the statute. Although consideration of public values carries some risk that the articulated public values will in fact be only the deciding judges’ personal values, it underscores the degree to which judicial consideration of statutes is often informed by larger public policy concerns as well as consideration of legislative intent and purpose. There are also advocates of “best answer” theories of statutory interpretation under which the judge is empowered, absent clear positive law commands to the contrary, to construe the statute so as to make its application most rational or most effective as a means of implementing accepted public policy.

which makes a provision of false statements to banks a crime); Leo Sheep Co. v. United States, 440 U.S. 668 (1979) (outlining the extensive historical background of the Union Pacific Act of 1862 as a guide to determine the status of western lands affected by statute during the Twentieth Century).

The common sense drive to understand the historical background of a law as a precursor to construing the law is sufficiently strong enough that even jurisdictions that frown on the use of legislative history materials per se find consideration of historical backdrop appropriate. See, e.g., DONALD GIFFORD, STATUTORY INTERPRETATION 91-95 (1990) (noting that the weight to be given to legislative history may or may not tip the balance of a court’s judgment and that attorneys are therefore well-advised to look at the legislative history of the statutory provision).

81. See ESKRIDGE, FRICKY & GARRETT, supra note 29, at 1047-50 (noting the three specific doctrines that courts use to interpret legislative inaction); see also CRS REPORT, supra note 30, at 45 (“If Congress reenacts a statute and leaves unchanged a provision that had received a definitive administrative or juridical interpretation, the Court sometimes holds that Congress has ratified that interpretation.”); see, e.g., Pierce v. Underwood, 487 U.S. 552, 567 (1988).


84. See generally Eskridge, Public Values in Statutory Interpretation, supra note 57 (discussing the history of public values in statutory interpretation as well as their role in the Supreme Court’s interpretation of statutes); see, e.g., Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (refusing to permit racially discriminating college to utilize tax code deduction); Perin v. Carey, 65 U.S. (24 How.) 465, 501 (1861) (using public policy considerations and conception of public good as guide to determining enforcement donor directives in charitable bequests). Of course, Perin v. Carey also suggests that the U.S. Supreme Court has favored resort to public policy considerations in the application of contracts for 150 years. Id.

85. See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); RONALD DWORKIN, LAW’S EMPIRE, at ch. 9 (1986); Heidi M. Hurst, Challenging Authority, 100 YALE L.J. 1611 (1991); Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 277 (1985).
A substantial body of scholarship has also advocated dynamic or evolutive construction of statutes in which courts are willing to refine and "update" statutes to effectuate their intended impact in modern situations that were not specifically envisioned by the enacting legislature. Dynamic approaches to statutory interpretation rest heavily on the premise that legislative text is static and the legislation—which is not easily updated or revised because of legislative inertia—is at risk of becoming outdated by changing circumstances. To combat this, dynamists would grant some authority to courts to consider changed circumstances when interpreting statutes and would reduce emphasis on statutory text or the specific intent of the enacting legislature.

E. Interpreting Insurance Policies as Legal Process

Statutory interpretation has also been impacted by both the classic Harvard legal process theory, associated with Henry Hart and Albert Sacks, and the "new" legal process, championed by modern legislation scholars such as William Eskridge and Philip Frickey. Under traditional legal process theory, courts construing statutes consider the respective roles and competence of governmental institutions in determining the degree of breadth given to a statutory directive, an administrative enforcement, or judicial construction of the statute. The notion is that the institutions with greatest competence in the subject matter of the statute should be given a proportionately larger role in determining statutory meaning, at least where the statute's meaning is not clearly set forth in text or specific legislative history as a matter of positive law. Additionally, classic legal process theory views statute-making as not only a purposive enterprise but also a public

86. See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (arguing that courts should be permitted in apt circumstances to interpret laws in a fashion that "updates" them as necessary for continued relevance to current society, for example, changes in social context, additional new legal rules and policies impacting subject matter of statute, and new overarching policies imposed by other positive law); CALABRESI, supra note 85 (arguing that older statutes should be given the stare decisis deference accorded to common law precedent but should not be absolutely binding on reviewing courts); Commonwealth v. Maxwell, 114 A. 825, 829 (Pa. 1921) (construing a jury service statute, which on its face permits only male jurors, to have been superseded or implicitly updated and revised by intervening constitutional and statutory changes giving women the right to vote); see also T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 MICH. L. REV. 20 (1988); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479 (1987); Philip P. Frickey, Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 CAL. L. REV. 1137 (1990).

87. See HART & SACKS, supra note 29.


spirited enterprise in which the role of courts is to help give statutes the meaning and impact envisioned by the enacting legislature.

Under the new legal process theory, similar considerations remain but are tempered by modern concerns over interest group politics, the role of lobbyists, legislative gridlock, agency capture, and the like. More than traditional legal process theory, new legal process theory is willing to vest courts—which are thought to be relatively more independent from factors degrading the pure public interest—with somewhat more authority to look beyond the face of the statute or administrative agency interpretation in construing and applying statutes.

In addition, the interest group and public choice perspectives discussed above have led many statutory interpretation scholars to argue that judicial construction of statutes should at least consider the role of interest groups, agenda control, and practical impediments to public-regarding legislation when rendering statutory construction decisions.91

F. Insurance Applications of Statutory Construction Perspectives

Applied to the insurance context, both traditional and new legal process theory would logically permit courts to take note of whether a given insurance policy provision was a self-serving provision “crammed down” the figurative throats of policyholders and society by the insurance industry or was, instead, an effort to clarify policy meaning or even the product of cooperation and colloquy between insurers and policyholders or regulators.

An example of a self-serving insurer position is the asbestos-related claims exclusion inserted into the 1986 revision of the standard CGL form. This restriction in general liability coverage was understandable because CGL insurers had been overwhelmed by insurance coverage obligations related to the asbestos mass tort for several years and wanted to cut their substantial losses. Although this broad elimination of all asbestos-connected coverage for future policies may not have been necessary to “save” liability insurers, it was without doubt a good idea for insurers and a perfectly understandable revision to the CGL by an industry that was interested in making rather than losing money. But it was self-
serving. Eliminating insurance coverage for asbestos-related claims benefited insurers but not policyholders.

Under standard contract law, even self-serving contract provisions will be enforced if they are clearly expressed in the text of the contract documents, do not contradict the specific intent or purpose of the contract, or run afoul of other legal doctrines such as illegality, unconscionability, or public policy. The same is true of self-serving private legislation. The asbestos exclusion may have been the insurers’ one-sided attempt to roll back coverage, but it was a clearly expressed policy term accurately reflecting insurer intent and consistent with the industry’s purpose of cutting its asbestos losses insofar as possible. Enforcing the broadly worded asbestos exclusion was a judicial “no-brainer.”

But in more complex cases, consideration of the motivation behind a policy change, particularly whether it serves the interest group that drafted the statute (i.e., the insurance industry), can be a helpful factor in policy construction. Consider the absolute pollution exclusion also added to the standard CGL form in the 1986 revision. Like the asbestos exclusion, the absolute pollution exclusion is a restriction of coverage designed only to help insurers with nothing for policyholders.

Under the “qualified” pollution exclusion of the 1973 CGL form, a policyholder could receive coverage for pollution-related liability if the discharge of the polluting material was “sudden and accidental.” Because courts construing the 1973 language divided over whether this exception to the ban on pollution coverage included unintentional discharge as well as abrupt discharge, insurers wanted to at least tighten the exclusion so that it could not be avoided. Between 1973 and 1986, however, pollution-related liability became a much bigger risk, prompting insurers to eschew any clarification of the qualified exclusion and coverage for abrupt discharges—moving to a total ban on pollution coverage.

As with the asbestos ban, this was a curtailment of previously available coverage for which it appears policyholders received no corresponding reduction in premiums. It was relentlessly self-serving behavior by the insurance industry, but self-serving behavior is not forbidden or even frowned upon provided it does not violate other legal prohibitions. Insurers selling the new 1986 version of the CGL policy were entitled to enforce the exclusion and avoid covering pollution-related claims under the new policy form.

Unlike the asbestos exclusion, the breadth of the absolute pollution exclusion induced substantial interpretative problems. Recall that the exclusionary language of the asbestos exclusion was clear and consistent with expressed industry intent and purpose. CGL insurers wanted out of asbestos coverage. It was also clear that the asbestos exclusion removed this discrete swath of general liability obligations from the scope of the CGL form but otherwise left CGL coverage intact. The CGL would still cover liability resulting from the policyholder’s use, sale, or distribution of other substances. The CGL would still cover claims arising out of the negligent or unsafe maintenance of property, the
distribution of injurious products, or the damage inflicted by negligent provision of the policyholder’s services.

At no time did insurers suggest that the newfound presence of the asbestos exclusion also eliminated coverage for claims related to the activity of the policyholder workforce, the distribution of policyholder products that did not contain asbestos, or claims arising from other substances or materials. The asbestos exclusion, despite its broad language, was designed to “laser-out” coverage for asbestos liability, an objective made clear by history, context, and the text of the exclusion.

Although the absolute pollution exclusion was broadly worded and designed to avoid pollution coverage, the similarities between the exclusions largely ended at that point. Unlike the textually clear asbestos exclusion, the extraordinary textual breadth of the absolute pollution exclusion raises as many questions as it answers, a fact noted by regulators when considering whether to approve the policy form. The pollution exclusion bars coverage for any claim related to the “release” of a “pollutant” and then defines “pollutant” to include any type of “irritant” or “chemical.” As a result, the pollution exclusion, if read literally, could conceivably bar coverage for even classic forms of general liability claims such as slip-and-fall accidents, policyholder flooding of a third party’s property, or fire damage.

After the 1986 CGL form and the absolute pollution exclusion had been in the field for a relatively short time, cynics’ worst fears were realized. Many insurers invoked the pollution exclusion in an effort to avoid coverage for claims that had historically been held to be well within CGL coverage. Yet there was nothing surrounding the “enactment” or “passage” of the pollution exclusion to suggest that insurers making the 1986 revisions to the CGL form sought to exclude anything but the pollution-related coverage responsibility they had come to dislike and wished to avoid in the future.

For example, insurers invoked the pollution exclusion to resist claims related to smoke drifting negligently across a highway, gasoline spills from a tank on which a workman was operating that caused skin burns, carbon monoxide poisoning due to defective furnace installation, injury inflicted by the curing of

92. See Stempel on Insurance Contracts, supra note 1, § 14.11 at 14-143 to 14-144 (reproducing absolute pollution exclusion language).
93. See id. § 14.11 (regarding the history and adjudication of the qualified and absolute pollution exclusions).
94. See id.
97. See, e.g., Reliance Ins. Co. v. Moessner, 121 F.3d 895 (3d Cir. 1997) (applying Pennsylvania law and allowing insurer to use pollution exclusion to avoid covering claim against policyholder for carbon monoxide-related injury resulting from faulty equipment). But see Stoney Run Co. v. Prudential-LMI

241
construction work involving chemicals, and injury from the application of pesticides around an apartment building. Insurers argued that injuries to children eating paint chips or breathing lead-containing particles from construction work were uncovered pollution claims. One insurer even argued that providing contaminated water to a professional golfer at a tournament was excluded from basic CGL coverage.

In addition to being at least highly problematic (if not dead wrong) as a matter of basic contract law, these insurer invocations of the pollution exclusion would be more obviously erroneous if a court appreciated the insurance policy-statute analogy and examined both the nature and background of the absolute pollution exclusion. The legislative history of the exclusion reveals that however self-serving it may have been, it was, like the asbestos exclusion, designed to remedy a particular problem faced by insurers. It was an attempt to "laser out" pollution coverage rather than to substantially revise and narrow the basic scope of the CGL form. Unfortunately, the language of the pollution exclusion is substantially more problematic than that of the asbestos exclusion. It can be read too broadly to apply to circumstances well beyond those within the contemplation of the CGL drafters and well outside the acknowledged purpose of the pollution exclusion.

However, if a reviewing court understands the degree to which the CGL revision resembles private legislation by insurers (and in this case it was by insurers unilaterally rather than as a type of collaboration with policyholders, as was the case with the "subcontractor exception" to the "your work" exclusion), the reviewing court will be more likely to consider the purpose of the policy.

Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995) (holding, under New York law, that the pollution exclusion was designed to preclude coverage in the case of traditional environmental harms caused by pollutants, not in the case of carbon monoxide poisoning due to a faulty heating and ventilation system); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997) (holding that pollution exclusion applies only to injuries caused by traditional environmental pollution and that accidental release of carbon monoxide from faulty furnace was not included in definition).

98. See, e.g., Quadrant Corp. v. Am. States Ins. Co., 110 P.3d 733 (Wash. 2005) (holding that pollution exclusion does not bar coverage for claim arising out of incidental fumes from apartment furnaces); But see Nav-Its, Inc. v. Selective Ins. Co. of Am., 869 A.2d 929 (N.J. 2005) (holding that pollution exclusion does not apply to injuries suffered as a result of ingestion of fumes from neighboring construction site); Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 15 (N.Y. 2003) (holding that pollution exclusion does not bar recovery of insured's employee who was injured when insured's workers released paint or solvent fumes).

99. See, e.g., MacKinnon v. Truck Ins. Exch., 73 P.3d 1205 (Cal. 2003) (holding that the pollution exclusion does not plainly and clearly exclude ordinary acts of negligence involving toxic chemicals such as the spraying of pesticides).

100. See, e.g., Auto Owners Ins. Co. v. City of Tampa Hous. Auth., 231 F.3d 1298 (11th Cir. 2000) (holding that, under Florida law, the pollution exclusion bars recovery for injuries resulting from the ingestion of paint chips).


change. In a manner similar to actual legislative history and purpose, examination of the legislative history and avowed purpose of the pollution exclusion leaves no doubt that the exclusion was focused on avoiding coverage for what might be termed traditional environmental pollution claims or perhaps some unanticipated claims that had the characteristics of the pollution problems already experienced by insurers and policyholders.

Claims that involved widespread release of contaminants causing widespread, correlated damage and affecting many third party victims arguably might fit within the exclusion even though they were not specifically contemplated as part of the drafting history of the exclusion. However, that same drafting history also makes it clear that insurers were not attempting to have the exclusion restrict traditional CGL coverage. Liability from standard mishaps perpetrated by policyholder negligence would continue within coverage unless they amounted to pollution within the common sense understanding of the term.103

Bearing this legislative background and purpose in mind, determining the applicability of the pollution exclusion becomes obvious in such unforeseen cases such as a tainted water cooler, lead paint chips, carbon monoxide poisoning, curing construction work emitting fumes in a limited area affecting a limited number of persons, gasoline spilling onto a worker through a defective shut-off valve, or accidentally overdosing an apartment resident with pesticide. The pollution exclusion cannot rationally apply to such situations, because doing so would be inconsistent with any evidence of specific drafting intent and with the overall purpose and objective of the pollution exclusion.

Applying the pollution exclusion to bar coverage in such cases would also run counter to the baseline judicial and social values about common sense construction of insurance policies. To allow the self-serving interest group that drafted problematic exclusionary language, without any indication that the group might invoke it, to work a more far-reaching curtailment of a widely used insurance product would also run counter to better reasoned theories of enhancing the public interest aspects of legislation and avoiding the pitfalls of statutory construction that favor interest groups at the expense of the public at large.

In short, consideration of the statute-like aspects of insurance, in particular as applied to the pollution exclusion, solidifies the determination provided by intelligent application of contract doctrine: the pollution exclusion cannot properly be used to bar coverage for claims that are not commonly and historically viewed as pollution claims. Further, the exclusion cannot be used to change the essential nature of the CGL policy form/statute/product when the background of the exclusion contains no evidence that this was the specific intent or general purpose of those involved in this revision of the CGL form.

103. See Stempel on Insurance Contracts, supra note 1, § 14.11[C].
Because of this history of greater receptiveness to additional interpretative factors in the statutory context, courts viewing insurance policies as a type of private legislation will be more willing to apply these additional considerations to the process of insurance policy construction. To all but hard-core textualists, this should be a welcome development, because it expands judicial tools for assessing policy meaning, but it also raises concerns that courts employing more interpretative considerations have more opportunity to engage in judicial activism and may render constructions of an insurance policy quite at odds with party intent or policy text.

Although this is a non-trivial danger, it is one that exists under a more cabined regime of interpretative factors. The popular perception is that limiting judicial activity to the reading of the text of contract documents restrains the court. Perhaps, but a court sufficiently motivated to reach a particular result can usually do so simply through the process of strained or odd construction of the text in question. If nothing else, the court can simply label the text ambiguous and either (a) rule against the drafter or (b) evaluate extrinsic evidence. This gives an activist court ample opportunity to see things in the desired manner and reach a preferred result accordingly. Rather than fret about whether judges with too many interpretative tools will use them wisely, perhaps it is more effective to allow courts all these tools and police their misuse through the standard quality control mechanism of case-by-case appellate review, rather than making sweeping restrictions upon the use of interpretative factors other than text.

G. The Statutory Perspective on Insurance Policies Logically Leads to Greater Consideration of Administrative Agency Inputs

As part of a purposive enterprise, statutes are almost always part of a regulatory system where administrative agencies are frequently charged with statutory enforcement and other regulatory duties. In the statutory arena, agencies, as both a legal and practical matter, have a great deal to say about the construction and enforcement of statutes. In particular, when questions about statutory meaning arise, courts almost always consult and frequently defer to agency interpretations.

The federal jurisprudence on this point is particularly developed, but the same general ground rules apply to state statutes and state administrative activity. In the federal system, at least a modest amount of deference to agency

---

104. Hard-core textualists are so ideologically committed to applying the text as written (i.e., as they read it) that they not only eschew additional sources of statutory meaning but apply text literally even if this produces an absurd result. See Eskridge, Textualism, The Unknown Ideal?, supra note 37, at 1512, 1549 (criticizing new textualism because its ironclad focus on applying text as written is inconsistent with the venerable "absurd result" principle that is widely accepted by most observers).

interpretation has been formally recognized since *Skidmore v. Swift & Co.*, which stated that a court construing a statute, although applying its independent judgment and having ultimate authority over the interpretative enterprise, should at least consult relevant agency understandings of the statute and consider "the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give [the agency] power to persuade, [even if the agency is] lacking power to control."

In 1984, federal statutory jurisprudence took a more deferential approach to agency views in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which stated that the Court would accept agency constructions of a statute if the agency interpretation was "reasonable," Congress had not itself "directly addressed" the particular interpretative issues before the Court, and Congress had given rulemaking or similar statutory implementation authority to the agency.

As a matter of doctrine, *Chevron* does not require courts to reflexively accept agency views. In practice, *Chevron* analysis is neither simplistic nor automatically applied. In particular, where there is no evidence of a congressional grant of interpretative authority to the agency, the Court has treated agency opinion under a *Skidmore* approach (listening to what the agency has to say), rather than a *Chevron* approach (deferring to the agency so long as its assessment is not unreasonable). In its 2001 *United States v. Mead Corp.* decision, the Court expressly announced this two-prong approach to agency deference depending on the nature of the agency’s authority.

Nonetheless, there is no doubt that the more recent *Chevron* regime gives more doctrinal and practical power to agencies than the *Skidmore* approach, even if *Chevron* is not as broad or commanding as some of its proponents argue.

Under *Chevron*, once the court sees that an agency has been delegated legislative authority over the construction of a statute, the agency position is likely to be followed unless it is distinctly at odds with other measures of statutory meaning. In practice, where the U.S. Supreme Court finds *Chevron* to be

106. 323 U.S. 134 (1944).
107. *Id.* at 140.
109. *Id.* at 865-66.
110. 533 U.S. 218 (2001); see also Peter H Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990) (noting that an empirical examination of cases during the first five years after *Chevron* reveals that the Court in practice was not as uniformly deferential to agency constructions of statutes as might initially have been suggested by language of *Chevron* opinion).
111. The *Skidmore* approach has been characterized by some as little more than the functional equivalent of a persuasive amicus brief. Perhaps, but even this is some deference, and, as a practical matter under *Skidmore* analysis, the agency position receives this deference even if its position is not set forth with the zinging persuasiveness of a well-done amicus brief.
112. Prior to *Chevron*, there was post-*Skidmore* precedent that urged particular deference where Congress appeared to have so empowered an agency. See, e.g., Batterton v. Francis, 432 U.S. 416, 425 (1977).
applicable, it adopts the relevant agency’s statutory construction nearly three-fourths of the time, even in the face of states’ rights and federalism concerns.113

Chevron has produced vigorous academic debate114 and several fascinating examinations of the Supreme Court’s use of the doctrine.115 Of particular concern to scholars is the prospect that judicial application of Chevron cedes too much power to executive branch administrative agencies and opens the door further to mischief created by politically motivated agency positions.116 In addition, the tendency of federal agencies to pursue implementation of national statutory systems and to increase their own relative power may result in Chevron deference undermining federalism and states’ rights concerns.117

Regardless of whether Chevron is wise or unwise, both Chevron and Skidmore point to the obvious implication of recognizing the degree to which insurance policy language is statute-like. To the extent the statutory analogy applies, this logically suggests at least some role for insurance regulatory agencies. In particular, the analogy suggests that where an insurance regulator has expressed a view on the apt scope of an insurance policy or product, courts should consider the agency position and accord it at least some respect, particularly if it is well-reasoned, longstanding, and consistent with other agency action and views (Skidmore). Where a state insurance regulator is given particular authority over a matter of policy interpretation and application, perhaps even greater deference is in order (accepting the agency position if it is reasonable).

For example, in the wake of a catastrophic event, insurance regulators may anticipate particular disputes between insurers and policyholders. After a hurricane, there will be questions about whether damage resulted from wind or water. After an earthquake, there will be questions about the proper application of the earth movement exclusions contained in many property policies. As discussed above, after 9/11, there were concerns about the degree to which the war risk exclusion precluded coverage for damage wrought by the hijacked airplanes. In such cases, state insurance regulators may issue interpretative

---

113. See Eskridge, Vetogates, supra note 47; Eskridge & Baer, supra note 47.
114. See, e.g., Thomas W. Merrill & Kristin E. Hickman, Chevron’s Domain, 89 GEO. L.J. 833 (2001); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 YALE L.J. 969 (1991); Schuck & Elliot, supra note 110.
115. See Eskridge & Baer, supra note 47; Schuck & Elliot, supra note 110.
statements assessing the application of an exclusion or at least setting protocols for the proper application of an exclusion, exception, or condition. To the extent insurance policies are statutes, it would only be logical for courts in coverage cases to at least address agency opinion and accord it some deference.

In a recent article, one well-known insurance scholar argued that the "statutory and regulatory control of insurance relationships should displace judicial reliance on contract principles." In her view, "[u]nderstanding that insurance policies are highly regulated documents rather than freely-negotiated contracts permits judicial interpretation that recognizes the important public policies which justify insurance regulation." In turn, regulatory activity, such as required approval of insurance policy forms, "focuses judicial efforts away from the interpretative paradigm of contract." However, appreciating this reality should not and cannot restrict judicial construction of insurance policies to the narrow inquiry of whether a policy provision was approved by insurance regulators or whether regulators held a particular understanding of a certain term. Rather, the reviewing court should ask which construction of the policy provision in dispute best fits with the goals of relevant insurance regulators as well as the goals of insurers, policyholders, and their constituents.

H. Appreciating Colloquy Regarding Policy Design, Text, and Meaning

Recognition that insurance policies are like statutes opens up the possibility that courts reviewing policies will more self-consciously engage in colloquy with the insurance industry in a manner similar to the colloquy between legislatures and courts.

In this sense, colloquy refers to the interaction between courts and legislatures regarding statute meaning. With some frequency, Congress has shown that it will amend a statute or enact corrective legislation where it finds the U.S. Supreme Court has rendered an incorrect statutory interpretation decision. For example, after the 1976 General Electric Co. v. Gilbert decision held that Title VII did not prohibit pregnancy discrimination, Congress passed the Pregnancy Discrimination Act of 1978 to legislatively overrule Gilbert. The Civil Rights Act of 1991 was a reaction to a number of Court decisions during the 1989 term that restricted the scope and utility of job discrimination law.
Although these examples are particularly dramatic, they are part of a larger, often less politicized, notion that where a court is perceived as erring in statutory construction, the relevant legislature can respond by clarifying language and indicating its specific desire to legislatively overrule the court decision. Because enacting legislation or amending an existing statute is easier than amending the Constitution, the conventional wisdom is that the U.S. Supreme Court and state supreme courts need not be as skittish in making definitive pronouncements about statutory construction. If the court “guesses wrong,” the legislature can respond to correct the problem. As a result, courts are generally less willing to reconsider their statutory construction decisions than their constitutional law decisions.

One should not make too much of the marvels of legislative-judicial colloquy. Depending on the legislative and political context at the time a decision is rendered, an “erroneous” statutory construction decision may be almost as difficult to change as a constitutional law blunder. Many factors can lead to legislative gridlock that makes legislative response practically impossible, even when a majority of legislators or the public strongly disagree with a judicial construction of a statute. Applying the colloquy concept to insurance policy construction is arguably less problematic than in the statutory arena. Although there are practical factors impeding a swift and uniform insurance industry response to disliked judicial decisions, insurers are generally in a better position to monitor and respond to disagreeable court rulings than is a legislature.

Insurer groups or affiliated organizations (such as ISO) are not, of course, representative democracies. If insurers dislike judicial decisions they regard as excessively expanding coverage, their efforts to amend the policy language in question will not be impeded by any legislative caucus of policyholder representatives. ISO and the insurance industry may, as a matter of commercial prudence, wish to consider the views of important policyholder or regulator constituencies so that a change in policy language does not result in lost business or denial of approval for policy forms. But policyholders and the government are powerless to prevent insurers from revising policy language if the insurers determine this to be the best response to disfavored judicial precedent. Even if the collective-action problem of effecting an industry-wide change in a standard


In addition, Congress may respond to the Court’s common law decisions that it regards as unduly restricting statutory rights or as making their enforcement difficult. For example, after the Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), essentially barred use of the private attorney general rationale for awarding counsel fees to successful public interest litigants, Congress passed the Attorney’s Fees Civil Rights Act of 1976 (now codified at 42 U.S.C.A. § 1988 (West 2003)), which provided for recovery of attorney’s fees for litigants successfully suing under Title VII and other civil rights laws such as 42 U.S.C. § 1983.
policy term are too daunting, individual insurers can customize their policies or issue particularized endorsements to correct the problem.

History suggests that insurers are at least as nimble in reaction as Congress, notwithstanding that there have been comparatively few major changes to standard forms such as the CGL policy and insurers seem to have taken a long time to exclude certain risks of which they complained. As discussed above, when the problems of pollution coverage and asbestos litigation became apparent in the 1970s, the insurance industry reacted with revisions to the standard general liability insurance policy (although revision was not accomplished until 1986). Nonetheless, the historical track record reflects insurer reaction to developing problems and attempts to “correct” disfavored judicial decisions by revising policy terms. Although it may take some time before the basic CGL form reflects these changes, insurers seem to be able to respond to a disfavored decision with at least a reactive endorsement that can be added to the basic (but as yet unamended) policy.

For example, in *Montrose Chemical Corp. of California v. Admiral Insurance Co.*, the California Supreme Court in essence adopted the continuous trigger for liability insurance, finding that in the context of construction defect litigation, CGL policies were triggered if there was actual injury during a policy period even if the injury had not become palpable, manifest, or detectable. Montrose also rejected the insurer’s argument that the claims were excluded under the “known loss” doctrine due to the policyholder’s awareness of problems, even though liability had not been fixed against the policyholder. The net effect was to put a larger number of CGL policies at risk of being required to defend or cover construction defect claims, a burgeoning source of litigation. Within a year of the decision, CGL insurers in California and other parts of the Southwest (e.g., Nevada and Arizona) were attaching a “Montrose endorsement” to their policies stating that in such cases, the first policy triggered by injury to a third party claimant would be the only policy required to respond to the claim.

Viewing insurance policies like statutes, courts might be less concerned that a decision in favor of coverage will be potentially ruinous to insurers. Insurers have shown themselves capable of swift reaction so that the problem (if it is big enough) is not presented in future policies. This may be cold comfort to insurers in situations where the third party’s claimed injuries have a long latency period, such as asbestos, because it potentially implicates so many policies that are already out in the field. But history has shown that asbestos is a unique tort and insurance problem, one not even equaled by pollution, product liability, or natural disasters in magnitude of danger to the industry. Further, even the problems presented by asbestos coverage appear to have resulted in a relatively

---

124. 913 P.2d 878 (Cal. 1995).
modest (perhaps only a single-digit) reduction in insurer earnings in an otherwise profitable CGL product.\textsuperscript{125}

This is not to suggest that the potential colloquy and insurer reaction justifies finding for policyholders when they otherwise should not win. Instead, the insurance industry, like Congress or a sophisticated state legislature, is well able to protect itself from judicial decisions it dislikes. More importantly, courts issuing such decisions may benefit insurers by highlighting problematic policy language so that insurers may address the problem.

I. The Potential Utility of Canons of Statutory Construction

Similar to axioms of contract construction, "maxims," "canons," or "principles" of construction are regularly applied to statutory interpretation. "Most of the nineteenth century English and American treatises on statutory interpretation were organized around the canons, and the leading doctrinal compilation today (a descendant of an 1891 treatise) is an exhaustive canon-by-canon tour."\textsuperscript{126} Almost all courts use the canons to some degree, and many states have codified the canons in state statutes as legitimate or official means of approaching statutory interpretation.

The leading casebook on statutory construction identifies three types of canons: (1) textual canons, sometimes called intrinsic aids, which "set forth inferences that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the statute"\textsuperscript{127} and assist the statutory interpreter in deriving the most likely meaning of statute under judicial scrutiny; (2) substantive canons, which are "presumptions about statutory meaning based upon substantive principles or policies drawn from the common law, other statutes, or the Constitution";\textsuperscript{128} and (3) reference canons, or extrinsic aids, that tell the reader of the statute other information (e.g., common law, other statutes, legislative history, agency regulation and interpretations) that may properly be consulted to discern the meaning of the statute.\textsuperscript{129}

Although the textual canons are more presumptions about word meaning than "hard-and-fast rules," they have considerable influence on statutory

\textsuperscript{125} See Stempel, Assessing the Coverage Carnage, supra note 15, at 361-63 (citing Tom Baker, Remarks at the University of Connecticut School of Law Insurance Law Center Symposium: Asbestos: Anatomy of a Mass Tort (Nov. 3, 2005), and V.J. Dowling, Remarks at the University of Connecticut School of Law Insurance Law Center Symposium: Asbestos: Anatomy of a Mass Tort (Nov. 3, 2005)).

\textsuperscript{126} ESKRIDGE, FRICKER \& GARRETT, supra note 29, at 848.

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Id. "Canons such as the plain meaning rule, which severely limits the use of extrinsic evidence, and the rule of deference to agency decisions have made a big comeback [in American law] since the mid-1980s." Id.; see also INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991).
interpretation decisions. Many of the textual canons are simply rules of the judicial road that seek to embody presumed common sense norms about the use of language. Included among these canons is the assumption that the legislature uses words in their ordinary sense—unless the statute is a technical or specialized one (e.g., a chemical or agricultural regulation), in which case the words presumptively carry the technical or specialized meaning they would have in the jargon of the regulated field. This approach of giving words “prototypical meaning,” in turn, “usually supports cautious, or restrictive, readings of statutes.”

In applying textual canons, courts may utilize dictionaries, but often eschew this in favor of giving a term the meaning it is viewed as having in average, common conversation. Where a statute is older, courts might be more willing to consult a dictionary from the era in order to better determine the ordinary meaning the enacting legislature attached to a word. Related to the ordinary meaning canons is the maxim that “[w]here Congress [or any legislature] uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”


131. See, e.g., Zuni Pub. School Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 88 (2007) (deferring to experts to resolve questions of whether a state aid program "equalizes expenditures"). But see Nix v. Hedden, 149 U.S. 304, 305-07 (1893), in which the Court had to determine whether a tomato was a vegetable or fruit for tariff purposes. Although there were technical arguments for considering the tomato to be a fruit under the tariff scheme, the Court applied common linguistics to find tomatoes to be vegetables (which are, after all, found in the vegetable section of the grocery store). The Court, applying technical classification concepts apt for the tariff inquiry, found that tomatoes were fruits for purposes of the tariff assessment. Id.

132. For an example, see Eskridge, Frickey & Garrett, supra note 29, at 850, citing as examples Holy Trinity Church v. United States, 143 U.S. 457 (1892), where the phrase “labor or service of any kind” was interpreted as applying to manual labor only, and Canada (Attorney General) v. Mossop, [1991] 1 F.C. 18, 34 (Fed. Ct.), aff’d, [1993] 1 S.C.R. 554 (Can.), where the court interpreted the “core meaning” of “family” to exclude same-sex relationships. See also James Bowman, Defining Definitions Down, WALL ST. J., Apr. 26, 2008, at W9 (reviewing KEYWORDS FOR AMERICAN CULTURAL STUDIES (Bruce Burgett & Glenn Hendler eds. 2008)) (discussing as an example of the author’s thesis that the connotation of words such as “family” can be used to define acceptable parameters of lifestyle and social identity).


134. See, e.g., Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (interpreting the Civil Rights Act of 1866 to protect person of Arab ancestry in part because Nineteenth Century dictionaries and encyclopedias reflected a view, which the Court, in turn, attributed to the enacting Congress, that persons of different ethnicity (e.g., Finns, Greeks, Basques, Arabs, Norwegians, Jews, and Hungarians) were distinct, identifiable “races”). Accord Cook County, Ill. v. United States, 538 U.S. 119, 132-33 (2003) (taking a similar approach to determining the enacting congress’ understanding of the word “person” in the False Claims Act of 1863).

Other popular textual canons are *noscitur a sociis* and *ejusdem generis*, or similar canons that suggest the correct understanding of statutory words by reference to other language in the relevant portion of the statute.

"Noscitur a sociis" translates as "[i]t is known from its associates" [and operates under the premise that] [l]ight may be shed on the meaning of an ambiguous word by reference to words associated with it. "Thus, when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word."136

In similar fashion, *ejusdem generis* (which translates as "[o]f the same kind, class, or nature") posits that:

[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. Where the opposite sequence is found, i.e., specific words following general ones, the doctrine is equally applicable and restricts application of the general term to things that are similar to those enumerated. The purpose of this rule is to give effect to all the words—the particular words indicate the class and the general words extend the provisions of the statute to everything else in the class (even though not enumerated by the specific words).137

---

136. ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 852 (citations omitted).
137. Id. at 853 (citations omitted); see also SINGER & SINGER, supra note 29, §§ 47.16, 47.17.

As an example of the application of the *noscitur a sociis* concept, Eskridge, Frickey & Garrett cite *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961), in which the Court declined to permit a pharmaceutical company and a camera manufacturer to take advantage of a tax code provision that allowed amortization of income over more than one tax year where the income resulted “from exploration, discovery, or prospecting.” The drug and camera companies argued that their research and development expenditures fell within the beneficial tax treatment of income from exploration or prospecting. The Court found that the statute applied only to extraction of mineral resources in view of the manner in which a word like “prospecting” logically influenced the congressional understanding of the adjacent word “discovery” in the statute. *Jarecki*, 367 U.S. 303.

As an example of the use of the *ejusdem generis* canon, they cite *Heatherman v. Giles*, 374 P.2d 839 (Utah 1962). In that case, a plaintiff brought a malicious prosecution claim against a prosecutor and an assistant prosecutor, both of whom argued that the action could not proceed unless plaintiff posted bond, which was required in actions 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... when such action arises out of, or in the course of the performance of his duty.” Id. at 839. The Utah Supreme Court held that despite the “any other person” language, actions against lawyers did not fall within the bond requirement, because looking at the enumerated subjects of the statute made it clear that “any other persons” referred to other types of policeman rather than those involved in the legal side of law enforcement. Id. at 840. After fifteen years of the television program *Law & Order* (and its extended family of spin-offs), the Court’s distinction probably makes common
Another popular, but perhaps more problematic, linguistic canon is *expressio unius est exclusio alterius*, literally translated as the “expression (or inclusion) of one thing indicates exclusion of the other.” If a statute enumerates certain things as falling within its scope, the absence of something from this list is read as indicating that the legislature did not intend to include things that were not listed in the statutory enumeration. On one level, the *expressio unius* canon comports with common sense and experience. If one gives out a specific purchasing list (e.g., one asking for apples, tomatoes, lettuce, avocado, bananas, bread, milk, eggs, and cheese), one would not ordinarily think that the requesting party also wants his or her agent to buy some melons, peaches, or red peppers while on this shopping trip. But in the more complex realm of legislation (and contracting), the *expressio unius* canon is considered problematic in that it makes an implicitly unrealistic assumption that legislatures give great thought and reflection to every word contained in a statute and consider all possible alternative versions of particular language. If the court views the statutory language in broader context and utilizes normative baselines when conducting statutory inquiry, the potentially misleading use of the *expressio unius* canon can be substantially mitigated. For example, a mother’s admonition that a daughter should not “hit, kick, or bite your sister” would not implicitly authorize the daughter to pinch, stab, or poison her sister. This would be an idiotic application of *expressio unius*. But one occasionally finds judicial decisions in this vein interpreting statutes, insurance policies, or other contracts.

The grammar-based canons of construction establish presumptive rules about how reviewing courts should view the presentation of statutory text and whether some aspects of the presentation logically impact the resulting judicial construction of a statute. For example, one grammar rule is the punctuation canon, which has not played a major role in American statutory interpretation.

—

sense to even laypersons, who have now seen a rather clear and consistent separation of the policing and prosecution functions. *Accord* Hodgerney v. Baker, 88 N.E.2d 625 (Mass. 1949) (finding that unsightly or inconveniently parked automobile not subject to ordinance forbidding the placing of “dirt, rubbish, wood, timber or other material of any kind” tending to obstruct the streets).

138. ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 854.

139. This is widely thought to be incorrect, not because law and political science professors look down their collective noses at the intellectual abilities of legislators, but because the frantic pace of legislation and the need for pragmatic compromise and expediency place severe limits on the degree to which even the most conscientious legislature can “brainstorm” possible alternative statutory language, including listings of things subject to a statute. The problem is particularly acute in state legislatures, where the members are often not full-time legislators, have only limited staff support, and are subject to abbreviated sessions during which statutory drafting, however imperfect, must be finalized.

140. ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 855.

141. *But see* United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) (finding punctuation rules determinative of meaning). *See also* U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993) (concluding that scrivener’s error occurred and effectively reading statute as repunctuated so that interpreted text conforms with legislature’s intended meaning). The traditional English approach to punctuation was that punctuation forms no part of the statute. In theory, the English approach was imported to America, even if it is not a particularly important rule, but has come in three alternative forms, which may explain why
Another grammar canon takes the view that referential and qualifying words or phrases refer only to the last antecedent, unless there is significant legislative intent to the contrary. "Similarly, a proviso applies only to the provision, clause, or word immediately preceding it." The "last antecedent" rule is seldom a key to statutory decisions but occasionally has impact.

A third grammar canon dealing with conjunctive and disjunctive words treats "terms joined by the disjunctive 'or' as often having separate meanings and significance," while terms joined by the conjunctive "and" are most likely viewed as expressing related or similar concepts or statutory objectives. Attaching such separationist power to the word "or" can, if applied inflexibly, lead to some tension with the *ejusdem generis* rule that suggests that the meaning of terms can at least in part be assessed according to their associated words in a section of a statute. A fourth grammar canon attaches significance to the legislature's use of "shall" or "may," positing that the former is a nondiscretionary command, while the latter connotes discretion rather than compulsion. Another grammar canon provides that use of singular or plural nouns does not have interpretative significance for courts unless there is strong evidence to the contrary, in which case the court will decide based on this extrinsic evidence or legislative history. The singular includes the plural and vice-versa. A variant of this is the view that male pronouns do not restrict the statute's application to men but imply applicability to both men and women, unless otherwise indicated.

An important canon, classified as one of grammar by most scholars, but arguably constituting a substantive legal canon or an expression governing public policy for the courts, is the so-called "golden rule" that courts will not construe statutory language so as to produce an absurd result. Even though courts are to

courts have not been particularly influenced by this somewhat chameleon-like canon. The forms of the canon may (a) follow the strict English rule of disregarding punctuation; (b) "allow[] punctuation as an aid in statutory construction;" or (c) consider punctuation as a last-ditch factor to be applied only after more reliable aids to understanding have failed. In practice, courts usually appear to follow option (c) or a weak version of option (b). See Raymond B. Marcin, *Punctuation and the Interpretation of Statutes*, 9 CONN. L. REV. 227, 233, 240 (1977).

142. ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 857.
144. See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 858-59; see, e.g., Garcia v. United States, 469 U.S. 70 (1984).
145. See, e.g., Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 7-8 (1985) (construing the words "fraudulent, deceptive, or manipulative" in securities law to focus on a failure of a stock offeror to disclose material information).
147. See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 860.
148. Id.
149. See id.; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). "[S]tandard interpretive doctrine... defines an 'absurd result' as an outcome so contrary to perceived social values that Congress could not have 'intended' it." Id. at 2390.
give statutes an ordinary meaning and apply clear statutory language, this general
norm is trumped by the absurd-result canon. The notion has been hard-wired into
American statutory jurisprudence since the days of the Marshall Court.\textsuperscript{150}

A freestanding conceptual canon is the "whole act rule," similar to the "entire
contract rule" of contract construction, which admonishes courts to read the
statute as a whole rather than concentrating solely on a disputed provision. Like
its contract cousin, the "entire contract" norm, the whole act rule encourages
courts to consider the overall legislation so that its understanding of component
provisions will be improved.\textsuperscript{151} There are also a number of corollaries to the
"whole act rule," which in general permit courts to consider what might be called
the "signposts" contained in a statute, including the title of the law and its
sections, preambles, and clauses setting forth the purpose of the statute, and
provisos. This is a significant departure from the historical English rule that
signposts in legislation were not to have a role in determining construction of the
statute.

Also, in viewing the entire statute, the typical judicial presumption is that the
legislature intended consistent usage of the same or similar words found in
different portions of the statute. Additionally, courts start with the proposition
that they will not interpret different statutory provisions as contradicting or
undermining one another. Further, there is the norm that statutes using the same
terminology should be construed \textit{in pari materia}.\textsuperscript{152}

In addition, there is the canon that courts should attempt to give meaning to
every word in a statute and not render a construction that makes some words or
terms redundant or reduces them to mere surplusage.\textsuperscript{153} This latter canon can
become unrealistic if applied too literally. Sometimes statute drafters are writing
with the intent of throwing in the metaphorical "kitchen sink" by stating statutory
coverage redundantly, so that there is less likelihood that a court will mistakenly
refuse to apply the statute.

The substantive canons of statutory construction, as the designation implies,
reflect substantive preferences and presumptions thought to accurately reflect
legislative thinking and shared social values. One famous substantive canon is

\begin{itemize}
\item \textsuperscript{150} See, e.g., United States v. Willings & Francis, 8 U.S. (4 Cranch) 48 (1807) (refusing to enforce a
statute requiring immediate registration after purchase under pain of losing favorable tariff status because the
vessel in question was purchased at sea, where immediate registration was impossible).
\item \textsuperscript{151} See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 862.
\item \textsuperscript{152} When more than one statute relates to a subject, the statutes must be considered together. The
reason for this is that the whole body of law must be kept consistent with itself; one act must not be read to
undermine or distort another act. One consequence of this bonding of acts is that a word must carry the same
meaning from one statute over into another related statute, just as a word should carry one meaning throughout
a bill. This canon makes the interpretation given a statute in one case relevant in a later case involving a
different, but related statute. See DAVIES, supra note 7, at 315; Frank E. Horack, Jr., \textit{The Common Law of
Legislation}, 23 IOWA L. REV. 41 (1937) (referring to the concept as one of "stare de statute"); see, e.g., Lorillard
v. Pons, 434 U.S. 575, 580-81 (1978) (explaining that when Congress reenacts a statute without change, it is
expected to be aware of and adopt any judicial interpretation).
\item \textsuperscript{153} See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 862.
\end{itemize}
that courts should liberally construe remedial legislation to affect its purposes, which is in tension with another famous canon positing that courts should strictly construe statutes altering the common law, even though statutes changing the common law are by definition remedial.\textsuperscript{154} Other substantive canons require the court to strictly construe statutes in derogation of government sovereignty so that the government itself does not unintentionally curtail government power.\textsuperscript{155} Another canon requires strict construction of public grants, while yet another directs strict construction of revenue provisions. One canon cautions that statutes should be generally interpreted to avoid constitutional problems.\textsuperscript{156} In addition, the requirement that the legislature make clear statements in order to overcome these substantive presumptions is itself a substantive canon of construction.

Although many of these canons are not strictly transferable to private commercial or consumer behavior or to insurance generally (despite the semi-public nature of insurance as a business affected with the public interest),\textsuperscript{157} they collectively stand for the proposition that statutes, and the public ordering they are designed to effect, should be construed in light of the larger political, economic, and social system of which the statute is a part. Applied to insurance policies, which are part of a similar, heavily regulated private ordering, the lesson of the substantive canons is that insurance policies are most effectively and accurately construed with reference to their purpose and the broad risk management context in which the insurance policy exists.

The rule of lenity is a prominent substantive canon that may have a more direct application to insurance. It demands a strict construction of penal statutes.\textsuperscript{158} The rule of lenity is based in part upon principles of fair notice and presumes that criminal statutes do not outlaw behavior unless the activity clearly comes within the sweep of the statutes.\textsuperscript{159} In the insurance context, the insurance industry acts as a de facto sovereign, albeit one more like the European Union than a totalitarian dictatorship. Nonetheless, normally risks will not be covered under commonly available policies sold at anything approaching affordable

\begin{footnotes}
\item[154.] See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 880-81; see also supra notes 52-60 and accompanying text (regarding Heydon's Case).
\item[155.] See SINGER & SINGER, supra note 29, § 62.01. But see Nev. Dep't Human Res. v. Hibbs, 538 U.S. 721 (2003) (holding that where there is clear intent to remove defense of sovereign immunity, presumption is not applicable). See also POPKIN, supra note 38, at 97 (noting that in the post-Civil War era, courts were particularly likely to give narrow interpretation to statutes in derogation of the common law).
\item[157.] See Randall, supra note 1, at 126-35 (noting that "state insurance codes are extensive" and involve rate regulation, content and organization of policy forms, mandated minimum coverage, and restrictions on investment of premium income); Spencer L. Kimball, The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law, 45 MINN. L. REV. 471, 490-91 (1961) (noting that insurance is an activity affected by the public interest).
\item[158.] See supra text accompanying notes 54-55 (discussing consequences of classifying a statute as penal).
\item[159.] See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 884-88; POPKIN, supra note 29, 107-14, 300-02.
\end{footnotes}
premiums, unless the insurance industry as a whole (i.e., major carriers, ISO, excess insurers, reinsurers) is willing to offer coverage of such scope. When insurance policies ostensibly provide such coverage, either through the language of the insuring agreement or the context, function, and marketing of the policy, courts should be hesitant to divest the policyholder of coverage seemingly provided solely on the basis of a particular construction of limiting or exclusionary language.

In this regard, the rule of lenity effectively parallels, or even echoes, the longstanding insurance-as-contract maxim that exclusions should be strictly construed against the insurer, who also bears the burden of persuasion on such issues. Similarly, the rule of lenity analogy strengthens the case for a reasonable application of the contra proferentem principle and is consistent with the reasonable expectations approach. Although one might argue that the rule of lenity does not necessarily add anything to the bottom line consideration of insurance policy construction, it is a strong brief in favor of these contract law doctrines that soften the occasionally rough edges of textual literalism and in some cases even overcome crabbed textualism altogether.

As discussed above, slavish use of the canons can create substantial potential for error. For example, a rigid and overly literal application of the word association canons, such as noctiture a sociis, ejusdem generis, or expressio unius est alterio exclusius, could result in a court giving unnecessarily grudging application to an omnibus or catch-all clause in legislation and thus restrict the statute so that it fails to reach situations specifically intended by the legislature or situations that were within the purposive contemplation of Congress when enacting the law in question. But notwithstanding this danger, the word association and listing canons—as well as textual canons, such as giving words their ordinary, everyday meaning, unless the subject is technical and governed by specialized, jargonesque meaning—makes intrinsic sense and helps courts interpret statutory language reasonably. Intelligent use of the canons and their underlying principles can help courts give reasonable construction to laws, rather than erring in favor of unduly narrow or overly broad construction.

An additional danger comes from the lengthy list of canons, which creates tension between some of their respective linguistic assumptions and substantive goals. Most famously, the master legal realist Karl Llewellyn, writing more than fifty years ago, juxtaposed many of the canons in ways that illustrated inconsistency and even outright contradiction.

---

160. See STEMPED ON INSURANCE CONTRACTS, supra note 1, § 2.06.
161. See id. § 4.08.
162. See id. § 4.09.
163. Llewellyn, supra note 57, at 401-06. Among the tensions he noted were:

1) The contrast between the canon that the statute's text limits its reach and the canon that statutes should be construed to further their purposes, which may argue for implementation beyond the scope of the text, particularly if legislative drafting fails to accurately capture the clear objectives of the legislature in promulgating the statute;
Llewellyn’s critique took some of the traditional sheen off the canons and may have at least tacitly influenced the judicial emphasis on legislative intent and purpose as indicia of statutory meaning during the decisions of the 1950s and 1960s. The ascendance of textualism during the 1980s and 1990s may also stem from a view that the canons were too contradictory or problematic and that simply slogging it out with the hermeneutics of statutory text was as good as any methodology for statutory construction. In the main, however, the trend toward greater focus on text was most likely the result of changing political and jurisprudential trends as well as the presence of high profile advocates such as Justice Scalia and other mostly conservative judges with a preference for textualism.¹⁶⁴

The canons on the whole, although less canonical than they were during the late Nineteenth and early Twentieth Centuries, absorbed Llewellyn’s blows and were still left standing. Major treatises, such as Sutherland’s, continue to be organized around them. Courts continue to use them, and law schools continue to teach them. As a matter of substantive analysis, the canons appear to deserve their longevity. Although Llewellyn’s critique was important, as well as clever, it was not the knockout punch scholars often describe.

To illustrate, Llewellyn’s famous juxtaposition of contradictions numbers twenty-eight. The excerpt above highlights five solidly legitimate contradictions and highly problematic tensions in the canons Llewellyn described. In the other twenty-three situations, Llewellyn’s criticism is more picking around the edges than driving a stake through the figurative heart of any of the canons. Without doubt, the canons are imperfect (perhaps even flawed), as are all but the most elegant legal doctrines. But this hardly makes them irreconcilably inconsistent, incoherent, or unusable. Rather, their imperfection simply requires that courts exercise care when applying the canons. In particular, courts should not apply the canons in a vacuum or without reference to other indicia of statutory meaning. Neither should courts make improperly selective use of the canons. If, for

2) The hoary canon that statutes in derogation of the common law should be strictly construed and the equally hoary canon that remedial legislation should be liberally construed. By definition, remedial legislation is in derogation of the common law it was intended to displace (at least partially) and remedy. Under these all-too-common circumstances, a court cannot render objectively principled interpretation by simply choosing from one of these two contradictory canons;

3) One prime canon posits that the plain language of the statute should be given effect while another counsels that literal interpretation should be avoided where it would lead to an “absurd” result or where it would bring about mischievous consequences or otherwise impede statutory purpose;

4) The canon that every word of a statute should be given effect and the canon that clearly superfluous language or drafting errors should be disregarded; and

5) The expressio unius canon may be in opposition to the canon of reading statutes reasonably, in that a listing in the statute may be for illustrative purposes only and not designed to be an exclusive or exclusionary list.

Id.

example, a court wants to decide the case on the ground that statutes in
derogation of the common law are to be strictly construed, it must also consider
the canon counseling that remedial statutes should be liberally construed.

Similarly, the canons survived modern scholarly criticism in addition to the
Llewellyn critique. Picking up where Llewellyn left off, more recent scholars
have criticized the canons as unrealistic in their view of the drafting care found in
the legislative process and often off-base in their substantive presumptions. The
latter critique reflects the reality that legislation is often, to use Otto von
Bismarck's famous metaphor, the equivalent of sausage-making. The final
product may look almost seamless and be well-received, even popular. But
watching its production would test the stomachs of even the strong. Writing
shortly after Llewellyn, two scholars characterized the canons as "useful only as
facades, which for an occasional judge may add lustre to an argument persuasive
for other reasons."165 In addition, scholars have criticized the canons as providing
seemingly objective window dressings for judicial decisions based largely on the
personal, ideological, or political preferences of courts.166 Although this may be a

165. See FRANK C. NEWMAN & STANLEY S. SURREY, LEGISLATION: CASES AND MATERIALS 654
(1955). Professor Surrey subsequently became Assistant Secretary of the Treasury for Tax Policy during the
Kennedy Administration. By all accounts, it appears that the IRS during this time period continued to invoke
the canons of statutory interpretation in litigation over the meaning of the nation's tax laws and the Service's
regulations. Although perhaps out of favor in the academy, the canons continued to be perennial players in the
real world of adjudication.

166. For example, the critical legal studies (CLS) movement of the 1970s and 1980s was critical of the
canons in a manner similar to much of the CLS critique about the objectivity and neutrality of law generally.
CLS scholars saw the canons and other legal rules or maxims as failing to acknowledge the social values and
political choices imbedded within the canons or rules and failing to see that applying rules of thumb like the
canons tended to obscure the contingency of law and the degree to which courts rendering decisions were
engaged in political acts that were often not favoring some constituencies at the expense of others. See, e.g.,
MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Gary Peller, The Metaphysics of American

From a different perspective, law and economics scholars during the 1970s and 1980s were attacking the
canons as empirically incorrect about the operation of legislatures and about the factors affecting the
motivations and actions of legislators. See, e.g., Victoria F. Nourse & Jane S. Schacter, The Politics of
Interpretation—In the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 806-07 (1983).

Related to this was the critique that use of the canons failed to consider the impact of interest groups,
agenda control, and pressures on individual legislators in shaping legislation. An example of the law and
economics critique is Judge Richard Posner's observation that:

Most canons of statutory construction go wrong not because they misconceive the nature of
judicial interpretation or of the legislative or political process but because they impute omniscience
to Congress. Omniscience is always an unrealistic assumption, and particularly so when one is
dealing with the legislative process. The basic reason why statutes are so frequently ambiguous in
application is not that they are poorly drafted—though many are—and not that legislators failed to
agree on just what they wanted to accomplish in the statute—though often they do fail—but that a
statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that
will be encountered in, its application.

See Posner, Statutory Interpretation, supra, at 811.

More cynical, post-realist criticisms of the canons aim not at the shortcomings of legislatures but at those
of judges, contending that many judges (and certainly several justices) use the canons strategically to mask and
valid criticism, the same can be said of judicial invocation about maxims of contract construction and word meaning assigned by judges, who seem to use whatever dictionary serves their purpose in purporting to render an objective textual assessment of constitutions, statutes, rules, regulations, contracts, and documentary evidence.

By the 1990s and early Twenty-first Century, however, countervailing scholarly views had emerged providing at least moderate support for the canons. The core of the defense was that the canons, whatever their imperfections, were useful heuristic devices for courts attempting to understand text in situations where the other indicia of meaning were not compellingly clear. Used appropriately, they could be more helpful than hurtful, particularly if used as merely part of an array of tools for understanding statutes, rather than as an inflexibly applied method of construction. In addition, the canons were not far off the mark in distilling to their essence common conventions of word meaning. Further, their use may provide stability in statutory construction. As a political matter, applying the canons may serve to smooth out the rough edges of legislation and, at least at the margin, bring some measure of

---


The most extensive empirical study of the canons lends some support to this claim in that the examination showed that:

- canon usage by Justices identified as liberals tends to be linked to liberal outcomes, and canon reliance by conservative Justices to be associated with conservative outcomes. [They] also found that canons are often invoked to justify conservative results in close cases—those decided by a one-vote or two-vote margin. Indeed, closely divided cases in which the majority relies on substantive canons are more likely to reach conservative results than close cases where those canons are not invoked. . . . Doctrinal analysis of illustrative decisions indicates that conservative members of the Rehnquist Court are using the canons in such contested cases to ignore—and thereby undermine—the demonstrable legislative preferences of Congress.


Almost as disturbingly, this study also found that in the 630 Supreme Court labor and workplace decisions they studied (during the 1969-2003 period), the Rehnquist Court relied considerably more on textual and linguistic canons than did the Burger Court, while the Burger Court used legislative history comparatively more than the Rehnquist Court. *Id.* No matter how much one supports the canons, their rules of thumb are generally not likely to as accurately reflect the aims of the legislature as would an actual examination of the legislative background of the statute. As a result, canon-driven construction may misconstrue the objective, goals, and meaning of the statute under review in situations where greater judicial willingness to look at specific legislative intent and statutory purpose would have produced an outcome closer to what the legislature wanted to achieve.


168. See, e.g., SAMUEL MERMIN, LAW AND THE LEGAL SYSTEM: AN INTRODUCTION 264 (2d ed. 1982) (analogizing canons to folk sayings that can be misleading if taken too literally but in general are largely correct); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179 (1990).

consistency to laws different legislatures have passed at different times.\textsuperscript{170} When a court errs significantly in assessing a statute, the federal legislature at least has shown considerable capacity to respond with overriding or corrective legislation.\textsuperscript{171} In the absence of definitive or corrective guidance from the legislature, the canons arguably set forth a generally accepted set of social norms and public values that are, at the margin, more likely to bring about judicial decisions acceptable to the body politic at large.\textsuperscript{172}

For example, one prominent scholar, departing from the traditional classification of the canons as textual, grammatical, and substantive, organizes the existing canons and proposes express recognition of additional canons thought to “be central to statutory interpretation.”\textsuperscript{173} He sees this expanded and revised template as a series of canons or principles the courts can apply in the modern regulatory or administrative state. This list includes canons reflecting “Constitutional Principles,” “Institutional Concerns,” and those attempting to “Counteract Statutory Failure.”\textsuperscript{174}

\begin{itemize}
  \item \textbf{Constitutional Principles}
    \begin{itemize}
      \item Avoiding constitutional invalidity/doubts
      \item Federalism
      \item Political accountability (nondelegation principle)
      \item Political deliberation*, checks and balances,* antipathy to naked interest-group transfers**
      \item [Protecting] Disadvantaged groups**
      \item Hearing rights
      \item Property and contract rights
      \item Welfare rights**
      \item Rule of law
    \end{itemize}
  \item \textbf{Institutional Concerns}
    \begin{itemize}
      \item Narrow construction of appropriations statutes
      \item Presumption in favor of judicial review
      \item Presumption against implied exemptions from taxation
      \item Presumption against implied repeals
      \item Question of administrative discretion*
      \item Cautious approach to legislative history
      \item Ratification, acquiescence,* stare decisis, and post-enactment history*
    \end{itemize}
  \item \textbf{Counteracting Statutory Failure}
    \begin{itemize}
      \item Presumption in favor of political accountability
      \item Presumption against subversion of statute through collective actions problems*
      \item Presumption in favor of coordination and consistency
      \item Presumption against obsolescence*
      \item Narrow construction of procedural qualifications of substantive rights*
    \end{itemize}
\end{itemize}

\begin{footnotes}
\footnotetext{171}{See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331 (1991).}
\footnotetext{172}{See, e.g., William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. PA. L. REV. 1007 (1989); Sunstein, Interpreting Statutes in the Regulatory State, supra note 57.}
\footnotetext{173}{Sunstein, Interpreting Statutes in the Regulatory State, supra note 57.}
\footnotetext{174}{See id. at 507-08. Professor Sunstein’s list:}
\end{footnotes}
Notwithstanding some drawbacks and controversy attending the canons, they remain well-established tools for statutory construction that have potential to be useful. Like any potentially useful tool, they should be available for selective and judicious use by the courts when interpreting texts analogous to statutes. Sometimes, application of a canon will be inapt, or if done without regard to other factors, will result in erroneous or inaccurate construction. But, as a whole, the canons (and the linguistic, empirical, and substantive concepts within them) can be useful in helping to distill insurance policy texts. Widely standardized insurance policies, which the insurance industry writes on either a de jure or de facto basis, could occasionally benefit from construction guided by the statutory canons.

For example, the textual canons as a whole remind adjudicators that terms of a document should generally be construed *in pari materia*, rather than given a string of broadly literal applications. A broad application could result in the text as a whole being construed in a fashion well beyond its intent and purpose as well as a fair and common sense reading of the text itself. The textual canons *noscitur a sociis* and *ejusdem generis* demonstrate that, in a complex policy with layers of wording, the words used generally fit together to make an overarching provision designed to accomplish some end in tailoring the insurance policy’s scope. Similarly, the *expressio unius est exclusio alterius* canon, despite its pitfalls, serves to remind that, in cases where text drafters are seeking a “laundry list” of items included or excluded from the reach of the instrument, the absence of an item most likely means that it was not intended to be part of the instrument. Applied to insurance agreements, exclusions, and definitions, this notion has potential power to keep courts from extending policy provisions further than intended. For exclusions from coverage in particular, use of these canons or application of their underlying concepts suggest that exclusions be more

---

6. Understanding systemic effects of regulatory controls
7. Presumption against irrationality and injustice
8. Proportionality (against overzealous implementation)
9. De minimis exceptions
10. Narrow construction of statutes embodying interest-group transfers (to counteract “deals”)
11. Broad construction of statutes protecting disadvantaged groups
12. Broad construction of statutes protecting nonmarket values
13. Avoiding private law principles

**ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 948-49, app. B (listing canons actually applied by Rehnquist and Roberts courts). In commenting upon Sunstein’s list:**

[EsKrige, et al.] placed an asterisk (*) by those of Sunstein’s principles which enjoy little support in the current Court’s assembly of canons. A double asterisk (**) means that we discern no explicit support, and implicit rejection in recent cases. Note that most of Sunstein’s canons fall into one of these categories. He would respond that the canons not already in the Court’s lexicon should be, for normative reasons regarding their usefulness for the modern regulatory state.

*Id.* at 948-49. Thus, many of these canons or principles may become important statutory construction tools only in the dreams of political liberals, while others appear to be consistent with the use of the traditional canons in operation.
narrowly construed rather than more broadly construed, which is perfectly consistent with long-standing insurance policy norms.

The empirical and substantive canons, if applied to insurance policies, argue that the courts construe revisions of policy language with care so as not to alter the terms of the policy more than the drafters intended (or their constituencies in cases where the policyholder community or some segment of it was consulted in connection with a wording or structural change). The canon notion that a new statute generally is presumed not to change the pre-existing common law can be used to prevent a court from erroneously taking a housekeeping change in wording and construing it to be a major substantive change in the scope of coverage provided. This can benefit both policyholders and insurers. Policyholders benefit because the scope of coverage is not reduced by accident, but only when this is clearly required by the text of a policy change or by the reliable information about what was intended by the change. Insurers can benefit because they would have more liberty to clarify policy language with less fear that courts would construe this to mean that prior versions of the policy form provided coverage that is now more clearly excluded by the policy text.

In addition, this grundnorm derived from statutory interpretation practice and the canons would make it less likely that revisions in policy format or language would surprise policyholders with unanticipated reductions in coverage. This is consistent with recognized insurance doctrine in many states requiring that when a change to an existing policy (through amendment or renewal) reduces coverage, the insurer must adequately alert the policyholder to the change in order to take advantage of more restrictive policy language.175

Although caution is required to avoid expanding policy changes through overly broad construction, the canons and statutory interpretation theory also have the notion that courts should broadly construe statutes to effect their purposes (even if changes from the status quo are generally approached cautiously). In the insurance policy context, this counsels courts to give full effect to insurance policy provisions that were clearly designed to rectify a perceived problem with the design and language of the previous version of a standard form policy. For example, as discussed above, the asbestos exclusion added to the 1986 CGL form deserves broad construction.176 It was the insurance industry’s equivalent of a remedial statute designed to correct the problems of the surprise emergence of the asbestos mass tort and the properties of asbestos that made courts particularly likely to adopt a continuous trigger or a very pro-policyholder “actual injury” trigger that did not require bodily injury to a third party to be diagnosable, palpable, visible, or manifest.177

175. See, e.g., Canadian Universal Ins. Co., Ltd. v. Fire Watch, Inc., 258 N.W.2d 570 (Minn. 1977).
176. See supra Part III.F.
177. See Stempel, Assessing the Coverage Carnage, supra note 15, at 464-70 (discussing insurance industry insertion of asbestos exclusion into standard form CGL policy and other changes in CGL structure to limit coverage of mass torts).
An equivalent example favoring policyholders, also discussed above, is the insertion of the subcontractor exception to the "your work" exclusion in the 1986 CGL form. The new subcontractor language was designed to rectify the problem of builder-policyholders being denied coverage, even though they had not been directly responsible for property damage claims arising from shoddy work. The construction community wanted to be assured of coverage in the subcontractor situation (which is the dominant manner in which modern housing and commercial structures are built) and was willing to pay a commensurate premium. This encourages CGL insurers to expand coverage as a business decision, especially considering subcontractor workmanship problems did not present the same problems of moral hazard and adverse selection posed by the policyholder's hands-on participation in defective work.

Other canon-derived norms, such as respect for the role of other entities and unwillingness to take authority from others without clear evidence of legislative intent, translate easily into the notion that policy revisions should not be regarded as effecting a radical change in the basic scope of policy coverage. Taken as a whole, the values, conventions, and norms reflected in the canons give courts a compass to evaluate the degree to which changes in standard forms are more minor or more far-reaching.

Consider a broad-based, heavily worded exclusion, such as the absolute pollution exclusion. To begin, the exclusion seeks an extensive reach by excluding any liability "arising out of" the "release" or "discharge" of a "pollutant." A definition later in the basic CGL policy sets forth an extremely broad definition of the term. A "pollutant" is "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed." The definition is so broad that, literally construed, the exclusion would bar coverage for the bodily injury or property damages inflicted by the release or escape of almost any substance because any substance is technically a "chemical." Consequently, if a policyholder's employee accidentally sprayed a passerby with a high-powered hose used in cleaning a facility, an insurer could argue that the resulting injury arose out of a polluting event, even if the substance sprayed was only water or soapy water.

Some courts have taken this extremely broad view of the pollution exclusion and construed it to deny CGL coverage even for everyday mishaps that few members of the public would consider a "pollution" problem. The reviewing court can easily avoid these kinds of erroneous expansions of the pollution exclusion if it engages in comprehensive contract analysis or appreciates the statute-like characteristics of the CGL policy. Adding the additional interpretative tools of seeing an insurance policy as a statute strengthens the case

178. See STEMPPEL ON INSURANCE CONTRACTS, supra note 1, § 25.05[B] at 25-73 to 25-82.
179. See id. § 14.11 at 14-144.
180. See id. § 14.11.
for reasonable construction of the pollution exclusion. In addition to consideration of drafting history and the "legislative intent" of ISO and the purpose of the industry in adopting the revised exclusion in the 1986 CGL form, several of the canons of statutory interpretation can help lead to sounder construction of the pollution exclusion or similar policy provisions.

First, there are the textual canons that counsel considering words as a group. The definition of "pollutant" is a laundry list of sorts, but when read as a whole (notwithstanding its linguistic breadth) it clearly is designed to reach substances that have contamination-like properties rather than all chemicals. In some cases, the *expressio unius* canon would be helpful by suggesting that courts not expand the already lengthy definition of a pollutant. Anything not on the definitional list or not falling quite squarely within such an extensive list must be outside the scope of the exclusion.

Most important, perhaps, the canon of giving words their ordinary meaning can provide help. At the outset, the core terms in question are "pollutant" and "pollution." The common and ordinary understanding of such terms is environmental pollution, fouling of the air, soil, or groundwater—and not indoor contamination. Perhaps the carbon monoxide poisoning and "hockey rink pollution" (from Zamboni ice-resurfacing machine exhaust) would come out more sanely if all courts remembered this core canon.

A normal person does
not speak of vacating an arena because it was polluted or consider the death of a sleeping family from a defective furnace the result of pollution. Ordinary people see this as negligent poisoning, as should courts.

Ordinary people also do not take a literalist view of what it means to “discharge” or “release” a pollutant. Spillage of small amounts of chemicals or fumes given off in a limited area (e.g., the workspace) as a byproduct of regular policyholder activity (e.g., installing tile, painting) are not thought of as discharges. To ordinary laypersons, a discharge occurs through a smokestack, a pipe, or the intentional discarding of material on a reasonably large, intentional, planned, regularized scale. Recognizing this canon of textual assessment and the ordinary meaning of words would help courts avoid misconstruction from viewing text in a vacuum.

Similarly, the canon that text will not be construed in a manner that produces an “absurd” result would seemingly stop aggressive application of the pollution exclusion in cases where applying the exclusion strips the CGL form of longstanding coverage that the insurance industry never spoke of eliminating as part of its effort to avoid future imposition of coverage for gradual environmental pollution by policyholders.

In addition, the grammar canons could be helpful in this type of situation by fostering a natural reading of the exclusion, rather than a literalist or overly expansive reading. Even without express consideration of the canons and the analogy between insurance policies and statutes, insurance law already has a de facto grammar canon that also has elements of a substantive canon—exclusions are to be strictly construed, with the insurer having the burden of persuasion to show the applicability of the exclusion.

Canon-like construction of insurance policies would hardly be a radical departure from existing contract-based construction. Many of the rules of thumb regarding contract interpretation are quite similar to statutory interpretation conventions and canons. For example, the statutory “whole act rule” is the functional equivalent of the contract norm that a contract be interpreted as a whole and that the court should not view contract provisions in isolation or out of context.¹⁸³

IV. UTILIZING THE STATUTE-LIKE CHARACTERISTICS OF INSURANCE POLICIES FOR SOUNDER CONSTRUCTION

Considering insurance policies as akin to statutes will allow courts the flexibility to apply an array of tools and approaches available for construing statutes. If these tools and approaches were even modestly imported into the standard mix of contract construction methods usually applied to insurance problematic text.

¹⁸³. See ESKRIDGE, FRICKEY & GARRETT, supra note 29, at 862.
policies, the result would hardly be seismic. But at least at the margin in difficult cases, the statutory methods counsel greater focus on the background of policy development, the purpose of policy provisions, and common sense construction, rather than overly literal and narrow focus on text.

To be sure, textualism has been on the ascendancy in statutory interpretation. But the chief philosophical rationale for statutory textualism—an argument that only the text of the statute counts as positive law—does not apply in the context of private legislation. However powerful the insurance industry may be, it is not the state. Its standard form contract enactments are not positive law but instead expressions of industry intent and purpose in product design. Consequently, there is no political or philosophical basis for viewing policy text alone as the product, contract, or private legislation that comprises the insurance policy.

Another argument favoring textualism—that it is the statutory doctrine most consistent with separation of powers in that it limits judicial authority—also does not apply to the insurance context. Notwithstanding the strong parallels between actual legislation and the standard form insurance policy process, the private legislation of insurance does not involve a coordinate branch of government and presents no serious separation of powers issues, as does actual statutory construction.

Another rationale for textualism in statutory interpretation is that consideration of other factors may mislead or lead to inconsistency in application since the text of the statute is what is most accessible to the public for governing its conduct and affairs. Insurance policies, by contrast, are not codified in statute books. Although widely available, they are not in a central repository of official government documents. More accessible to policyholders, prospective policyholders, and the public are summary documents about policies that may be obtained on company websites or in agents' offices.

In addition, because both insurer and policyholder counsel have ready access to judicial decisions about insurance, there is little danger that consideration of non-textual factors will lead to a body of coverage law in case reports that is inconsistent with the face of standardized policy text. In both theory and practice, policy text, even more than statutory text, means what the courts determine it to mean. Affected parties will both monitor judicial precedent or have it monitored for them by agents, brokers, lawyers, and the insurers themselves, who will come to accept judicial determinations, even those in some tension with the face of policy text. As an analogy, insurers initially resisted some judicial tests for determining bad faith, but today it is common to hear layperson adjusters say things like “we always look for coverage rather than non-coverage” or “we need to give equal consideration to the interests of the insured and cannot favor the insurer’s interest.” There is even less likelihood of a disconnect between

184. See POPKIN, supra note 38, at 170.
2010 / The Insurance Policy as Statute

insurance text and judicially determined insurance policy meaning than is the case in the statutory arena.

The overall impact of the statutory concerns creates the view that insurance policies are designed to effect a purpose or an intended result. Determining the meaning of policy terms can be aided not only by tools like canons of construction but also by judicial consideration of the backdrop leading to the standard insurance policy and its provisions, including revisions to policy text. Seeing insurance policies as related to statutes on the whole provides a brief for greater use of the legislative history and purpose of the policy, greater common sense construction, and more caution in reading policy text so as not to narrow coverage unless it is clear that this was the objective underlying policy revisions over time.

As discussed above, one can see the analytic value of the statute-insurance policy analogy to a variety of coverage questions. Perhaps most obviously, the background of a policy form and its “drafting history,” like legislative history, should have a place in the interpretative toolbox of lawyers and courts. Jettisoning the unfortunate label “regulatory estoppel” and replacing it with the simple notion that the build-up to issuance of insurance policy language (e.g., a revised exclusion or new endorsement), and the representations of its application by insurers and others involved in the process can only help clarify understanding of the policy provisions at issue. Included in this background information is the understanding of the insurance industry, the broker, and the policyholder community regarding an insurance policy term. Insurance regulators, like other government agencies implementing statutes, have an important role to play, and their opinions and assessments should be considered, at least on the modest level of Skidmore v. Swift & Co.185 and, in some cases, the greater deference of Chevron USA, Inc. v. National Resources Defense Council.186

V. CONCLUSION

This Article has discussed the use of statutory construction tools to assist determination of insurance coverage regarding the asbestos exclusion,187 the absolute pollution exclusion,188 and the application of the CGL form to construction defect claims (specifically the subcontractor exception to the “your work” exclusion). Similar benefits would likely be obtained by bringing the application of statutory construction to bear on fortuity/intentional injury disputes,189 battles over policy trigger, and creative but strained attempts to obtain

185. 323 U.S. 134 (1944); see supra Part III.G and accompanying notes.
187. See supra Part III.F and accompanying notes.
188. See supra Part III.F and accompanying notes.
189. A recent Arkansas case provides a useful example—consistent with the statutory interpretation
concept of giving due consideration to the purpose of the insurance policy as private legislation—of a reasonable judicial approach to determining the impact of criminal proceedings on the often-related issue of whether a policyholder’s infliction of injury on a third party was not accidental, sufficiently expected, or intended to bar coverage under a liability policy. In Bradley Ventures, Inc. v. Farm Bureau Mutual Insurance Co., 264 S.W.3d 485 (Ark. 2007), the court held that a guilty plea by a policyholder in a related criminal matter does not automatically bar liability insurance coverage for civil litigation against the policyholders.

The issue arises frequently. An insured commits an illegal offense and is subjected to the criminal justice system. In addition, the victim of the criminal offense institutes a civil action for damages against the insured. Because of the underlying criminal conduct, the civil complaint alleges that the insured committed acts of an intentional nature, as well as conduct that may be characterized as less than intentional, such as negligent or some other degree of culpability. The complaint is tendered to the insurer, who is now confronted with the question whether it is obligated to provide a defense to its insured.

On one hand, based on the four corners of the complaint, a defense is owed because the negligence allegation gives rise to the possibility of coverage. On the other hand, the insurer can point to the insured’s criminal conviction or guilty plea and argue that, while such information is outside the four corners of the complaint, it conclusively proves that the negligence allegations in the complaint are unfounded. Thus, the insurer argues that it should be entitled to disclaim coverage for a defense. In general, courts have been receptive to this argument by insurers that a finding in a criminal action serves as an exception to the four corners rule for purposes of making a defense determination.

But even if such a general exception is held to exist, that is not always the end of the story. Insurers must then establish that the elements of the crime for which the insured was convicted or pleaded guilty satisfy the standard for whatever intentional injury-based exclusion the insurer seeks to rely on to disclaim coverage. That is not always easy to do. Many courts go through a painstaking analysis of the elements of the criminal statute at issue to determine whether they have been established by the conviction or plea, in order to satisfy the intentional act-based exclusion.

A review of the many decisions on this issue reveals that courts do not act with a knee-jerk or automatically conclude that a criminal conviction or guilty plea must mean that the “expected or intended” or some like-minded exclusion is applicable. Nonetheless, despite the thoughtfulness that courts bring to this issue, the Bradley Ventures, Inc. v. Farm Bureau court chose to take a different approach. In cases involving a guilty plea, the court simply adopted a blanket rule that, no matter what the circumstances, it is not an admission of the elements of the offense that can be used against the insured in a subsequent coverage action. For purposes of making this determination, the court examined the doctrine of collateral estoppel, or issue preclusion. This doctrine “bars the relitigation of issues of law or fact actually litigated by the parties in the first suit, provided that the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question and that issue was essential to the judgment.” Id. at 490 (emphasis added). The Arkansas Supreme Court held that “a guilty plea in a criminal case is not equivalent to a criminal conviction that has been actually litigated.” Id. at 492. The court held that “‘actually litigated’ means ‘actually litigated.’” Id. Therefore, because the issue of intent was not actually litigated, the court held that a genuine issue of material fact still remained as to whether Trybulec intentionally started the fire at AQ Chicken, making summary judgment inappropriate. Id.

The Bradley Ventures court’s rationale for its decision seemed to be based on a perceived unfairness to Trybulec because he may not have been sufficiently motivated to challenge the criminal allegations. The court observed that “[w]hen a defendant is given the option to plead guilty to a lesser offense rather than proceeding to trial at the risk of being found guilty by a jury of a more serious offense, seemingly that defendant has a serious motivation to enter a guilty plea.” Id. at 491. Most criminal convictions are reached through a plea agreement and not through an actually litigated trial. Given how complex collateral estoppel can be, especially in the context of sometimes murky “expected or intended” standards, the Arkansas Supreme Court’s decision—adopting a blanket rule preventing its use in coverage actions following a guilty plea—may be an attractive solution for other courts confronting the issue.

Although fortuity is a core concept of insurance, insurers themselves accept the view that there is sufficient fortuity to insure even after a loss has taken place. For example, after the tragic fire at the MGM Hotel in the 1980s, at least one liability insurer was still willing to sell a policy covering the defense and indemnity of claims, because the uncertainty of the success of the claims and the amounts required to resolve the litigation were sufficiently uncertain to provide the requisite fortuity. The premium, of course, was logically higher than it
or deny coverage based on overbroad policy language. The pollution exclusion problems previously discussed serve as perhaps the archetypical example of unfair denial based on stretching policy language beyond intent, purpose, or other indicia of statutory meaning.

Perhaps most important, insurance policies should be regarded as initiatives designed to achieve risk distribution, seeking to accomplish particular purposes, and providing particular types of risk management protection. Like statute-making, insurance policy structure, design, and drafting is a purposive enterprise. Construing insurance policies in light of their purpose, like construing statutes in light of their purpose, can hardly be a bad thing and should improve the overall quality of coverage case outcomes.

would have been had the policy been sold prior to the fire, but the fact remains that a little bit of fortuity is all that insurance markets need to address a risk. A Warren Buffett-owned insurer has sold a policy designed to cover asbestos claims under a similar theory. Of course, there are a lot of claims out there and injury has already taken place, but the final resolution of the matters may cost more or less than predicted.

Insurers understood this when establishing and selling liability coverage, both under the CGL and pursuant to other types of liability coverage. The purpose of liability insurance is to take on contingent risk (for a fee and for the chance to invest resulting premium dollars) knowing that the contingencies will result in at least some liability because of human tendency to err. Sometimes these errors will be purely accidental and will not implicate concerns about fortuity. For example, a driver who is rear-ended at a stoplight has only "erred" by getting on the road that day. Where a policyholder has made volitional business decisions or found itself in a physical altercation, the situation looks less accidental. But taking too self-righteous a view about what an accident is or when injury was intended undermines the purpose of liability insurance—to protect policyholders from their mistakes—and the intent of the drafters. Only if the policyholder's conduct clearly goes beyond the realm of mistake and into the realm of subjective intent to inflict harm should coverage be lost.

Consequently, courts are more consistent with the intent and purpose underlying the liability policy when they are reluctant to find a disqualifying intent to injure or lack of fortuity. They risk undermining the insurance system and its social and economic benefits if they are too quick to treat mistakes as intentional, especially if this treatment is based on proceedings outside the court. Therefore, at least a cautious approach to guilty pleas and judgments or admissions in other courts is required. The court's ruling that the instant guilty plea did not definitively determine the policyholder's state of mind seems correct.

One can argue that the seeming per se rule of Arkansas that a guilty plea has no impact on insurance coverage for civil litigation is too favorable to policyholders. But all the decision does is prevent the insurer from automatically winning with this defense based on a guilty plea. The insurer is still free to successfully litigate the intended injury defense "from the ground up" in the coverage litigation itself. Refusing to give the insurer the benefit of issue preclusion from a different proceeding can be defended as vindicating the overall thrust of the liability insurance regime, a system much like a statutory scheme.

An example of overreaching to obtain coverage is reflected in policyholder efforts, most unsuccessful, attempting to obtain coverage for pollution liability under the "personal injury" provisions of the CGL form by arguing that pollution inflicted on a third party was a "trespass" covered under the personal injury section of the CGL policy. See STEMPFL ON INSURANCE CONTRACTS, supra note 1, § 14.11, for examples of this and resulting court decisions. This argument deserves to fail because it stretches the notion of "trespass" far beyond that intended by the drafters or expected by the affected constituencies (at least prior to a loss for which they would like financial assistance). It also runs counter to the nature of personal injury coverage, which was designed to protect businesses from certain types of volitional business behavior, but not to serve as a second type of coverage duplicating or expanding the coverage provided for bodily injury or property damage claims. Pure pollution liability claims are outside the scope of the CGL form and clearly fall within the pollution exclusion, notwithstanding its drafting problems and overuse by insurers. It would be inconsistent with the basic design and purpose of the CGL form to permit pollution coverage through the back door of the policy's personal injury protection simply because the word "trespass" can conceivably be read to include chemicals "invading" third party property.