TURNING UNAMBIGUOUS STATUTORY MATERIALS INTO AMBIGUOUS STATUTES: ORDERING PRINCIPLES, AVOIDANCE, AND TRANSPARENT JUSTIFICATION IN CASES OF INTERPRETIVE CHOICE

CARLOS E. GONZÁLEZ†

ABSTRACT

How should courts handle interpretive choices, such as when statutory text strongly points to one statutory meaning but strong evidence of legislative intent suggests a contradictory statutory meaning? Courts have addressed this longstanding dilemma inconsistently. Sometimes courts follow statutory text over contradictory legislative intent; sometimes they do the exact opposite.

Though reaching contradictory conclusions, many courts facing interpretive choices have argued that the law of interpretation provides definitive solutions. This Article argues that the opposite is true: the law of interpretation generates, rather than resolves, interpretive choices. When this occurs, legally unconstrained judicial discretion and extralegal factors, rather than the law of interpretation, determine legal meaning. While other scholars have focused on the role of judicial discretion in shaping legal meaning, their analyses invariably have centered on inherently ambiguous legal texts or legislative histories. This Article, by contrast, demonstrates how, in cases of interpretive choice, unique features of the law of interpretation turn unambiguous legal texts and legislative histories into ambiguous statutes.

This Article also explores how courts facing interpretive choices misrepresent the nature and capacity of the law of interpretation. Rather than acknowledging the central role of judicial discretion and extralegal considerations, courts argue that the law of interpretation

† Professor of Law and Herbert Hannoch Scholar, Rutgers School of Law-Newark. The author thanks Carlos Gabriel González for helpful comments on earlier drafts and the editors of the *Duke Law Journal* for their exceptional editorial contributions in the final preparation of this Article.

definitively resolves interpretive choices. Rule-of-law values and the consonant desire to preserve the legitimacy of judicial decisionmaking prompt courts to opt for this obfuscatory strategy. This Article, however, offers an alternative strategy—transparent justification—and explains why the case in favor of transparent justification is much stronger than most might imagine.

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INTRODUCTION

What should a court do when the text of a statute points to one statutory meaning but the evidence of legislative intent suggests an entirely different statutory meaning? The court could follow the most natural reading of the text, but that approach would upset the expectations of the enacting legislature. Or it could adopt a reading that matches the clearly expressed intent and understanding of the

enacting legislature, but to do so would be at odds with the statutory text.

Courts address this longstanding dilemma inconsistently. Sometimes courts adhere to statutory text over contradictory legislative intent; sometimes they do the exact opposite. Importantly, courts grappling with the text-versus-intent dilemma usually argue or imply that the law of interpretation provides a definitive solution. This Article argues that the opposite is true: the law of interpretation generates, rather than resolves, this and similar dilemmas.

Arlington Central School District Board of Education v. Murphy[1] serves as a provocative exemplar of this text-versus-intent dilemma, as well as the law of interpretation's failure to resolve the dilemma. In *Arlington Central*, the Supreme Court held that the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA)[2] does not permit recovery of expert-witness fees by prevailing plaintiffs.[3] This interpretation followed uncontroversially from the statutory text,[4] which states that prevailing parties may be awarded "reasonable attorneys' fees as part of the costs."[5] Justice Alito's opinion for the Court emphasized that the statutory text refers only to recovery of attorneys' fees and costs; it says nothing about recovery of expert-witness fees.[6] Justice Alito bolstered his textual analysis by stressing that "costs" is a term of art that is understood to exclude expert-witness fees.[7]

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1. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006).

2. Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(3)(B) (2006).

3. *Arlington Cent.*, 548 U.S. at 304. *Arlington Central* generated four separate opinions. Justice Alito wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. *Id.* at 293–304. Justice Ginsberg filed a separate opinion, which concurred with the result and most of the reasoning of the majority opinion but dissented from the majority's invocation of a clear-statement requirement. *Id.* at 304–08 (Ginsberg, J., concurring and dissenting in part). A lengthy dissent authored by Justice Breyer was joined by Justices Stevens and Souter. *Id.* at 308–24 (Breyer, J., dissenting). Justice Souter also submitted a separate one-paragraph dissent. *Id.* at 308 (Souter, J., dissenting). This Article will refer to the opinion authored by Justice Breyer as the dissenting opinion.

4. *See id.* at 300 (majority opinion) ("[T]he terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants.").

5. *Id.* at 297 (quoting 20 U.S.C. § 1415(i)(3)(B)) (internal quotation marks omitted).

6. *Id*.

7. *Id*. at 297, 302. The majority opinion also bolstered its argument with application of a clear-statement rule: because Congress passed § 1415 of the IDEA pursuant to its Spending Clause powers, the majority asserted that any condition to state acceptance of federal funds "must be set out 'unambiguously.'" *Id*. at 295–96 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). Both Justice Ginsburg's partial concurrence and Justice

In response to the majority's textualist thrust, however, Justice Breyer's dissenting opinion offered an intentionalist parry.[8] Despite the text,[9] Justice Breyer argued, the provision's legislative history demonstrates that Congress understood that the statutory clause in question would permit prevailing parties to recover not only attorneys' fees as part of costs, but also expert-witness fees.[10] Most pertinently, the conference committee's report stated, "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses . . . ."[11]

Arlington Central offers a stark example of what one commentator calls "interpretive choice"—a judicial choice between conflicting interpretive approaches or principles.[12] Because the interpretive choice in *Arlington Central* is extraordinarily uncluttered, I use the case throughout this Article to illustrate and examine fundamental features of the law of interpretation.[13]

The choice between textualism and intentionalism, of course, is just one of many interpretive choices that courts confront. Courts

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Breyer's dissent, however, argued that a clear-statement rule was inapplicable. *Id.* at 304–08 (Ginsburg, J., concurring and dissenting in part); *id.* at 316–18 (Breyer, J., dissenting).

8. *See id*. at 308–24 (Breyer, J., dissenting).

9. Justice Breyer's dissenting opinion acknowledged that a construction permitting recovery of expert-witness fees would not represent the most linguistically natural reading of the statutory text. *Id*. at 319.

10. *Id*. at 309–13. The dissent also argued that the interpretation of IDEA favored by the majority would discourage parents from enforcing their children's IDEA rights and would thereby undermine the statutory purpose of promoting free public education for disabled children. *Id.* at 313–16.

11. H.R. REP. NO. 99-687, at 5 (1986) (Conf. Rep.). In addition to the conference committee's language, the dissent also pointed to several other indicators of legislative intent to permit expert-witness fee shifting. *See infra* text accompanying notes 91–94.

12. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000) (defining interpretive choice as "the selection of one interpretive doctrine, from a group of candidate doctrines, in the service of a goal specified by a higher-level theory of interpretation").

13. Another example involving interpretive choice between clear text and clear, diametrically opposed legislative intent is an issue that has been litigated in federal courts. *See* Adam N. Steinman, *"Less" Is "More"?: Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1187–88 (2007). The issue arises out of a section of the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d), 1453 (2006), which grants federal appellate courts the uncommon power to hear immediate appeals of federal district court orders regarding remand of class actions to state courts. Steinman, *supra*, at 1187. Unambiguous CAFA statutory text creates a seven-day *waiting period* before a litigant may apply for appellate review. *Id*. But unambiguous evidence of legislative intent—including a key committee report—indicates that Congress intended to create a seven-day *limitation period* for the filing of applications for appellate review. *Id*.

may choose purposive or dynamic interpretive approaches[14] and may utilize different flavors of a particular interpretive approach. Textualism, for example, is not a monolithic approach but rather a multiplicity of different approaches using statutory text in different ways.[15] The same holds true for intentionalism. Courts may choose between honoring an actual expression of the legislature's intent or estimating the probable legislative intent regarding an issue that was not originally contemplated by the legislature.[16] Moreover, below the level of general interpretive approaches, courts may choose from a diverse array of particularized interpretive canons, maxims, and rules. For example, when analyzing statutory text, should a court apply the interpretive rule that "all words in a statute must be given effect"[17] or

14. Thus, what should a court do when statutory text suggests one meaning but statutory purpose would be frustrated by application of that textual meaning? *Compare* Caminetti v. United States, 242 U.S. 470 (1917) (applying a broad, literal meaning deduced from the statutory text over a more limited meaning derived from the statutory purpose), *with* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (favoring a limited statutory purpose over a broader literal meaning based on statutory text). Should courts interpret statutory terms statically, such that their meaning is frozen at the time of enactment, or dynamically, such that their meaning shifts over time? *Compare* People *ex rel.* Fyfe v. Barnett, 150 N.E. 290, 292 (Ill. 1925) (interpreting a statute statically to read the term "electors" consistently with its meaning at the time of the statute's passage, despite a conflict with its contemporary meaning), *with* Commonwealth v. Maxwell, 114 A. 825, 829 (Pa. 1921) (interpreting a statute dynamically to read the term "electors" consistently with its contemporary meaning, despite a conflict with its meaning at the time of the statute's passage).

15. For example, as Professor Lawrence Solan emphasizes, courts operating under a textualist rubric may choose a plain-meaning approach, which he terms a "definitional" or "ordinary" meaning approach. Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2031–39 (2005).

16. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 706–07 (4th ed. 2007) (discussing actual legislative intent and imaginatively reconstructed legislative intent); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 630 (1990) (noting that courts using intentionalist interpretation sometimes seek evidence of actual legislative intent and other times "'reconstruct' the answer the enacting Congress would have given if the interpretive issue had been posed directly"). For a paradigmatic example of imaginative reconstruction, see *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In *Cardoza-Fonseca*, the Court drew on various indicia of legislative intent to gauge what Congress would have intended if it had contemplated the narrow issue before the Court. *Id.* at 432–43. In contrast, *Arlington Central* involved direct evidence of congressional intent on the narrow issue before the Court. *See supra* note 11.

17. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 174 (2001) (citing the canon against surplusage, which holds that courts must "give effect, if possible, to every clause and word of a statute").

the rule that "a word repugnant to the rest of the statute can be ignored"?[18]

When faced with interpretive choices, courts vacillate.[19] With respect to the text-versus-intent dilemma, for example, in one case, a court will proclaim, "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[20] In another case, however, the same court will assert a contrary principle: "[When] literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters[,] . . . . the intention of the drafters, rather than the strict language, controls."[21] Similar contradictions appear in choices between other interpretive approaches,[22] between different versions of the same interpretive

18. *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (stating that the canon "requiring a court to give effect to each word '*if possible*' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute'" (quoting KARL LLEWELLYN, THE COMMON LAW TRADITION 525 (1960))).

19. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 112 (1991) (Stevens, J., dissenting) ("In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation."); Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 2001 (2007) (concluding that the Supreme Court is "quite pluralist in its methods of statutory interpretation").

20. Dodd v. United States, 545 U.S. 353, 359 (2005) (alteration in original) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000)) (internal quotation marks omitted); *see also infra* note 63.

21. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)) (internal quotation mark omitted); *see also infra* note 64.

22. For example, although courts sometimes enunciate the principle that statutory purpose may trump the plain meaning of statutory text, courts also occasionally state that statutory text controls even if it would frustrate statutory purpose. *Compare* Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) ("The general words used in the clause . . . , taken by themselves, and literally construed, without regard to the object in view, ... in many cases . . . would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, *but will take in connection with it the whole statute . . . and the objects and policy of the law*." (first and fourth omissions in original) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857)) (internal quotation mark omitted)), *and* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("[E]ven when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922))), *with Casey*, 499 U.S. at 98 (rejecting the argument that a statute should be construed in accordance with its statutory purpose rather than with the literal meaning of its text).

approach,[23] and between fine-grained rules of interpretation.[24] Professor Karl Llewellyn's legal-realist critique of statutory interpretation famously demonstrates that the canons of construction are often inconsistent.[25] The kinds of inconsistencies that Llewellyn identifies are not limited to the canons, however, but instead are present even at the level of general interpretive approaches.

This Article addresses the unique structure of the law of interpretation and explains how this structure often renders the law of interpretation useless for resolving interpretive choices. The law of interpretation combines a grab bag of conflicting injunctive principles with an absence of ordering principles. Injunctive principles instruct courts on how to interpret statutes. Ordering principles establish hierarchies of use for these injunctive principles. Because the law of interpretation lacks a hierarchy for ordering its injunctive principles, it is incapable of identifying a single legally superior interpretation among two or more rival interpretations. Instead, the law of interpretation often identifies multiple interpretations of equal legal validity. Thus, the law of interpretation not only fails to resolve interpretive choices, but in fact accomplishes the exact opposite: it generates interpretive choices. When this occurs, elements outside of the law of interpretation—generally, legally unconstrained judicial discretion and extralegal factors—necessarily determine which among multiple legally sanctioned interpretations a court will select. In *Arlington Central*, for example, the Court did not employ textualist over intentionalist interpretive principles because the law of interpretation so prescribed. Instead, the Court did so because the

23. The law of interpretation encompasses both plain-meaning and ordinary-meaning textualism, and the Supreme Court has used both at different times, or even in different opinions in the same case. *See* Solan, *supra* note 15, at 2032–36 (discussing the use of plain-meaning and ordinary-meaning textualism in *Smith v. United States*, 508 U.S. 223 (1993)).

24. For example, federal courts may choose between different versions of the same canon of construction, such as the rule of lenity. Specifically, the majority opinion in *Muscarello v. United States*, 524 U.S. 125 (1998), cited a narrow version of the rule of lenity applicable only if a court "can make 'no more than a guess as to what Congress intended,'" *id.* at 138 (quoting United States v. Wells, 519 U.S. 482, 499 (1997)), whereas the dissenting opinion cited a broader version of the rule that applies unless "text, structure, and history fail to establish that the Government's position is unambiguously correct," *id.* at 148 (Ginsburg, J., dissenting). Similarly, federal courts may choose from at least three different versions of the avoidance canon. *See* Gilbert Lee, Comment, *How Many Avoidance Canons Are There After* Clark v. Martinez*?*, 10 U. PA. J. CONST. L. 193, 202–20 (2007) (describing the serious-constitutional-doubts, clear-affirmative-intention, and lowest-common-denominator canons of avoidance).

25. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

five Justices joining the majority opinion exercised legally unconstrained discretion and concluded that statutory text should trump legislative intent in that particular case.

Many other commentators have explored the role of judicial discretion in legal interpretation,[26] invariably focusing their analyses on the inherent ambiguity of legal texts or legislative histories.[27] The novel argument offered here is that legally unconstrained judicial discretion and extralegal factors can dominate legal interpretation even when the underlying legal materials—statutory text and legislative history—are themselves clear and unambiguous. In other words, the law of interpretation not only fails to deal with inherently ambiguous statutory material, but it also turns *unambiguous* statutory material into *ambiguous* statutes.

Second, this Article focuses on how courts respond to cases that present interpretive choices. Simply stated, courts regularly employ an avoidance maneuver: they avoid acknowledging that the law of interpretation necessitates legally unconstrained choices among injunctive interpretive principles and deny that judicial discretion and extralegal factors even play a role in resolving interpretive choices. Instead, courts routinely contend or imply that the law of interpretation imposes ordering principles that establish hierarchies of injunctive interpretive principles. Once a court posits or presumes that the law of interpretation prefers certain interpretive principles, it can cast a particular statutory interpretation—not coincidentally, the one chosen by the court—as compelled by the law of interpretation.

Arlington Central demonstrates this phenomenon. Both the majority and dissenting opinions in *Arlington Central* avoided acknowledging the role of judicial discretion and extralegal

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26. A recent, thoughtful meditation on judicial discretion lists Professor Ronald Dworkin, Justice Benjamin Cardozo, and Professor Ahron Barak among the "countless" authors of works on "discretion in the judicial process." A. David Pardo, *Judicial Discretion in Talmudic Times and the Modern Era*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 429, 430 n.4 (2009).

27. *See, e.g.*, Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2034 (2002) (arguing that courts should respond to statutory indeterminacy by adopting interpretations that are consistent with the present society's "enactable political preferences" rather than the preferences of the enacting Congress); Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 9–23 (2007) (discussing statutory indeterminacy and arguing that courts should be permitted to refer ambiguous statutory-interpretation issues back to Congress); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408 (2003) (discussing how textualist judges should exercise discretion when facing ambiguous statutory texts); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (proposing a statutory code of permissible principles of interpretation in response to the "inevitable ambiguities" of statutes).

considerations in determining the outcome. They did this by suggesting that the law of interpretation provided a definitive answer to the text-versus-intent dilemma presented by the case.

Third, this Article explores whether the avoidance maneuver offers the optimal response for courts facing interpretive choices. The central problem with the avoidance maneuver is that courts employing it misrepresent the law of interpretation. In *Arlington Central*, both opinions distorted the law of interpretation because both suggested that it favored one interpretive approach—textualism or intentionalism—over another. The law of interpretation, however, contains no ordering principles that establish a definitive hierarchy between textualist and intentionalist interpretive approaches. Instead, the law of interpretation sanctions conflicting interpretive principles and grants neither approach a definitive legal trump over the other.

As an alternative to the avoidance maneuver, courts could confront interpretive choices with a strategy of *transparent justification*. Under this strategy, courts would admit that the law of interpretation generates interpretive choices and would then openly explain the extralegal factors motivating them to choose one legally valid interpretation over another interpretation of equal legal validity.

Both rule-of-law values and the consonant desire to preserve the legitimacy of judicial decisionmaking might be seen as counseling in favor of the avoidance maneuver and against transparent justification. But the rule-of-law justification for the avoidance maneuver is surprisingly weak, and the case in favor of transparent justification is much stronger than many imagine. Cases presenting interpretive choices cannot be decided in accordance with rule-of-law values. The avoidance maneuver cannot alter the inescapable reality that judicial discretion and extralegal factors will be determinative in these cases. Rather than enhancing or even preserving the legitimacy of courts and judicial decisionmaking, the avoidance maneuver merely drapes judicial discretion in an unconvincing rule-of-law façade. By contrast, transparent justification would do no discernible damage to the legitimacy of judicial decisionmaking. Courts using transparent justification would confront interpretive choices with candor and completeness. Because lawyers, litigants, and attentive segments of the general public already comprehend that the law of interpretation alone cannot adjudicate interpretive choices, the candor of transparent justification would not produce legitimacy-eroding effects.

Part I explains why the law of interpretation generates, rather than resolves, interpretive choices and thus why it permits legally unconstrained discretion and extralegal factors to be outcome determinative in cases involving interpretive choice. Part II illustrates how courts deploy the avoidance maneuver and how they routinely claim that the law of interpretation resolves interpretive choices by identifying legally superior statutory interpretations. Part III addresses the merits and demerits of both the avoidance maneuver and transparent justification. Additionally, Part III argues that courts should more readily recognize the drawbacks of the avoidance maneuver and should be more receptive to using transparent justification in cases of interpretive choice.

I. THE UNSTRUCTURED AND INTERNALLY CONFLICTED NATURE OF THE LAW OF INTERPRETATION

The law of interpretation sanctions conflicting interpretive principles and treats them as hierarchic equals. As a result, the law of interpretation generates but cannot resolve interpretive choices. Instead, unfettered judicial discretion and extralegal factors resolve interpretive choices.

In *Arlington Central*, the Justices faced an interpretive choice between textualist and intentionalist interpretive principles. Because the law of interpretation treats these principles as hierarchic equals, it is ultimately incapable of resolving the interpretive choice. Thus, the law of interpretation could not have been the decisive element that produced the majority and dissenting interpretations of IDEA § 1415. Instead, extralegal factors—perhaps the Justices' substantive policy preferences, their personally held philosophies of interpretation, or other idiosyncratic factors—resolved the interpretive choice and determined the outcome of the case.

My argument goes beyond the pedestrian point that judicial discretion is often the deciding factor in legal interpretation cases. To be sure, judicial discretion is the determinative factor when statutory materials exhibit inherent ambiguity.[28] The argument offered here,

28. The final contours of statutes with ambiguous text, for example, will be drawn by an inescapable exercise of judicial discretion. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 41–47 (1994) (arguing that textualist principles do not limit judicial discretion because they cannot always clarify ambiguous statutory provisions); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV.

however, has nothing to do with cases involving inherent linguistic ambiguity or open-textured terminology. To the contrary, I argue that legally unconstrained judicial discretion driven by extralegal considerations determines outcomes in *any* case of interpretive choice, even when the statutory material itself is relatively free of inherent ambiguity or open-textured terminology.

Thus, in *Arlington Central*, the relevant fee-shifting provision in IDEA § 1415 is marked by a very low degree of ambiguity. The statutory text refers only to recovery of "reasonable attorneys' fees as part of the costs."[29] It does not mention expert-witness fees. Moreover, "costs" is a term of art that does not include expert-witness fees.[30] The evidence in the record of legislative history is equally unambiguous in indicating that Congress intended for the words "reasonable attorneys' fees as part of the costs" to permit recovery of expert-witness fees. Principally, the conference report stated that "[t]he conferees intend[ed for] the term 'attorneys' fees as part of the costs' [to] include reasonable expenses *and fees of expert witnesses*."[31] Despite this lack of inherent ambiguity in the statutory materials, legally unconstrained judicial discretion determined which of two unambiguous but conflicting meanings prevailed.

How could the law of interpretation fail to establish a hierarchy between textualist and intentionalist interpretive norms? More broadly, how could the law of interpretation generate, rather than resolve, interpretive choices between interpretive principles? The answer lies in the structure—or, perhaps more accurately, the antistructure—of the law of interpretation. The law of interpretation is not a neatly systematized hierarchy of principles. It is instead a disorderly and unstructured grab bag of tools—featuring interpretive approaches, canons, and other rules—from which courts may draw to suit their needs. The law of interpretation lacks structure because it combines a varied and often conflicting body of *injunctive interpretive principles* with an almost complete lack of *ordering principles* for organizing and prioritizing those injunctive principles. The lack of ordering principles leaves the law of interpretation without rules for

1648, 1655 (2001) ("Ambiguous language necessarily vests judges with some degree of policymaking discretion . . . .").

29. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 297 (2006).

30. *Id.*

31. *Id.* at 312 (Breyer, J., dissenting) (emphasis added).

resolving conflicts between injunctive principles, such as opposing textualist and intentionalist principles.

A. Injunctive Principles and Ordering Principles

The law of interpretation is primarily composed of rules that can be labeled injunctive interpretive principles. Injunctive interpretive principles resemble commands, directives, or imperatives. They instruct or command courts engaged in the interpretive enterprise. Courts have developed injunctive interpretive principles at two levels of generality. First, at a high level of generality, courts have devised and employed different general interpretive approaches.[32] Textualism and intentionalism, on display in *Arlington Central*, are the most frequently used approaches.[33] Purposive and dynamic approaches, however, are also regularly employed.[34] These different interpretive approaches offer courts guidance on the general objectives of the interpretive enterprise. Textualist injunctive principles establish that when interpreting statutes, courts should strive to discern the meaning of the statutes' enacted and officially adopted words.[35] Intentionalist injunctive principles, by contrast, maintain that courts should seek first and foremost to interpret statutes in accordance with

32. *See* Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 594–624 (1996) (reviewing the textualist, intentionalist, purposive, and dynamic interpretive approaches).

33. Frost, *supra* note 27, at 2 (referring to textualism and intentionalism as "the two most widely accepted interpretive theories"); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–20 (2005) (naming textualism and intentionalism as the most frequently used interpretive methodologies).

34. On dynamic interpretation, see ESKRIDGE, *supra* note 28, at 48–80. On purposive interpretation, see AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 83–304 (2005); WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 115–49 (1999); and Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 66–67 (2002). For arguments that pragmatic- or practical-reasoning approaches should perhaps be separate interpretive approaches, see, for example, RICHARD A. POSNER, HOW JUDGES THINK 230–65 (2008); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353–62 (1990); and Daniel A. Farber, *Do Theories of Statutory Interpretation Matter?: A Case Study*, 94 NW. U. L. REV. 1409, 1414–16 (2000).

35. *See* González, *supra* note 32, at 596 ("The common thread linking the family of textual theories of statutory interpretation is their uniform reliance on the words of statutes as an interpretive guide."); Manning, *supra* note 33, at 420 ("[T]extualism . . . is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text . . . ."); *see also* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 416–17 (2005) (arguing that textualism is subtle rather than simplistic and, in the end, is not that different from an intentionalist approach).

the intent of the legislative body, even if that intent is inconsistent with, or imperfectly conveyed by, a statute's textual provisions.[36]

Second, at a lower level of generality, courts have devised and employed a long list of injunctive interpretive canons, maxims, presumptions, and rules.[37] Many canons are meant to assist courts in deciphering the meaning of statutory texts.[38] Other canons assist courts in determining the most probable legislative intent.[39] Still other canons imbue the law of interpretation with substantive presumptions or biases.[40] Like the broad interpretive approaches, the narrow canons, maxims, and rules instruct courts on how to conduct and engage in the interpretive enterprise. For example, one commonly used principle explains: "Where general words follow specific words in a statutory enumeration, the general words [should be] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[41] Another less well-known principle instructs courts to interpret ambiguous statutes "to avoid unreasonable interference with the sovereign authority of other nations" and to "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws."[42]

Though the above review traces only the broadest outlines of the law of interpretation, it should be clear that the body of injunctive interpretive principles is vast and varied.[43] In contrast to this body of injunctive interpretive principles, the law of interpretation is almost completely devoid of ordering principles—rules to order, organize,

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36. ESKRIDGE, *supra* note 28, at 14; González, *supra* note 32, at 605; Steinman, *supra* note 13, at 1197.

37. *See* ESKRIDGE ET AL., *supra* note 16, app. B at 19–41 (providing a comprehensive list of the canons of statutory interpretation).

38. *Id*. app. B at 19–23.

39. *Id*. app. B at 25–28.

40. *Id*. app. B at 29–34.

41. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (first alteration in original) (quoting 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.17 (5th ed. 1992)) (internal quotation marks omitted) (employing the *ejusdem generis* canon of construction).

42. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004).

43. The scope of this body of injunctive interpretive principles is so vast, varied, and complex that American law schools increasingly offer courses devoted substantially or entirely to judicial interpretation of statutes. Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 168 n.9 (2008); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1904 (2008).

prioritize, and coordinate often-discordant injunctive interpretive principles.[44]

The key difference between injunctive and ordering principles lies in the following idea: Injunctive principles instruct courts on the methods they should use to interpret statutes and statutory material. They are the tools available to courts charged with the task of untangling the meaning of statutes. Ordering principles, by comparison, define which injunctive principles possess primacy, priority, or hierarchic superiority in any given interpretive situation. They instruct courts not on how to interpret statutes, but rather on which interpretive tools to use or not use in a particular case or circumstance. Ordering principles establish that certain injunctive interpretive principles trump other injunctive interpretive principles, at least in particular situations. In *Arlington Central*, an ordering principle would have determined which injunctive interpretive principle—textualist or intentionalist—should have taken precedence and governed the Court's interpretation of IDEA § 1415's fee-shifting provision. This kind of ordering principle is precisely what the law of interpretation lacks. Simply stated, no unequivocal ordering rule exists to establish a hierarchy between textualist and intentionalist injunctive principles.

Judges, however, do not acknowledge this feature of the law of interpretation. Instead, they often proclaim the opposite—that the law of interpretation dictates particular orderings of injunctive interpretive principles. For example, Justice Scalia argues that the law of interpretation grants paramount privilege to statutory text over conflicting legislative history.[45] In fact, Justice Scalia incorrectly describes the law of interpretation. Despite the forceful protestations

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44. Perhaps in response to this phenomenon, some scholars have called for a systematized code, a restatement of statutory interpretation, or a stare decisis approach to rules of interpretation. *See, e.g.*, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1867 (2008) (supporting the application of stare decisis to principles of statutory interpretation); Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333, 334 (2004) (arguing for the creation of a restatement of statutory-interpretation principles); Rosenkranz, *supra* note 27, at 2087 (arguing for a legislatively created code of statutory interpretation).

45. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 122 (2007) (Scalia, J., dissenting) ("The only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail."); Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (arguing that the Supreme Court has "adopted a regular method for interpreting the meaning of language in a statute" that embraces textualist principles and rejects reliance on legislative history); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (1997).

found in many of Justice Scalia's opinions,[46] the law of interpretation does not definitively require judges to privilege statutory text over conflicting legislative intent. To the contrary, the law of interpretation manifestly permits courts to go beyond statutory text.[47] More precisely, the law of interpretation has long sanctioned two conflicting injunctive interpretive principles. On the one hand, many cases stand for the proposition that when statutory text and legislative intent stand in conflict, the text must prevail.[48] On the other hand, numerous other cases stand for the proposition that legislative intent may trump contrary statutory text.[49]

Justice Scalia's preference for text over legislative history as an aid in statutory interpretation may or may not be based on sound reasoning. My contention, however, is that his preference is entirely personal and, therefore, extralegal. When Justice Scalia drafts an opinion arguing that the law of interpretation requires courts to enforce statutory text regardless of contrary legislative intent, he writes not based on what the law of interpretation actually is, but rather on what he believes it ought to be. In such situations, he is exercising unadulterated judicial discretion based on personal preference and conviction rather than legal compulsion.[50]

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46. *See* ESKRIDGE ET AL., *supra* note 16, at 989 (listing cases in which Justice Scalia has criticized the use of legislative history); *see also, e.g.*, Zedner v. United States, 547 U.S. 489, 509–11 (2006) (Scalia, J., concurring) (objecting to the Court's use of the legislative record to corroborate its interpretation that was based on statutory text alone); Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 76 (2004) (Scalia, J., dissenting) (arguing that the Court should not favor legislative intent over the enacted statutory text).

47. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 280 (1990) (stating that the practice of referring to a record of legislative history "can be traced back at least a century"); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 206–13 (1983) (tracing the use of legislative history in Supreme Court decisions).

48. *See infra* text accompanying note 63.

49. *See infra* text accompanying note 64.

50. Indeed, eight Supreme Court Justices joined an opinion repudiating Justice Scalia's entreaties to avoid using legislative history. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610–12 n.4 (1991). Moreover, even the Roberts Court, which features several textualist-leaning Justices, continues to refer to legislative history regularly when interpreting statutes. *See* James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222–23 (2006) (finding that the Supreme Court's reliance on legislative history persists, although it is less frequent than during the Burger Court era, and concluding that nearly 50 percent of the decline is attributable to Justices Scalia and Thomas).

I do not mean to suggest that Justice Scalia acts improperly when he exercises this sort of judicial discretion. Legal reform, including reform of the law of interpretation, falls squarely within the jurisdiction of Supreme Court Justices. My aim is simply to underscore the point that Justice Scalia's rejection of legislative history is based not on the extant law of interpretation, but rather on his own preferences regarding how the law of interpretation should be altered. Because the law of interpretation lacks an ordering principle that definitively determines whether text trumps contrary intent, or vice versa, the factor that determines whether Justice Scalia will consult a legislative record is not internal to the law of interpretation. Instead, extralegal considerations, such as Justice Scalia's own personal preferences regarding interpretive methodology, will be determinative.

Although the law of interpretation lacks ordering principles, such hierarchy-imposing principles are common in other areas of the law. On a macro level, ordering principles dictate that constitutional norms trump conflicting statutory norms, which in turn trump conflicting administrative norms, which in turn trump conflicting common-law norms.[51] Similarly, the American federal system includes an ordering principle, memorialized in the Supremacy Clause of the Constitution, which establishes that federal law trumps conflicting state law.[52]

Ordering principles commonly operate at the micro level, too. Thus, within constitutional law, ordering principles dictate that certain constitutional norms must trump other constitutional norms when the two conflict. For example, Article I of the Constitution grants Congress a broadly interpreted power to pass statutes that regulate interstate commerce.[53] When an exercise of Congress's Commerce Clause power violates the First Amendment's free-speech, assembly, or religious-practice protections, those First Amendment protections trump Congress's Article I legislative powers.[54] As constitutional norms, both the Commerce Clause and the First

51. *See* Carlos E. González, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 533 (2001) (illustrating the hierarchy of legal norms graphically).

52. U.S. CONST. art. VI, cl. 2; Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

53. U.S. CONST. art. I, § 8, cl. 3.

54. *See* González, *supra* note 51, at 524 (arguing that under the chronologic axiom, when in conflict, rights-granting clauses in the Bill of Rights trump power-granting clauses in the Constitution's main body).

Amendment are norms of the highest rank. Yet an ordering principle clearly establishes that, in cases of conflict, the First Amendment trumps the Commerce Clause. Ordering principles establish hierarchies of norms in the law of civil procedure as well. Under the *Erie* doctrine, an ordering principle dictates that in federal diversity-jurisdiction litigation, federal procedural rules trump conflicting state procedural rules. Thus, when federal courts adjudicate claims based on state substantive law, they apply federal, rather than conflicting state, procedural law.[55]

Ordering principles are useful in areas in which legal norms are likely to come into conflict, such as conflicts between constitutional rights and powers, between federal and state substantive law, or between federal and state rules of civil procedure. In these areas, ordering principles prevent chaotic and inconsistent application of conflicting legal norms. But for the existence of a clear and unquestionable ordering principle granting First Amendment protections superiority over Article I legislative powers, in cases of conflict, courts would have no legalistic means for definitively adjudicating the constitutionality of an act of Congress that impairs First Amendment protections.

For example, suppose Congress were to pass a statute prohibiting employers from requiring their employees to work more than four hours on days of religious Sabbath. As long as Congress made a serious and plausible finding that the prohibition affected interstate commerce, such a statute would fall within Congress's Commerce Clause power.[56] The statute, however, would stand in conflict with the First Amendment's Establishment Clause protections.[57] Without an ordering principle to establish a hierarchy

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55. *See* Rules of Decision Act, 28 U.S.C. § 1652 (2006) (providing that state law applies "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide"); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case [based on diversity of citizenship] is the law of the state.").

56. *See* Gonzales v. Raich, 545 U.S. 1, 16–22 (2005) (reviewing the Commerce Clause doctrine and reaffirming that, under the Commerce Clause, Congress may regulate activities that have a substantial effect on interstate commerce in the aggregate); United States v. Darby, 312 U.S. 100, 118–27 (1941) (holding that, under the Commerce Clause, Congress may regulate employment conditions such as wages and hours when they affect interstate commerce).

57. *See* Estate of Thornton v. Caldor, 472 U.S. 703, 709–11 (1985) (holding that a state law prohibiting employers from requiring employees to work on the Sabbath violated the Establishment Clause because it favored or advanced religion over other interests); Lemon v. Kurtzman, 403 U.S. 602, 612–14 (1971) (holding that state laws providing for the funding of secular subjects in religious schools violate the Establishment Clause).

between First Amendment protections and any conflicting exercises of Article I legislative powers, neither could claim a definitive trump over the other. Courts could vacillate in their outcomes. One court could find such a statute unconstitutional because it violates a First Amendment protection, even though it was passed under a valid exercise of the Commerce Clause. This court would be giving First Amendment protections priority over Commerce Clause legislative power. By contrast, a different court—or even the same court at a later date—could find that the statute is valid and constitutional. That court would be giving the Commerce Clause power priority over First Amendment protections.

The latter holding seems both strange and mistaken. But the reason it seems strange and mistaken is that a universally recognizable and unimpeachable ordering principle establishes a hierarchy. Every constitutional lawyer would acknowledge that First Amendment protections trump conflicting exercises of Commerce Clause legislative power. Under this ordering principle, Congress is permitted to pass laws that substantially affect interstate commerce, as long as those laws do not infringe First Amendment—or other—constitutional rights and protections.

A review of litigated issues will reveal the presence or absence of ordering principles. In areas in which ordering principles are present, litigation will not dwell on ordering issues but instead will focus on whether the case presents a conflict of norms. In a case involving the Commerce Clause power and the Establishment Clause protection, for example, the ordering principle granting the latter primacy over the former is entrenched, clear, and understood. Litigants therefore will not bother to contest the existence or applicability of that ordering principle. Instead, they will argue over whether a conflict is present or whether the law, passed under Congress's Commerce Clause powers, infringes on Establishment Clause protections.

Thus, for the statute prohibiting employers from requiring employees to work on days of religious Sabbath, the key litigation question will be whether such a statute violates the Establishment Clause's prohibition on laws favoring religious interests. If it does—and yes, it does[58]—the applicable ordering principle indisputably privileges the First Amendment's Establishment Clause protections over Congress's legislative power under the Commerce Clause. The

58. *Estate of Thornton*, 472 U.S. at 710–11.

presence of an entrenched and unequivocal ordering principle takes the issue of whether the Establishment Clause protections trump a conflicting exercise of Commerce Clause legislative powers off the table, thereby narrowing the litigation to a different issue: whether the exercise of Commerce Clause legislative powers in question conflicts with the Establishment Clause protections.

Evidence from litigation supports the claim that the law of interpretation lacks ordering principles. Arguments in statutory-interpretation cases often focus on which injunctive interpretive rule holds a paramount status. Thus, in cases in which statutory text and legislative intent stand in conflict, the issue of whether text should trump intent, or vice versa, is very much front and center.[59] In *Arlington Central*, the majority and dissenting opinions were divided on this central legal issue.[60] If there had been a clearly established ordering principle to decide the issue, the opinions would not have needed to argue the point.

B. False Ordering Principles

The law of interpretation is almost all judge-made law; its elements are found in, and are the product of, court opinions.[61] The courts have not developed any set of positive norms to organize, prioritize, or rank the law of interpretation's vast and varied array of injunctive principles. Simply stated, the reporters are full of injunctive interpretive principles, but devoid of ordering principles that would serve to place the injunctive principles in an identifiable and uncontroversial hierarchy.

Many statements in cases look like, or at least purport to operate as, ordering principles establishing the hierarchic superiority of certain injunctive interpretive principles over others. Close examination, however, shows that these statements do not operate as ordering principles and do not establish hierarchies of injunctive principles. They instead constitute nothing more than standard conflicts and contradictions between injunctive interpretive principles.

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59. The lower federal court cases that deal with IDEA § 1415 and the shifting of expert-witness fees exemplify this phenomenon. *See infra* text accompanying notes 72–99.

60. *See infra* text accompanying notes 95–111.

61. O'Connor, *supra* note 44, at 336 (stating that "most of the 'rules' of statutory interpretation are judge-made"); Rosenkranz, *supra* note 27, at 2086 (observing that courts have developed principles of statutory interpretation).

For example, numerous case authorities seem to suggest that text trumps conflicting legislative intent. Thus, as mentioned in the Introduction,[62] many case authorities endorse the proposition that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[63] In isolation, this kind of statement might appear to represent an ordering principle that unequivocally establishes the primacy of statutory text—at least unambiguous statutory text—over conflicting legislative intent.

Other case authorities, however, undermine any ordering function this sort of statement might perform. Many cases communicate the notion that when "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters[,] . . . . the intention of the drafters, rather than the strict language, controls."[64] This statement, if viewed in isolation, also looks

62. *See supra* text accompanying note 20.

63. Dodd v. United States, 545 U.S. 353, 359 (2005); *see also* Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000))); *Hartford Underwriters*, 530 U.S. at 6 (repeating the same quotation from *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989)); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." (citation omitted) (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992))); *Estate of Cowart*, 505 U.S. at 475 ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."); Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.").

64. *Ron Pair Enters., Inc.*, 489 U.S. at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)) (internal quotation mark omitted); *see also* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 104–05 (2007) (Stevens, J., concurring) ("[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."); Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 565 (1990) (Blackmun, J., dissenting) ("The strict language of the Bankruptcy Code does not control, even if the statutory language has a 'plain' meaning, if the application of that language 'will produce a result demonstrably at odds with the intention of its drafters.'" (quoting *Ron Pair Enters., Inc.*, 489 U.S. at 242)); *Griffin*, 458 U.S. at 571 ("Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."); Lionberger v. Rouse, 76 U.S. (9. Wall.) 468, 475 (1869) ("It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice."); United States v. Kirby, 74 U.S. (7 Wall.) 482, 486–87 (1868) ("General terms should be so

as though it establishes an ordering principle, albeit an ordering principle that demands the opposite hierarchy from that demanded by the prior principle—legislative intent over conflicting statutory text.

The simultaneous existence of case authorities purporting to establish both textualism and intentionalism as hierarchically superior does not demonstrate that the law of interpretation indeed includes some sort of text-versus-intent ordering principle. To the contrary, it undermines any claim of superior hierarchic status and demonstrates the irreconcilably conflicted nature of the law of interpretation's injunctive principles. In simple terms, one valid and firmly established interpretive principle maintains that statutory text trumps conflicting legislative intent. Another equally valid and firmly established interpretive principle maintains the exact opposite—that legislative intent trumps conflicting statutory text. In the end, neither of these statements operates as an ordering principle capable of setting a definitive or unequivocal hierarchy between textualist and intentionalist principles. Both statements are really nothing more than iterations of two competing injunctive interpretive principles. With no ordering principle to referee the conflict, these contradictory assertions of normative supremacy merely cancel each other out.[65]

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limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language . . . ."); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 631 (1818) (stating that "general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them"); Eskridge, *supra* note 16, at 628 n.25 (stating that "[i]n a significant number of cases, the Court has pretty much admitted that it was displacing plain meaning with apparent legislative intent or purpose gleaned from legislative history" and citing numerous Supreme Court cases as examples); Manning, *supra* note 27, at 2399 & n.36 (listing several Supreme Court cases "sanctioning departures from clear statutory texts when exceptional circumstances disclosed 'a clearly expressed legislative intention to the contrary'" (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980))).

65. Nor does the frequency of use of different injunctive principles reveal any sort of hierarchy of injunctive principles within the law of interpretation. The more frequent use of some injunctive principles could signal that those principles are simply more popular with judges. If that is the case, then simply the personal preferences of judges for some injunctive interpretive principles over others—and not any true ordering principles within the law of interpretation—is at work.

Greater frequency of use could also signal that courts tend to apply some injunctive principles in a predictable sequence, and consequently that they apply the first principle in the sequence with greater frequency. For example, it may be that some courts apply textualism as a first method and only resort to intentionalist, purposive, or dynamic methods if textualism produces an unsatisfactory result. So long as textualism often produces satisfactory results, this sequential formula would result in courts' relying on textualism more than intentionalism or

Because the law of interpretation endorses two contrary injunctive principles and fails to establish a hierarchy between them, nothing within the law of interpretation compels courts to consistently apply one injunctive principle over another. As occurred in *Arlington Central*, judges who wish to apply a textualist methodology can rely on the case authorities stating that the sole function of courts is to apply the plain meaning of statutory text regardless of conflicting legislative intent. Likewise, judges who wish to apply an intentionalist methodology can rely on the cases favoring legislative intent over conflicting statutory text. Neither set of judges will be able to cite dispositive case authority that unequivocally and without substantial contradiction ranks one interpretive approach over the other. In other words, no trump cards that could settle a disagreement over injunctive principles between these two sets of judges exist within the law of interpretation.

C. Generating Rather than Resolving Interpretive Choice

So far, this Article has used *Arlington Central* and its text-versus-intent interpretive choice as an exemplar to illustrate two important features of the law of interpretation. First, the law of interpretation sanctions numerous injunctive interpretive principles that can produce divergent statutory interpretations. Second, it lacks any ordering principles that could determine which injunctive principle should prevail in cases of conflict.

Because of these two features, the law of interpretation generates, rather than resolves, instances of interpretive choice. Perhaps the easiest way to illustrate this point is to imagine a counterfactual law of interpretation that does not exhibit either of these two features. Removing either feature would eliminate the phenomenon of interpretive choice. First, imagine a law of interpretation that contains just one injunctive approach: interpret all statutes in accordance with the ordinary meaning of the inscribed and approved statutory words. True, even this simplified law of interpretation would not provide all of the answers. Given the inherent ambiguity of language, courts would still have to determine

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dynamism. Nothing in this practice, however, would signal any hierarchic superiority of textualism over other competing injunctive principles. Whatever the greater frequency with which some injunctive principles are used, that frequency does not provide ordering principles that resolve the problem in *Arlington Central* and discussed in this Article.

the ordinary meaning of statutory texts under varying circumstances.[66] But because such a law of interpretation would sanction only one general interpretive approach, interpretive choice between general interpretive approaches would be nonexistent. No textualism-versus-intentionalism conflict could arise, as intentionalism would not be sanctioned as a valid interpretive method.[67]

Second, imagine a law of interpretation that sanctioned competing injunctive interpretive principles but that also included a set of ordering principles establishing clear hierarchies for cases in which the injunctive principles led to conflicting statutory interpretations. Here too courts would face no interpretive choices, at least not in the sense of courts' choosing to privilege one injunctive principle over another. In every case in which different injunctive principles pointed to different statutory interpretations, an ordering principle would specify the appropriate hierarchy of principles, thus obviating any need for interpretive choice. In cases in which the text pointed to one statutory construction and legislative intent to a different construction, an established and unimpeachable ordering principle would determine which of the two should control.

The real law of interpretation, however, sanctions competing injunctive interpretive principles and lacks ordering principles.[68] Cases like *Arlington Central* are the natural result. In *Arlington Central*, textualist principles produced an interpretation of IDEA § 1415 that denied prevailing plaintiffs the recovery of expert-witness fees, whereas intentionalist principles led to an interpretation that permitted the recovery of those fees. Because the law of interpretation sanctions both textualist and intentionalist methodologies, both constructions count as plausible and legally legitimate IDEA § 1415 interpretations.

This situation left the Court with an interpretive choice: Should the Court enforce the statutory text or the contrary legislative intent? If the law of interpretation had offered an ordering principle establishing a definitive hierarchy between statutory text and

66. Courts using textualist methods sometimes disagree on the meaning of statutory text. *See, e.g.*, Muscarello v. United States, 524 U.S. 125, 126–27, 139 (1998) (interpreting the word "carries" in a sentencing statute in different text-based ways).

67. Interpretive choices among different textualist injunctive principles, however, would be possible. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697–98, 702–03 (1995) (rejecting the lowers court's usage of *noscitur sociis* and instead employing the canon against surplusage).

68. *See supra* Part I.A.

legislative intent, the case would have been easy. Whichever interpretation flowed from the hierarchically superior interpretive methodology would have been considered legally correct. But the law of interpretation lacks such an ordering principle, and it therefore provided no way to determine which interpretive methodology, or which statutory interpretation, was legally superior.

Because the law of interpretation sanctions competing methodologies, it generates interpretive choices. By failing to provide an ordering principle to mediate conflicts between competing interpretive methodologies, the law of interpretation offers no way to referee an interpretive choice and identify a single legally superior interpretation. Thus, in *Arlington Central*, neither the majority's textualist-derived interpretation nor the dissent's intentionalist-derived interpretation could claim a legally superior status. The two competing interpretive approaches—and two competing IDEA interpretations—were left in a state of exactly equal hierarchic status and legal validity.

The presence of two equally valid methodologies generates uncommon forms of legal ambiguity and judicial discretion not found in areas of law in which ordering principles are present. First, consider the manner in which the law of interpretation generates this form of ambiguity. As I suggest, legal materials themselves may exhibit an inherent ambiguity stemming from the imprecision of language.[69] The law of interpretation, however, can produce ambiguity even when the underlying legal materials themselves are relatively unambiguous. The reason that the meaning of the IDEA § 1415 fee-shifting provision was in doubt in *Arlington Central* had nothing to do with the IDEA itself. Both its text and its legislative history were relatively unambiguous.[70] Instead, the meaning of the IDEA § 1415 fee-shifting provision was ambiguous because (1) the law of interpretation sanctions competing interpretive methodologies, but (2) it offers no legal formula for determining which interpretive methodology, and which consequent interpretation, should prevail. In other words, the law of interpretation transformed unambiguous statutory materials into an ambiguous statute.[71]

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69. *See supra* text accompanying note 28.

70. *See supra* text accompanying notes 30–32.

71. Compare the ambiguity of the IDEA in *Arlington Central* with my hypothetical statute regarding work on the Sabbath. *See supra* text accompanying notes 50–52. In cases involving a conflict between the Commerce Clause and a First Amendment protection, an unimpeachable

As a matter of course, courts often must exercise discretion in interpreting and applying inherently ambiguous legal materials. The law of interpretation's lack of ordering principles, however, offers courts discretion on a completely separate plane. Because it lacks ordering principles, the law of interpretation affords courts the legally unconstrained discretion to choose between conflicting interpretive principles. Thus, in *Arlington Central*, should the Court have employed textualist or intentionalist injunctive interpretive principles? Because the law of interpretation does not include an ordering principle that definitively settles this question, the Court exercised legally unconstrained discretion in deciding whether text trumped conflicting intent, or vice versa.[72]

II. THE JUDICIAL RESPONSE TO INTERPRETIVE CHOICE: THE AVOIDANCE MANEUVER

In written opinions, judges rarely acknowledge that the law of interpretation fails to provide definitive answers in cases of interpretive choice or that factors beyond the law of interpretation are determinative. Instead, judges respond to interpretive choice by deploying an avoidance maneuver. The avoidance maneuver comes in two archetypal variants.

In one archetypal variant, judges will acknowledge that different injunctive interpretive principles point to different interpretations, but they will simultaneously deny the existence of an interpretive choice. Judges will effect this denial by expressly claiming, or implicitly suggesting, that the law of interpretation favors certain injunctive interpretive principles over others and, therefore, that it favors certain statutory interpretations over others. Thus, for the

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ordering principle dictates that the latter trumps the former. Any ambiguity in the case would stem from uncertainty about the contours of the Commerce Clause or the First Amendment. The question would not be, "Does the Commerce Clause trump the First Amendment, or vice versa?" An ordering principle unequivocally answers this question. Instead, the question would be, "Does the First Amendment offer protection against laws prohibiting private employers from requiring work on the Sabbath?" In *Arlington Central*, the ambiguity stemmed from the law of interpretation's lack of an ordering principle. Should statutory text trump legislative intent, or vice versa? The law of interpretation left the outcome uncertain.

72. Other areas of law furnish ordering principles and, therefore, limit judicial discretion to a single plane. Thus, courts have no discretion to determine whether First Amendment protections or Commerce Clause legislative powers are superior. Because an ordering principle exists, courts have discretion only on a single plane: defining the meanings and scopes of the First Amendment and Commerce Clause or, in other words, determining whether an exercise of the Commerce Clause power stands in conflict with any First Amendment rights.

textualism-versus-intentionalism interpretive choice presented by IDEA § 1415 in *Arlington Central*, a judge might recognize and even discuss both interpretive methodologies, but he will contend that he has no discretion to choose between the differing methodologies because the law of interpretation ultimately favors one methodology over the other.[73]

In the second archetypal variant, judges will simply fail to grapple with the competing injunctive interpretive principles. Instead, judges will simply select an interpretive principle and apply it with little or no explanation as to why certain competing interpretive principles were subordinated. In the context of the textualism-versus-intentionalism interpretive choice presented by IDEA § 1415, for example, Justice Breyer simply applied intentionalism over textualism, but he offered no discussion or explanation as to why legislative intent should trump contrary statutory text.[74]

Both avoidance maneuver variants are problematic because (1) they misrepresent the law of interpretation and (2) they suppress public discussion of decisive extralegal factors. Section A uses *Arlington Central* and several lower federal court opinions dealing with expert-witness fee shifting to illustrate the avoidance maneuver in action. Section B examines what might motivate courts to resort to the avoidance maneuver in cases of interpretive choice.

A. The Avoidance Maneuver in Arlington Central *and Other IDEA § 1415 Cases*

Thus far, this Article has used *Arlington Central* as the exemplar case of interpretive choice. Numerous lower federal courts, however, have issued opinions on expert-witness fee shifting under IDEA § 1415.[75] The lower court opinions employed the two variants of the avoidance maneuver. Some opinions expressly or implicitly suggested that the law of interpretation favors text over intent, or vice versa.[76]

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73. *See infra* text accompanying notes 95–114.

74. *See infra* text accompanying notes 115–26.

75. Before the Supreme Court's June 2006 decision in *Arlington Central*, forty-six cases available in the Westlaw database considered whether prevailing parties may recover expert-witness fees under IDEA § 1415. The circuit courts had decided six cases on the issue, and the district courts had decided forty, twenty-two of which were published in reporters and eighteen of which were unpublished but available in the Westlaw database. For a list of these cases, see *infra* Appendix.

76. Four of the six circuit court cases explicitly discussed whether statutory text or legislative intent should prevail. *See* Goldring v. District of Columbia, 416 F.3d 70, 73–82 (D.C.

Others simply mentioned either textualist themes or intentionalist themes but failed to grapple with any conflicting interpretive methods.[77] Importantly, none of the opinions argued or suggested that the law of interpretation could not resolve the choice between statutory text and legislative intent. Nor did any of the opinions suggest that legally unconstrained judicial discretion or extralegal factors were central in deciding whether text or intent should control.

At one extreme of the first variant of the avoidance maneuver, some of the opinions argued pointedly and explicitly that the law of interpretation grants one interpretive principle a trump card over another and that a legally superior statutory interpretation is therefore obvious. For example, in *Goldring v. District of Columbia*,[78] the U.S. Court of Appeals for the District of Columbia Circuit asserted that the law of interpretation does not permit any reference to legislative history when statutory text is unambiguous. Citing a frequently employed injunctive interpretive principle, the *Goldring* majority declared that "there should be no resort to legislative history when language is plain and does not lead to an absurd result."[79] The court bolstered this declaration with a citation to a string of similar supporting principles.[80] Because the *Goldring* majority posited that the law of interpretation favors statutory text over contrary legislative

Cir. 2005) (rejecting reliance on legislative history when interpreting IDEA § 1415); Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332, 335–40 (2d Cir. 2005), *vacated*, 548 U.S. 291 (2006) (noting that although other courts had relied on the text of IDEA § 1415 alone, the legislative history should be relevant to an interpretation of the statute); T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 481–82 (7th Cir. 2003) (examining the legislative history of IDEA § 1415 but ultimately relying on the statutory text alone to reach a decision); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1032–33 (8th Cir. 2003) (finding that because the text of IDEA § 1415 is not ambiguous, there was no need to look to its legislative history). Two circuit court cases did not discuss the text-versus-intent issue. In *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3d Cir. 1988), the Third Circuit determined that fees charged by a lay advocate are not recoverable, but the court noted in dicta and without analysis that fees for anything qualifying as expert-witness work could be recovered. *Id.* at 62–63. Though *Arons* offered no analysis of expert-witness fee shifting under IDEA § 1415, later courts cited *Arons* for the proposition that the Third Circuit had interpreted the IDEA to permit expert-witness fee shifting. *E.g.*, *Murphy*, 402 F.3d at 334; P.G. v. Brick Twp. Bd. of Educ., 124 F. Supp. 2d 251, 267 (D.N.J. 2000). In *Missouri Department of Elementary & Secondary Education v. Springfield R-12 School District*, 358 F.3d 992 (8th Cir. 2004), the Eighth Circuit offered no analysis of the text-versus-intent issue and merely cited circuit precedent establishing that expert-witness fees are not recoverable. *Id.* at 1002.

77. *See infra* text accompanying notes 115–26.

78. Goldring v. District of Columbia, 416 F.3d 70 (D.C. Cir. 2005).

79. *Id.* at 75.

80. *Id*. at 74–75.

intent, it concluded that the "correct decision" was "not . . . difficult to reach."[81] As portrayed by the *Goldring* majority, the law of interpretation grants clear statutory text a trump card over clear contrary evidence of legislative intent. Therefore, per the court's logic, the court did not face an interpretive choice and did not exercise legally unconstrained judicial discretion. The law of interpretation pointed to a single legally superior construction of the IDEA § 1415 fee-shifting provision, and any contrary construction was legally inferior.

The dissenting opinion in *Goldring* also featured a pointed and explicit treatment of the text-versus-intent dilemma. Somewhat ironically, however, it argued that the law of interpretation holds that even clear statutory text can be trumped by contrary legislative intent.[82] Like the majority opinion, the *Goldring* dissent explicitly enunciated injunctive interpretive principles. The dissent cited the Supreme Court for the injunctive interpretive principles that "the ultimate purpose of statutory construction is to effectuate congressional intent"[83] and that "the strong presumption that the plain language of the statute expresses congressional intent [can be] rebutted . . . when a contrary legislative intent is clearly expressed."[84] Like the *Goldring* majority opinion, the dissent offered supporting citations to related injunctive interpretive principles, all of which bolstered the notion that the law of interpretation favors clearly expressed legislative intent over contrary statutory text.[85] Thus, both the majority and dissenting opinions in *Goldring* argued that the case did not present an interpretive choice because the law of interpretation decidedly favored one set of interpretive principles over another and, therefore, decidedly favored one IDEA § 1415 interpretation over another.

The majority opinion in *Neosho R-V School District v. Clark*,[86] a case from the U.S. Court of Appeals for the Eighth Circuit, provides another example of the first variant of the avoidance maneuver.[87] Like the *Goldring* majority opinion, the *Neosho* majority opinion

81. *Id*. at 73.

82. *Id*. at 80 (Rogers, J., dissenting).

83. *Id*.

84. *Id*. (alteration and omission in original) (quoting Ardestani v. INS, 502 U.S. 129, 135–36 (1991)) (internal quotation marks omitted).

85. *Id*.

86. Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003).

87. *Id.* at 1032–33.

explicitly argued that the law of interpretation requires courts to follow clear statutory text over contrary legislative intent. In the words of the Eighth Circuit, "[T]he mere fact that statutory provisions conflict with language in the legislative history is not an exceptional circumstance permitting a court to apply the legislative history rather than the statute."[88] The *Neosho* majority bolstered this interpretive principle with citations to cases enunciating analogous injunctive interpretive principles.[89] Because the *Neosho* majority opinion cast the law of interpretation as granting clear statutory text a trump over clear, but contrary, legislative intent, it implicitly denied the presence of any interpretive choice.

Other opinions exemplifying the first variant of the avoidance maneuver were less explicit and pointed in citations to injunctive interpretive principles. Still, these opinions strongly implied that courts do not face interpretive choices or exercise legally unfettered discretion because the law of interpretation grants a trump to either unambiguous statutory text or conflicting unambiguous legislative intent. The dissenting opinion in *Neosho* fits this model, as does the Second Circuit's decision in *Murphy v. Arlington Central*,[90] the case that was appealed to the Supreme Court in *Arlington Central*.

Unlike the dissent in *Goldring*, the *Neosho* dissent did not explicitly cite injunctive interpretive principles prioritizing clear legislative intent over clear statutory text. It would have been easy to offer explicit citations. Eighth Circuit cases have long recognized the principle that clear legislative intent may trump contrary statutory text.[91] Indeed, earlier in the same year that it decided *Neosho*, the

88. *Id.* at 1033 (quoting United States v. Erickson P'ship, 856 F.2d 1068, 1070 (8th Cir. 1988)) (internal quotation marks omitted).

89. *Id.* at 1032–33.

90. Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 (2d Cir. 2005), *vacated*, 548 U.S. 291 (2006).

91. *See, e.g.*, *In re* Waugh, 109 F.3d 489, 493 (8th Cir. 1997) (holding that the intent of Congress must trump the literal meaning of the statutory text at issue and citing *Ron Pair Enterprises, Inc.*, for the proposition that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters'" (alterations in original) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989))); Mo. Dep't of Revenue v. L.J. O'Neill Shoe Co., 64 F.3d 1146, 1150 (8th Cir. 1995) (citing the same proposition from *Ron Pair Enterprises*); Minnesota v. Hoffman, 543 F.2d 1198, 1202 (8th Cir. 1976) ("[A] statute will not be read literally if such a reading leads to a result that conflicts with Congress' intent."); Derengowski v. United States, 404 F.2d 778, 780 (8th Cir. 1968) ("The maxim of strict construction may not be utilized to defeat the clear intent of a statute, nor to encompass within its meaning something obviously omitted from its terms.").

Eighth Circuit explicitly recognized that a court may apply legislative intent over contrary statutory text when "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."[92] Though it omitted a citation to that particular case, the *Neosho* dissent was built on this principle. The *Neosho* dissent explained that "Congress's clear legislative intent, [as well as] the nature and purpose of the IDEA[,] compels an award of expert witness fees as part of the costs."[93] In stressing that the superiority of legislative intent and statutory purpose "compel[led]" a certain interpretation of IDEA § 1415, the *Neosho* dissent implied that the law of interpretation requires courts to apply clearly expressed legislative intent over contrary statutory text.

The Second Circuit's IDEA decision, *Murphy v. Arlington Central*,[94] in many ways paralleled the formula used by the *Neosho* dissent. Like the *Neosho* dissent, the *Murphy* decision failed to cite any cases for the proposition that clear intent should trump clear text. It nonetheless strongly implied that these principles compelled or required the court to favor intent over text. The closest the *Murphy* court came to avowing an explicit injunctive interpretive rule was with the following language: "While we appreciate—and in practice honor, wherever possible—the virtues of relying solely on statutory text, at times text without context can lead to results that Congress did not intend."[95] This statement makes sense only if the Second Circuit implicitly relied on an injunctive interpretive principle granting clearly expressed legislative intent a trump over unambiguous statutory text. Just as in the *Neosho* dissent, the court had circuit precedent that it could have relied on for the principle that clear intent will be determinative, even when it is contrary to the clear text of a statute.[96]

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92. *In re* Kolich, 328 F.3d 406, 409 (8th Cir. 2003) (citation omitted). In *In re Kolich*, 328 F.3d 406 (8th Cir. 2003), the Eighth Circuit acknowledged that other courts, in interpreting a particular section of the Bankruptcy Code, had refused to "apply the [statutory-text] formula literally" because literal application "would [have] produce[d] an outcome at odds with the purpose of Congress." *Id*. (citing Nelson v. Scala, 192 F.3d 32, 35 (1st Cir. 1999)). Nevertheless, the Eighth Circuit found that literal application of the statutory clause in question would not conflict with legislative intent. *Id.* at 410.

93. *Neosho R-V Sch. Dist*., 315 F.3d at 1035 (Pratt, J., dissenting).

94. *Murphy*, 402 F.3d at 335–40.

95. *Id*. at 336.

96. Before the 2005 *Murphy* opinion, the Second Circuit had decided two cases in which it endorsed an intent-over-text principle. *See* Tyler v. Douglas, 280 F.3d 116, 123 (2d Cir. 2001) ("Although a statute's plain language is generally dispositive, it sometimes will yield when

Also paralleling the *Neosho* dissent was the *Murphy* court's argument that legislative intent, along with two other factors,[97] "require[d it] to find that Congress intended to and did authorize the reimbursement of expert fees in IDEA actions."[98] A bit later in the opinion, the Second Circuit reiterated that legislative intent required the court to construe the IDEA as permitting recovery of expert-witness fees.[99] By stressing that the IDEA interpretation was required, the *Murphy* decision strongly implied that the law of interpretation privileges clear legislative intent over clear statutory text, at least in the narrow circumstances presented by the case. Neither the *Murphy* decision nor the *Neosho* dissent suggested that judicial discretion or extralegal factors compelled an IDEA interpretation privileging legislative intent over statutory text. To the contrary, both implied that the law of interpretation compels and requires a particular IDEA construction.

Like the various *Goldring*, *Neosho*, and *Murphy* opinions, the Court's majority and dissent in *Arlington Central* deployed the first variant of the avoidance maneuver. Both the majority and dissenting opinions in *Arlington Central* acknowledged that the law of interpretation sanctions injunctive interpretive rules that could support more than one IDEA interpretation. Ultimately, however, both opinions argued or implied that the law of interpretation identifies both a legally superior interpretive approach and a legally superior interpretation of IDEA § 1415. In other words, both

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evidence of legislative history is so strong to the contrary that giving a literal reading to the statutory language will result in defeating Congress' purpose in enacting it." (quoting Greene v. United States, 79 F.3d 1348, 1356 (2d Cir. 1996))); United States v. Arnold, 126 F.3d 82, 89 (2d Cir. 1997) ("A statute should not be literally applied if it results in an interpretation clearly at odds with the intent of the drafters."). After the *Murphy* opinion, Second Circuit cases continued to recognize the intent-over-text principle. *See* United States v. Whitley, 529 F.3d 150, 156 (2d Cir. 2008) ("We acknowledge that where the literal meaning of a statute yields an illogical result or one manifestly not intended by the legislature, departure from strict adherence to statutory text may be warranted."); Goldman v. Cohen, 445 F.3d 152, 155 (2d Cir. 2006) ("The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." (quoting *Ron Pair Enters., Inc.*, 489 U.S. at 242) (internal quotation marks omitted)).

97. First, the *Murphy* court believed that dicta in the Supreme Court case of *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), was consistent with its analysis of IDEA § 1415's legislative history. *Murphy*, 402 F.3d at 336–37. Second, the *Murphy* court believed that congressional inaction following the *Casey* decision suggested that the *Casey* dicta had been correct. *Id.* at 337.

98. *Id*. at 336.

99. *Id*. at 337.

Arlington Central opinions ultimately argued that the law of interpretation obviates any interpretive choice between textualism and intentionalism, and that it thereby denies any meaningful role for legally unconstrained judicial discretion.

In casting the law of interpretation as establishing that statutory text trumps contrary legislative intent, the *Arlington Central* majority invoked a variant of the familiar injunctive interpretive principle used in the *Goldring* and *Neosho* majority opinions. The *Arlington Central* majority stated that "[w]hen the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'"[100] The majority opinion then outlined the reasons it found the text of the IDEA to be unambiguous.[101] For the majority, "the terms of the IDEA overwhelmingly support[ed] the conclusion that prevailing parents may not recover the costs of experts or consultants."[102]

The *Arlington Central* majority conceded that the legislative record was contrary to its text-centered reading of the IDEA and admitted that legislative history might deserve "merit in another context."[103] Ultimately, however, the majority opinion concluded that "where everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough."[104] As the *Arlington Central* majority cast it, the law of interpretation permits intentionalist interpretive methods and consultation of legislative history in some circumstances. When statutory text is unambiguous, however, the law of interpretation grants statutory text a trump over evidence of contrary legislative intent and, therefore, produces the IDEA interpretation advanced by

100. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006).

101. The majority found that the text of the IDEA provision on cost shifting—as well as other statutory provisions that define "costs" and previous cases defining "costs" in other contexts—supported this construction of the IDEA. *Id.* at 296–98, 300–03. In addition, the majority argued that under the clear-statement rule of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), because the IDEA was passed pursuant to Congress's Spending Clause power, the IDEA could not be read as providing states with clear notice that they would have to pay prevailing parties' expert-witness fees in IDEA cases. *Arlington Cent.*, 548 U.S. at 295–96. In other words, the *Pennhurst* principle provides an additional reason to favor statutory text over contrary legislative intent that might not be present in statutes that are not passed pursuant to Congress's Spending Clause powers.

102. *Id.* at 300.

103. *Id.* at 304.

104. *Id*.

the majority.[105] Thus, according to the *Arlington Central* majority, no interpretive choice existed between text and intent: the law of interpretation, not legally unconstrained judicial discretion, furnished the grounds for saying that statutory text trumped contrary legislative intent.

For its part, the *Arlington Central* dissent similarly cast the law of interpretation—and not judicial discretion or extralegal factors—as the arbiter between competing text- and intent-derived interpretations of the IDEA. According to the dissent, however, the law of interpretation favors legislative intent over statutory text. The dissent offered an exhaustive recounting of the legislative history establishing that Congress understood that the IDEA would permit prevailing claimants to recover expert-witness fees as part of their costs. The centerpiece of this evidence of legislative intent was the House-Senate conference committee's report on the IDEA. The conference committee's report stated that "[t]he conferees intend[ed] that the term 'attorneys' fees as part of costs' [would] include reasonable expenses and fees of expert witnesses."[106] In addition, the dissent described several other aspects of the record of legislative history that demonstrated Congress's understanding and intent throughout the legislative process for prevailing claimants to recover expert-witness fees as part of their costs.[107] Ultimately, the dissent

105. The majority also held that when the Court is interpreting legislation passed pursuant to the Spending Clause, it has additional reason to prefer clear text over contrary legislative intent. Specifically, Justice Alito noted that the majority "[could]not say that the legislative history on which [the] respondents [were] rely[ing was] sufficient to provide the requisite fair notice" of the cost to states. *Id*.

106. H.R. REP. NO. 99-687, at 5 (1986) (Conf. Rep.).

107. *Arlington Cent.*, 548 U.S. at 309–13 (Breyer, J., dissenting). In essence, the dissent argued that the record of legislative history suggested that the House, the Senate, and the conference committee had all intended to permit the shifting of expert-witness fees, but that the conference had adopted clumsy language that failed to express that intent unequivocally. On the Senate side, a bipartisan compromise produced language that would have allowed courts to award "a reasonable attorney's fee in addition to the costs to a parent" who prevailed in an IDEA action. S. REP. NO. 99-112, pt. 2, at 15 (1985). On the floor of the Senate, Senator Lowell Weicker, Jr., explained that this language reflected the legislature's "intent that such awards [would] include, at the discretion of the court, reasonable attorney's fees, [and] necessary expert witness fees." 131 CONG. REC. 21,390 (1985) (statement of Sen. Lowell Weicker, Jr.). The *Arlington Central* dissent argued that "[t]he House version of the bill also reflected an intention to authorize recovery of expert costs." *Arlington Cent.*, 548 U.S. at 310 (Breyer, J., dissenting). The House Committee on Education and Labor reported a version of the bill that would have permitted courts to "award reasonable attorneys' fees, costs and expenses." H.R. REP. NO. 99-296, at 1, 5 (1985) (internal quotation marks omitted). The House report stated the following: "The phrase 'expenses and costs' includes expenses of expert witnesses." *Id.* at 6. The

concluded, "Members of both Houses of Congress voted to adopt both the statutory text [of the IDEA] and the Conference Report that made clear that the statute's words include[d] the expert costs here in question."[108]

The dissent also addressed the text of the IDEA, admitting that the majority's interpretation represented the most "linguistically natural" reading of the text.[109] But the dissent argued that such an understanding of the text was "not inevitable."[110] To the dissent, "the word 'costs' alone, sa[id] nothing at all about which costs f[e]ll within its scope" and the text of the IDEA did not "unambiguously foreclose an award of expert fees."[111] Moreover, the dissent argued that "one can, consistent with the language," read the IDEA as permitting recovery of expert-witness fees by prevailing IDEA claimants.[112] In short, the *Arlington Central* dissent did not base its IDEA interpretation on the most natural meaning of the text, but instead on a merely plausible textual construction that could be made compatible with the contours of the unambiguously expressed legislative intent.[113]

In much the same style employed in the *Neosho* dissent and the *Murphy* opinion,[114] the *Arlington Central* dissent did not bother to offer an explicit citation to cases enunciating injunctive interpretive principles. Nonetheless, the structure of the argument in the *Arlington Central* dissent plainly relied on a particular injunctive interpretive principle. To simplify, the dissent (1) established clear evidence of the legislature's intent that expert-witness fees should be

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conference committee reconciled the difference in the Senate and House versions of the cost-shifting provision by adopting an amendment providing that "the court, in its discretion, may award reasonable attorneys' fees as part of the costs." H.R. REP. NO. 99-687, at 5 (internal quotation marks omitted). The conference committee's report explained that the conferees intended for "the term 'attorneys' fees as part of the costs' [to] include reasonable expenses and fees of expert witnesses." *Id.*

108. *Arlington Cent.*, 548 U.S. at 313 (Breyer, J., dissenting). Justice Breyer also bolstered his evidence of legislative intent with the argument that adoption of the interpretation advanced by the majority would undermine the basic purpose of the IDEA. *Id.* at 313–16.

109. *Id*. at 319.

110. *Id*.

111. *Id*.

112. *Id*.

113. Arguably, the dissent engaged in what Dean Roscoe Pound termed "spurious interpretation." *See* Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382 (1907) ("[T]he object of spurious interpretation is to make, unmake, or remake, and not merely discover [the meaning of statutory text].").

114. *See supra* text accompanying notes 91–94.

recoverable under IDEA § 1415; (2) argued that the text of IDEA § 1415 was susceptible to a construction permitting recovery of expert-witness fees; and (3) concluded that the Court should adopt the interpretation matching the clearly expressed legislative intent, rather that the most linguistically natural interpretation. The dissent did not pursue this structure to suggest that the Court is free to engage in a legally unconstrained exercise of judicial discretion, giving IDEA § 1415 whatever meaning it might prefer.[115] To the contrary, the dissent adopted this strategy because it implicitly relied on the principle that courts should seek to interpret statutes in accordance with the clear intent of Congress, as long as the statutory text is susceptible to a meaning consistent with that clear intent. The pedigree of this interpretive principle is well known and firmly established.[116]

The dissent's choice of this interpretive principle is interesting. The *Arlington Central* majority opinion, as well as the various *Goldring*, *Neosho*, and *Murphy* opinions, all acknowledged that the statutory text and the legislative intent stood in irreconcilable conflict. They then argued or implied that the law of interpretation negated any interpretive choice by granting unambiguous text a trump over unambiguous intent, or vice versa. Justice Breyer's *Arlington Central*

115. The dissent stated that it could "find no good reason . . . to interpret the language of [the] statute as meaning the precise opposite of what Congress told us it intended." *Arlington Cent.*, 548 U.S. at 309 (Breyer, J., dissenting). This statement suggests that the dissent understood that the law of interpretation does not require courts to apply the most linguistically natural reading of a statutory text over contrary legislative intent.

116. *See* United States v. Campos-Serrano, 404 U.S. 293, 298 (1971) ("If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered."); *see also* Johnson v. United States, 529 U.S. 694, 706–07 & n.9 (2000) (adopting an interpretation that departed from the most natural or ordinary meaning of the statutory text, in part because the ordinary meaning would have contravened "clear congressional policy"); 73 AM. JUR. 2D *Statutes* § 125 (2001) ("In construing a statute, the uncommon sense of a term may be relied on . . . when the realization of clear congressional policy is in tension with the result that customary interpretive rules would deliver. Where it is evident that some other meaning was intended, and the application of the commonly accepted meaning would operate to defeat the purpose of the statute and the intent of the legislature, a departure from the usual or natural meaning of the words in a statute may be deemed proper. Indeed, it is an old and well-established maxim that words ought to be more subservient to the intent, and not the intent to the words. Moreover, it is a general rule that the manifest intent of the legislature will prevail over the literal import of the words."); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:7 (7th ed. 2007) ("Although many expressions favoring literal interpretation may be found in caselaw, it is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent . . . the words of the statute will be construed to agree with the intention of the legislature.").

dissent, in contrast, argued that the text and intent could be made compatible, and that the law of interpretation requires courts to adopt the reading most compatible with clearly expressed legislative intent, even if that reading is at odds with the most natural textual construction. Thus, the *Arlington Central* dissent relied on a narrower principle than some of the lower court opinions that favored legislative intent over contrary statutory text. Some of those opinions went as far as to state or imply that clearly expressed legislative intent trumps contrary statutory text.[117] Justice Breyer's *Arlington Central* dissent argued only that clearly expressed legislative intent should trump the most natural reading of statutory text—provided that the text can be given a construction compatible with legislative intent. As the *Arlington Central* dissent understood it, the law of interpretation directs courts to bend statutory text to conform to clearly expressed legislative intent, rather than to honor the most natural reading of statutory text in the face of contrary legislative intent.[118]

Though Justice Breyer's approach was subtly different from that of the lower courts, it had the same effect.[119] As with the other opinions, the *Arlington Central* dissent implied that the law of interpretation dissolves any possible interpretive choice. The dissent's suggestion was not that the law of interpretation grants the Court unfettered discretion to choose between text and contrary legislative intent. Rather, the suggestion was more subtle: that the law of interpretation favors clearly expressed legislative intent over the most linguistically natural meaning of statutory text.

The majority and dissenting opinions in *Arlington Central*, as well as the various *Goldring*, *Neosho*, and *Murphy* opinions, demonstrate the first variant of the avoidance maneuver. Numerous examples of the second variant of the avoidance maneuver can also

117. *See supra* text accompanying notes 76–79, 84–94.

118. In other words, as the dissent understood the law of interpretation, unambiguous evidence of legislative intent trumps the most natural reading of a statutory text, at least when the text will permit a meaning consistent with the legislative intent.

119. This approach strongly suggests that the dissent understood the law of interpretation in a different fashion from the *Arlington Central* majority and the panels of circuit judges in *Goldring*, *Neosho*, and *Murphy*. Those judges framed the central question as whether the law of interpretation grants clear text a trump over clear legislative intent, or vice versa. The *Arlington Central* dissent, by contrast, implied that it understood the law of interpretation as obligating courts to ask a preliminary question: Can statutory text be made consistent with the clearly expressed legislative intent? Only if the answer to this question were "no" would it become necessary to decide whether the law of interpretation grants clear text a trump over clear and irreconcilably conflicting legislative intent.

be found among the lower federal court cases on the shifting of expert-witness fees under the IDEA. These opinions did not grapple with the issue of whether the law of interpretation favors text or contrary legislative intent. Instead, they simply applied either textualist or intentionalist principles with little or no analysis, and they adopted the consequent IDEA § 1415 construction. As might be expected, these cases were often found at the district court level, where docket loads may not always permit expansive analysis in written opinions.[120]

For example, in *Field v. Haddonfield Board of Education*,[121] the U.S. District Court for the District of New Jersey allowed recovery of expert-witness fees under IDEA § 1415.[122] The opinion merely cited the conference committee's report on the issue; it offered no discussion of why that report should prevail over the text of IDEA § 1415.[123] Similarly, in *Aranow v. District of Columbia*,[124] the District Court for the District of Columbia permitted recovery of expert-witness fees and stated nothing more than the following: "Based upon a review of the legislative history of . . . 20 U.S.C. § 1415(e), the Court is convinced that the award of fees for the services of an expert witness is not barred under the Supreme Court's analysis in *West Virginia* [*University*] *Hospitals, Inc.* [*v. Casey*[125]] . . . and is consistent with Congress' purpose in enacting [§ 1415(e)]."[126] The U.S. District Court for the District of Connecticut was even more succinct in *Mr. & Mrs. B. v. Weston Board of Education.*[127] In that case, the Court cited the conference committee's report and a decision from another federal district court and, without explanation, concluded that "the

120. Not all of the federal district court cases on expert-witness fee shifting under the IDEA are characterized by superficial analysis. *See, e.g.*, Brillon *ex rel.* Brillon v. Klein Indep. Sch. Dist., 274 F. Supp. 2d 864, 870–72 (S.D. Tex. 2003) (discussing § 1415's text, legislative history, statutory purpose, and interpretation in other courts), *rev'd in part*, 100 Fed. App'x 309 (5th Cir. 2004); Pazik v. Gateway Reg'l Sch. Dist., 130 F. Supp. 2d 217, 220–21 (D. Mass. 2001) (analyzing the text, legislative intent, and statutory purpose of § 1415 before discussing the Supreme Court's and First Circuit's uses of legislative history).

121. Field v. Haddonfield Bd. of Educ., 769 F. Supp. 1313 (D.N.J. 1991).

122. *Id.* at 1323.

123. *Id.*

124. Aranow v. District of Columbia, 791 F. Supp. 318 (D.D.C. 1992).

125. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991).

126. *Aranow*, 791 F. Supp. at 318. This sparse treatment is particularly troubling because the district court's opinion reconsidered and altered its previous decision to deny recovery of expert-witness fees in the same case based on the text of IDEA § 1415. *Compare id.*, *with* Aranow v. District of Columbia, 780 F. Supp. 46, 48 (D.D.C. 1992).

127. Mr. & Mrs. B. v. Weston Bd. of Educ., 34 F. Supp. 2d 777 (D. Conn. 1999).

view that expert witness fees are recoverable under the IDEA as part of attorney's fees and costs [was] the better one."[128]

Cases offering little or no analysis of whether the law of interpretation favors clear text or clear contrary legislative intent are not limited to opinions permitting recovery of expert-witness fees under IDEA § 1415. For example, in *Hiram C. v. Manteca Unified School District*,[129] the U.S. District Court for the Eastern District of California denied recovery of expert-witness fees and stated little more than that "the IDEA has no provision for them" and that it was "reluctant" to award them "without any clear authority from Congress."[130] In *Mayo v. Booker*,[131] the U.S. District Court for the District of Maryland was even more fleeting in denying recovery of expert-witness fees under IDEA § 1415.[132] The court merely stated that, in its view, "expert witness fees [were] not recoverable under the IDEA, which provides only for shifting of 'reasonable attorneys' fees as part of the costs.'"[133]

B. Why Deploy the Avoidance Maneuver?

Federal courts' treatment of expert-witness fee shifting under IDEA § 1415 illustrates the avoidance maneuver in the context of a conflict between unambiguous statutory text and unambiguous contrary legislative intent. Though the law of interpretation does not include an ordering principle to resolve this conflict, none of the federal courts interpreting IDEA § 1415 openly confronted this reality. Instead, they deployed some variation of the avoidance maneuver.

Why do courts deploy the avoidance maneuver? Why do they deny the presence of interpretive choice? Why do they deny the roles of legally unconstrained judicial discretion and extralegal factors in resolving interpretive choices? Rule-of-law values prompt courts to portray the law of interpretation as doing more work than it is actually capable of doing in resolving interpretive choices. At bottom, rule-of-law values maintain that established legal principles, rather

128. *Id*. at 784.

129. Hiram C. v. Manteca Unified Sch. Dist., No. S-03-2568 WBS KJM, 2004 WL 4999156 (E.D. Cal. Nov. 5, 2004).

130. *Id.* at *3–4.

131. Mayo v. Booker, 56 F. Supp. 2d 597 (D. Md. 1999).

132. *See id.* at 599.

133. *Id.*

than legally unconstrained discretion, should govern.[134] Applied to courts, rule-of-law values dictate that judges should both arrive at and justify their decisions through legal norms, not by reference to extralegal factors such as policy considerations or personal preferences.[135] Applied to cases presenting interpretive choices, rule-

134. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944) (defining the rule of law as requiring "that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances"); POSNER, *supra* note 34, at 89 ("[O]ne meaning of the term 'rule of law' . . . . is 'a government of laws not men'—that is, that law is the ruler of the nation rather than officials being the rulers.").

135. Extralegal policy considerations and the personal preferences of judges probably do affect judicial decisionmaking. *See, e.g.*, POSNER, *supra* note 34, at 9, 81 (acknowledging that extralegal factors such as judges' "own political opinions or policy judgments" play a role in judicial decisionmaking and referring to judges as "*occasional legislators*"); RICHARD A. POSNER, OVERCOMING LAW 123–26 (1995) (analyzing how judicial behavior can be affected by extralegal factors and personal preferences); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86–96 (2002) (discussing the attitudinal model, which posits that the political ideologies of judges may drive their judicial decisions); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6, 94 (2005) (concluding that canons of construction "are regularly used in an instrumental if not ideologically conscious manner" and that the use of canons "is fundamentally a façade to justify certain judicially devised policy preferences"); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265–79 (1997) (discussing the attitudinal model, which "suggests that judicial decisionmaking is not based upon reasoned judgment from precedent, but rather upon each judge's political ideology and the identity of the parties"); Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN'S L. REV. 231, 244–45 (2009) (discussing the attitudinal model, which "posits that judges decide cases based on their political attitudes and values").

As a justification for judicial decisions, however, extralegal factors are almost never considered sufficient. Courts are expected to offer justifications for their decisions that are rooted in the application of legal principles, rather than extralegal factors. *See* Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 33 (1993) ("The purpose of the opinion is, rather, to show that the decision is not arbitrary but can be supported rationally and is not inconsistent with prior decisions of the court or, in the case of a statute, with the text of the statute."); Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137, 137 (1994) ("The legitimacy of the Supreme Court is widely assumed to depend on the perception that its decisions are dictated by law."); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 155–56 (1994) ("Presumably, courts could tell the loser: 'You have lost because we, the judges, have chosen that you should lose. We have so chosen because we think society would be better off if you lost.' Courts have decided, however, in all of the societies that have a modern judicial system, to avoid the appearance of deciding cases based on judicial whim. . . . [I]n all modern societies, and in all cases, judges tell the loser: 'You did not lose because we the judges chose that you should lose. You lost because the law required that you should lose.'").

of-law values admonish courts against contending that extralegal considerations determine which interpretive principles, and which interpretations, will prevail.[136] To the contrary, rule-of-law values demand that courts cast their chosen interpretive principles and consequent statutory interpretations as compelled by the law of interpretation.[137] A legal opinion that is consistent with rule-of-law values seeks to explain why the law of interpretation requires certain injunctive interpretive principles to control and why it generates one legally superior statutory construction.

Courts have strong instrumental reasons to adhere to rule-of-law values. All other things being equal, a judicial opinion adhering to rule-of-law values protects the legitimacy of courts and judicial decisionmaking.[138] An opinion contrary to rule-of-law values, by contrast, erodes the legitimacy of courts and judicial decisionmaking.[139] The rule of law has its limits, though. No active participant in the legal system or observant legal scholar would contend that extant legal principles fully determine the outcome of every case. To one degree or another, judicial discretion and

136. *See* Lawrence C. Marshall, *The Canons of Statutory Construction and Judicial Constraints: A Response to Macey and Miller*, 45 VAND. L. REV. 673, 685 (1992) ("In the case of statutory interpretation, the 'duty to the rules of law' is generally recognized to carry with it the obligation for the judge to do her best to interpret what Congress has said before she moves on to decide a case explicitly on her own policy preferences. . . . Whether or not a judge personally accepts this view of her role, the dominant legal culture that restrains and evaluates judges forces judges to adhere to it, at least in form.").

137. *See* Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 838–39 (1991) ("In our law, however, the exercise of a power to speak authoritatively as an interpreter carries with it an obligation to explain the grounds upon which the interpreter gives that authoritative judgment. If we begin with the notion that giving such reasons will occur to us only in circumstances in which different approaches produce different results, the argument moves back a step. We, or the authoritative interpreter, must be able to state why some particular approach to reason-giving is a legitimate way to give authoritative meaning to the words of the text.").

138. *See* Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 287 (1992) ("Judges, more than other political actors, must answer the question of why anyone should obey. The president has the army, Congress the purse. Judges have reason. . . . The rule of law attracts formidable support only so long as people believe that there is a rule *of law* and not a rule *by judges*. . . . [I]t is most unlikely that obedience will long be forthcoming to an institution that appears to be simply subcommittee chairmen wearing robes.").

139. *See* Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1120 (1992) ("As in constitutional interpretation, scholars in the statutory field are confronted with the so-called countermajoritarian difficulty—the problem of life-tenured, unelected judges making policy decisions. If all or most statutory cases turn on policy factors left to the judge's choice, how can that exercise of power be considered legitimate?").

extralegal factors affect both judicial decisionmaking and case outcomes.[140] Regardless of which factors actually drive an outcome, a desire to adhere to rule-of-law values encourages judges to offer justifications in their legal opinions that sidestep extralegal factors and to portray their legal opinions as driven by the law of interpretation.[141] Rule-of-law values, in other words, prompt courts to justify and explain their decisions as grounded in and following from extant legal principles.[142] Courts seek to ground their opinions in rule-of-law values even when the law alone cannot fully decide the case. Thus, courts often oversell the ability of the law of interpretation to determine outcomes. This observation holds true even in those situations in which an exercise of legally unconstrained judicial discretion might be thought unavoidable.

Consider a situation—unlike that in *Arlington Central*—in which the underlying statutory materials were truly ambiguous.[143] When statutory materials are ambiguous, by definition, they are subject to more than one legally justifiable and plausible interpretation. As such, the power of the law to determine outcomes in cases of genuine ambiguity is very limited. In explaining their decisions in these kinds of cases, courts typically accentuate the role played by the law of interpretation, while obscuring or omitting the role played by judicial discretion and extralegal factors. In *Smith v. United States*,[144] for example, the Supreme Court was required to interpret a federal

140. *See* Ward Farnsworth, *Signature of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 51 (2005) ("Everyone suspects that Supreme Court justices' own views of policy play a part in their decisions, but the size and nature of the part is a matter of vague impression and frequent dispute.").

141. *See* POSNER, *supra* note 34, at 41 (stating that "[l]egalism . . . hypothesizes that judicial decisions are determined by 'the law,'" that "the legalist theory of judging . . . remains the judiciary's 'official' theory of judicial behavior," that the Supreme Court claims adherence to legalism because it is "a political court . . . especially in need of protective coloration," and that "the legalist slogan is 'the rule of law'"); JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS, at x (1986) ("[T]he quest for the holy grail of perfect, nonpolitical, aloof neutral law and legal decisions . . . remains a test for acceptability.").

142. Presumably, not only the justifications for judicial decisions, but also judicial decisions themselves, should be driven by legal norms. *Cf.* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 991 (2008) (offering a nonconsequentialist argument in support of the courts' obligation to "not only justify their decisions, [but also] make the reasons for their decisions publicly available").

143. In this kind of case, courts do not necessarily face interpretive choice. Rather than choosing among competing injunctive interpretive principles, courts apply the same or similar interpretive principles but nonetheless grapple with conflicting, plausible constructions of a given statute.

144. Smith v. United States, 508 U.S. 223 (1993).

statute that imposed a minimum prison sentence for any defendant who, "during and in relation to any crime of violence or drug trafficking crime[,] uses . . . a firearm."[145] By a 6–3 vote, the Court held that the word "uses" in the statute encompasses not only discharging or brandishing a firearm, but also bartering drugs in exchange for a firearm.[146] Though the statutory text was ambiguous[147] and the evidence of legislative intent was both sparse[148] and inconclusive,[149] both the majority and the dissent in *Smith* framed their chosen interpretations as deriving from the law of interpretation. The majority adopted a broad interpretation and cast its chosen interpretation as following from application of the ordinary-meaning principle[150] and the whole-act rule.[151] The dissent advocated a narrow

145. *Id.* at 227 (alteration in original) (quoting 18 U.S.C. § 924(c)(1) (2006)) (internal quotation marks omitted).

146. *Id*. at 241.

147. The 6–3 split at the Supreme Court level and the split among the circuit courts attest to the ambiguity of the language. *See id.* at 227 (discussing the circuit split). Nonetheless, and somewhat incredibly, both the Supreme Court majority and dissenting opinions maintained that the statutory text was clear and not ambiguous. *See id.* at 239–40 (arguing that the rule of lenity should not apply because the statute was not ambiguous); *id*. at 246–47 (Scalia, J., dissenting) (arguing that the statutory text was not ambiguous but that if it were, the rule of lenity should apply).

148. United States v. Phelps, 877 F.2d 28, 30 (9th Cir. 1989) (acknowledging that "the legislative history of § 924 is 'sparse'" (quoting United States v. Moore, 580 F.2d 360, 362 (9th Cir. 1978))).

149. The Supreme Court majority thought its expansive interpretation of the phrase was consistent with legislative intent and statutory purpose. *See Smith*, 508 U.S. at 240 ("Imposing a more restrictive reading of the phrase 'uses . . . a firearm' does violence not only to the structure and language of the statute, but to its purpose as well. . . . We therefore see no reason why Congress would have intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter . . . ." (first omission in original)). The Ninth Circuit, however, understood that Congress intended the statutory phrase to be limited to the use of a gun "as an offensive weapon" and not as an item of barter. *See Phelps*, 877 F.2d at 30 (discussing statutory purpose and legislative intent before concluding "that the mere presence of a firearm does not trigger the statute" because "Congress directed the statute at 'persons who chose to carry a firearm as an offensive weapon for a specific criminal act'" (quoting S. REP. NO. 98-225, at 314 n.10 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492)).

150. *See Smith*, 508 U.S. at 228 (citing the ordinary-meaning principle, which dictates that "[w]hen a word is not defined by statute, [the court should] normally construe it in accord with its ordinary or natural meaning").

151. *See id.* at 233 (citing the whole-act principle, which provides that "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law" (quoting United Sav. Ass'n v. Timbers of Inwood Assocs., 484 U.S. 365, 371 (1988)) (internal quotation mark omitted)).

interpretation and cast its interpretation as following—ironically—from the ordinary-meaning principle and from whole-act analysis.[152]

Because both the majority and the dissenting opinions in *Smith* offered plausible readings of the word "used" in the sentencing statute, their respective interpretations were both, in a limited way, derived from the application of injunctive interpretive principles. Indeed, both opinions emphasized how their chosen interpretations followed from application of the ordinary-meaning and whole-act-rule interpretive principles. Thus, the opinions adhered to rule-of-law values by offering the appearance that the outcomes were required by extant legal principles.[153]

Importantly, however, neither opinion in *Smith* confronted or discussed the pivotal question: What factors referee between two plausible but divergent understandings of ordinary meaning? Nothing in the law of interpretation can locate a single ordinary meaning for the word "uses" in the sentencing statute. In *Smith*, the underlying statutory text was fraught with irreducible ambiguity. Indeed, *Smith* seemed to be a case in which the precise outer contours of the word "uses"—specifically, as to whether that word included or excluded bartering drugs for a gun—took no discernible shape until after the Court had interpreted the statute.

To select between two plausible understandings of the word "uses," a court necessarily must exercise legally unconstrained judicial discretion and must resort to considerations outside the law of interpretation. Yet neither the majority opinion nor the dissenting opinion in *Smith* acknowledged the role of judicial discretion or discussed the decisive extralegal factors. To the contrary, both opinions cast their favored interpretations as derived from the application of injunctive interpretive principles. Both opinions, in other words, portrayed the law of interpretation as doing more work in determining the meaning of the statute than it possibly could have done, and also portrayed judicial discretion and extralegal considerations as lesser ingredients than they necessarily must have been.

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152. *See id.* at 242, 245–46 (Scalia, J., dissenting) (using the ordinary-meaning principle to explain that "[i]n the search for statutory meaning, [the Court will] give nontechnical words and phrases their ordinary meaning" and later employing whole-act analysis to emphasize the difference between "using" and "carrying" a firearm).

153. *Cf.* Shapiro, *supra* note 135, at 155–56 (arguing that a court must deny that it makes law and must instead assert dishonestly that legal norms determine outcomes).

The same phenomenon appears in cases of interpretive choice such as *Arlington Central*. In these cases, the law of interpretation is not called upon to clarify ambiguous statutory materials. Rather, the underlying statutory materials—statutory text and evidence of legislative intent—are individually unambiguous but collectively inconsistent. Nonetheless, because the law of interpretation lacks ordering principles, courts necessarily must exercise legally unconstrained judicial discretion to select between conflicting injunctive interpretive principles. Yet, as seen in the cases applying IDEA § 1415, the pull of rule-of-law values encourages courts to portray the law of interpretation, rather than judicial discretion and extralegal factors, as the key element driving the selection. By casting the law of interpretation as definitively favoring statutory text over legislative intent, or vice versa, courts portray the outcome as driven by extant legal principles. The avoidance maneuver, in short, enables the reasoning in judicial opinions to adhere to rule-of-law values and, in turn, seeks to enhance or at least to preserve the legitimacy of judicial decisionmaking.[154]

The avoidance maneuver, however, comes at a price. Though the avoidance maneuver may enable judicial opinions to adhere to rule-of-law values and to preserve the legitimacy of judicial action, courts deploying it portray the law of interpretation as though it includes ordering principles that establish hierarchies of injunctive interpretive norms. This misrepresents the law of interpretation. Moreover, because courts portray the law of interpretation as determinative when they deploy the avoidance maneuver, they fail to offer a public discussion of the extralegal considerations that are in fact crucial to the ultimate outcome.

Despite these problems, courts almost universally respond to interpretive choice with the avoidance maneuver. Legal opinions that openly acknowledge that the law of interpretation fails to favor certain injunctive interpretive principles over others are rare, if they exist at all. None of the opinions interpreting the expert-witness fee-shifting provision of the IDEA declared that the law of interpretation is indifferent between textualist or intentionalist principles. None of

154. *See* Zeppos, *supra* note 139, at 1122 ("In statutory cases, judges are regularly confronted with the need to make value or policy choices. . . . Citation to authority provides a basis for the judge's choice other than her own personal preferences. The use of authority allows the judge to express a value choice while claiming that the policy preference finds support in a recognized legal authority.").

the opinions declared that the court faced a legally unconstrained choice between conflicting interpretive principles and incompatible interpretations of IDEA § 1415. None of the opinions declared that the court had to go outside the law of interpretation to arrive at its outcome. Instead, every opinion deployed the avoidance maneuver.[155]

III. TRANSPARENT JUSTIFICATION AS AN ALTERNATIVE TO THE AVOIDANCE MANEUVER

Courts have another option. Rather than deploying some variation of the avoidance maneuver, judges could respond to interpretive choice by writing opinions characterized by transparent justification. Transparent justification would entail acknowledging that the law of interpretation generates an interpretive choice and then openly explaining the extralegal factors that led the court to choose one legally valid interpretation over another interpretation of equal legal validity. In the context of the IDEA § 1415 fee-shifting provision, transparent justification would mean an opinion that (1) openly acknowledged that when unambiguous statutory text and unambiguous legislative intent clash, the law of interpretation favors neither textualist nor intentionalist principles; (2) openly acknowledged that the law of interpretation sanctions two opposing IDEA § 1415 interpretations of equal legal validity; and (3) offered a frank and full explanation of the extralegal factors that persuaded the Court to favor one legally valid interpretation over a different interpretation of equal legal validity.

Unlike the avoidance maneuver, transparent justification does not involve any misrepresentation of the law of interpretation. It instead obliges courts to offer a public explanation of the factors beyond the law of interpretation that help determine outcomes. In other words, the avoidance maneuver's liabilities are transparent justification's assets.

Conversely, although transparent justification eliminates the more problematic aspects of the avoidance maneuver, it also eliminates the avoidance maneuver's main putative virtue: adherence to rule-of-law values. Admittedly, transparent justification represents the antithesis of rule-of-law values. Rather than seeking to explain how a judicial interpretation of a statute follows from a neutral application of the law of interpretation, it does the opposite. It seeks

155. *See, e.g.*, *supra* text accompanying notes 75–99.

to explain why a judicial interpretation *cannot* follow from application of the law of interpretation alone. It concedes the role of legally unconstrained judicial discretion and judicial reliance on factors outside the law of interpretation.

The overwhelming dominance of the avoidance maneuver in cases of interpretive choice suggests that courts estimate that transparent justification would be so inimical to rule-of-law values that its costs—potential damage to the legitimacy of judicial decisionmaking—would outweigh any possible benefits. At a minimum, judges must perceive the cost-benefit ratio of the avoidance maneuver to be more favorable than the cost-benefit ratio of transparent justification.

This reasoning is fundamentally flawed. Ultimately, the case in favor of the avoidance maneuver is weaker than it might first appear, and the case in favor of transparent justification is stronger than most might believe. I do not argue, however, that reasonable minds must unanimously resolve that courts should jettison the avoidance maneuver in favor of transparent justification. The appeal of apparent adherence to rule-of-law values is not trivial, and, therefore, the case in favor of the avoidance maneuver is not wholly devoid of value. Moreover, transparent justification is unconventional, and courts might therefore approach it with trepidation. Accordingly, I argue only that the case in favor of the avoidance maneuver is weak enough, and the case in favor of transparent justification is strong enough, that reasonable minds could, at the very least, disagree over which option represents the better judicial response to interpretive choice.

Courts, however, have universally rejected transparent justification and have embraced the avoidance maneuver. The judicial response to interpretive choice should not be so one-sided. The merits and demerits of the two alternatives are close enough that courts should give more serious consideration to transparent justification, and at least some courts should conclude that transparent justification is the better alternative.[156]

156. Only a few judges openly acknowledge the limits of legal norms and the role of extralegal policy factors in their decisionmaking. *See, e.g.*, POSNER, *supra* note 135, at 123–26 (suggesting that judges' self-interest may shape judicial practices); Barak, *supra* note 34, at 33–36 (noting that society's perception of the judicial role influences judicial activity).

A. Why Transparent Justification Does Not Undermine Rule-of-Law Values

I begin with the source of the supposed weakness of transparent justification and the supposed strength of the avoidance maneuver: adherence—or the lack thereof—to rule-of-law values. If courts were to deploy transparent justification in cases of interpretive choice, they would offer opinions antithetical to rule-of-law values and thus adverse to the legitimacy of judicial decisionmaking. Or so critics would argue.[157] It is true that transparent justification does not strive toward adherence to rule-of-law values. By acknowledging that the law of interpretation does not resolve interpretive choices, courts would be candidly declaring that cases' outcomes are determined not by law, but instead by legally unconstrained judicial discretion and extralegal factors.

Imagine, for example, how Justice Breyer's dissenting opinion in *Arlington Central* might have read if it had deployed transparent justification. The *Arlington Central* dissent relied heavily on the principle that the law of interpretation favors clearly expressed legislative intent over the most linguistically natural reading of statutory text.[158] Had the dissent deployed transparent justification, it would have done several things: First, it would have noted that the law of interpretation encompasses two equally valid but contradictory principles—one that favors legislative intent over statutory text, and one that favors the ordinary meaning of the text over contrary evidence of legislative intent. Second, the dissent would have conceded that nothing in the law of interpretation determines which of these adverse injunctive interpretive principles is legally superior and, therefore, that the Court had to look outside the law of interpretation to make its own determination. Third, the dissent would have enumerated and discussed the factors outside the law of interpretation that led the Court to favor one injunctive interpretive principle over another.

None of this analysis would have adhered to the rule-of-law prescription that judges should decide cases in accordance with extant

157. Courts are expected to offer justifications for their decisions that are rooted in the application of legal principles rather than extralegal factors. *See* Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 490 (noting that "the official line of the legal culture is still that judges are rule-bound in their decisions"); *supra* note 135.

158. *See supra* text accompanying notes 101–14.

legal norms and should avoid resorting to extralegal considerations. Courts are in closest adherence to rule-of-law values when they base their decisions on preexisting legal norms rather than on extralegal factors.[159] In other words, from a rule-of-law perspective, the legitimacy of judicial decisionmaking stands on the most secure footing when courts can credibly claim that the application of preexisting, unambiguous legal norms leads to a single, unequivocal outcome. In these situations, courts can credibly claim that the law—and not extralegal factors, such as policy considerations or the personal preferences of the judge or judges—determined the case's outcome. By responding to interpretive choice with transparent justification, though, the dissenting opinion in *Arlington Central* would have entertained no pretense that the law had been determinative or that judicial discretion and factors outside the law of interpretation had been immaterial.

Herein lies the supposed problem with transparent justification: any legal opinion deploying transparent justification acknowledges a situation diametrically opposed to the situation most in adherence to rule-of-law values and most protective of the legitimacy of judicial decisionmaking. At bottom, however, this problem is inherent not so much in the technique of transparent justification but rather in interpretive choice itself. True, a court responding to an interpretive choice with transparent justification could not credibly claim that the law of interpretation pointed to a singular legally superior outcome or that factors outside of the law of interpretation were not determinative. And true, a court using transparent justification could not expect any legitimacy-preserving effect via supposed adherence to rule-of-law values.

But transparent justification is not itself the real reason behind these truths—the law of interpretation is. Because the law of interpretation contains no ordering principles, it cannot referee conflicts between competing injunctive interpretive principles. A court necessarily *must* rely on extralegal factors and necessarily *will* exercise legally unconstrained discretion when selecting between competing injunctive interpretive principles and consequent competing interpretations. Nothing in the way that judges choose to explain or justify the selection they make can change this reality. Whether a court decides to admit this fact openly—as in transparent

159. *See supra* note 135.

justification—or to obscure it—through the avoidance maneuver—is irrelevant and beside the point.

Stated differently, the problem of a lack of adherence to rule-of-law values and the corresponding debasement of the legitimacy of judicial decisionmaking do not stem from the use of transparent justification. Instead, they are part and parcel of the phenomenon of interpretive choice. Cases presenting an interpretive choice belong inescapably to the class of cases in which legally unconstrained judicial discretion and extralegal considerations, rather than extant legal norms, will be the ultimate determinants. Courts deploying the avoidance maneuver may simulate adherence to rule-of-law values.[160] In reality, however, in cases of interpretive choice, adherence to rule-of-law values is not fully possible. In cases of interpretive choice, the law of interpretation can do no more than narrow the field of choice to opposing interpretations of equal legal validity. Legally unconstrained judicial discretion and extralegal factors will ultimately select between these opposing interpretations.

B. Why the Avoidance Maneuver Does Not Enhance Rule-of-Law Values

The avoidance maneuver cannot alter the brute fact that, in cases of interpretive choice, the law of interpretation is not the deciding factor. At best, all the avoidance maneuver can do is drape judicial discretion in a rule-of-law façade. The supposed benefit of the avoidance maneuver, therefore, is no benefit at all. Or it would be a benefit only if its obfuscatory gambit deceived relevant audiences into believing that the law of interpretation determines outcomes. But the avoidance maneuver almost always fails to deceive relevant audiences.

The audiences closest to a legal dispute—lawyers and litigants—will not be deceived easily. In a case such as *Arlington Central*, the notion that the lawyers and litigants might be duped into accepting that the law of interpretation decidedly and uncontroversially favors clear statutory text over clear contrary legislative intent approaches the absurd. The lawyers in *Arlington Central* were fully aware that the law of interpretation does not definitively establish whether textualist

160. *See* Zeppos, *supra* note 139, at 1121 ("Judges might perform [a] legitimating function by lying or deception—that is, by acting as if originalist or textual sources alone compel a result and not revealing the real grounds for decision.").

or intentionalist injunctive principles should prevail.[161] If nothing else, the attorneys would have noted that the various IDEA § 1415 cases in the lower courts had vacillated in reliance on diametrically opposed injunctive interpretive principles.[162] As such, they would understand that the inclinations and dispositions of five Supreme Court Justices, rather than the law of interpretation, would determine whether text or contrary legislative intent would prevail. A mere judicial assertion that the law of interpretation demands that statutory text trump contrary legislative intent could not have persuaded the litigating attorneys to believe that judicial discretion and extralegal factors were immaterial.[163] Indeed, if judges could deceive lawyers merely by proclaiming that the law of interpretation unequivocally requires that clear text trump contrary clear legislative intent, one should be worried not about the legitimacy of courts, but rather about the judicial system as a whole. Any legal system populated by attorneys unable to pierce such a transparent distortion of the law would fall into terminal dysfunction.

In a way, courts that deploy the avoidance maneuver are audacious to the point of imprudence. Opinions deploying the avoidance maneuver confidently maintain that the law of interpretation contemplates certain hierarchies of injunctive interpretive principles. But they make this claim in the face of dissenting opinions, previous opinions from the same court, and previous opinions from other courts that claim just as confidently that the law of interpretation contemplates the exact opposite hierarchy of

161. The litigants' Supreme Court briefs included extensive discussions of the conflicting injunctive interpretive principles. *See* Brief of Petitioner at 21–24, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (No. 05-18) (arguing that the statutory language is unambiguous and that the Second Circuit therefore erred in relying on legislative history to construe the IDEA); Brief of Respondent at 16–17, 30, *Arlington Cent.*, 548 U.S. 291 (No. 05-18) (asserting that the legislative history, the plain meaning of the statutory text, and sources contemporary to the statute indicated that the IDEA authorized the respondents to recover the cost of their expert's participation); Brief for the National Disability Rights Network and the Center for Law and Education as Amici Curiae in Support of Respondents at 17, 28, *Arlington Cent.*, 548 U.S. 291 (No. 05-18) (arguing that the provision must be read in the context of the rest of the IDEA and its legislative history).

162. *See supra* note 77.

163. The simple fact that five Supreme Court Justices joined an opinion claiming that the law of interpretation grants statutory text a trump over legislative intent, whereas three Justices joined a dissent maintaining the exact opposite, undermines any argument in support of the avoidance maneuver's ability to deceive. A judicial assertion that the law of interpretation demands X, countered by a judicial assertion that the law of interpretation demands not-X, only reinforces the reality that the law of interpretation fails to resolve whether X or not-X should prevail.

injunctive interpretive principles. Plausible arguments might reasonably contend that unvarnished and all-inclusive candor is not always the best policy for courts.[164] Perhaps a judicial white lie is a necessary expedient in some situations. A judicial white lie, however, is inadvisable when it is obviously and demonstrably erroneous. Or, at least, the obviously erroneous judicial white lie should be the rare exception rather than the universal rule of judicial justification. If the avoidance maneuver convinced lawyers and their clients that the law of interpretation decides cases involving interpretive choices, then it might produce some salutary effect in terms of preserving the legitimacy of judicial decisionmaking. In the end, however, the avoidance maneuver's feigned adherence to rule-of-law values is too easily detected.[165] Any supposed legitimacy-enhancing effect is therefore nugatory and probably even counterproductive.

If the avoidance maneuver does not deceive litigants and their lawyers, what about the broader relevant audience? Might the avoidance maneuver's illusion of adherence to rule-of-law values preserve the legitimacy of judicial decisionmaking in the eyes of the general public? Though lawyers understand the basic features of the law of interpretation, the general public is, understandably, less aware of judicial decisions as a whole. Thus, perhaps the avoidance maneuver might deceive the general public into believing that the law of interpretation resolves cases involving interpretive choices or, more generally, that the law, rather than legally unconstrained judicial discretion, determines outcomes. If this were the case, then the avoidance maneuver arguably might represent an imperfect but defensible expedient for courts facing interpretive choices.

In the end, however, the avoidance maneuver has no salutary effect on the general public for the exact opposite reason that it has no effect on attorneys. The avoidance maneuver does not deceive attorneys because they know too much. They can research conflicting

164. *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1310 (1995) (arguing in favor of weighing the prudential value of candor against competing values); Schwartzman, *supra* note 142, at 988–99 (cataloguing the arguments against judicial candor); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 358–59 (1989) (arguing that judicial candor in statutory-interpretation cases would undermine the legitimacy of courts).

165. *See* Francis J. Mootz, III, *Rethinking the Rule of Law: A Demonstration That the Obvious Is Plausible*, 61 TENN. L. REV. 69, 71 (1993) ("No lawyer really believes that judges and administrators can apply rules derived from neutral premises without implicating their own values and perspectives.").

injunctive interpretive principles and see that the law of interpretation lacks ordering principles that definitively resolve interpretive choices. The general public, by contrast, knows too little. The general public maintains only a vague awareness and understanding of judicial institutions and does not fully understand the intricacies of judicial opinions.[166] Opting for transparent justification instead of the avoidance maneuver in cases of interpretive choice would cause nary a ripple in the sensibilities of the general public.[167] Courts strive to offer opinions that adhere to rule-of-law values, depict legal norms as determinative, and minimize or obscure the roles of legally unconstrained judicial discretion and extralegal factors. Yet if anything, the general public already comprehends that judges often exercise legally unconstrained discretion.[168] Evidently, the general public is either unaware of or

166. *See* Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 899 (2007) (finding that "public knowledge about . . . the courts is low"); Herbert M. Kritzer, *The Impact of* Bush v. Gore *on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 34 (2001) ("Most research on the public's knowledge of the Supreme Court concludes that the public knows little about the Court or its workings. A regularly cited example of the public's ignorance is that in 1989, 71 percent could not name a single member of the Court while 54 percent of the same sample could name the judge on the television show 'The People's Court.' That this survey found such results was not news to political scientists, who have long documented the minimal knowledge most citizens have about the Court."); *see also* Gregory A. Caldeira, *Court and Public Opinion*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 303 (John B. Gates & Charles A. Johnson eds., 1991) (stating that Supreme Court decisions "lack . . . saliency in all but a few situations"); Ilya Somin & Sanford Levinson, Debate, *Democracy, Political Ignorance, and Constitutional Reform*, 157 U. PA. L. REV. PENNUMBRA 239, 247–48 (2009), http://www.pennumbra.com/debates/pdfs/ConstitutionalReform.pdf ("Former Justice Sandra Day O'Connor has recently complained that '[t]wo-thirds of Americans know at least one of the judges on the Fox TV show *American Idol*, but less than one in ten can name the Chief Justice of the United States Supreme Court.'" (alteration in original) (quoting Justice O'Connor)).

167. Not even *Bush v. Gore*, 531 U.S. 98 (2000), which was viewed by many commentators as driven by politics rather than law, and which was surely among the most widely reported Supreme Court cases of all time, meaningfully altered public perception of the Supreme Court. *See* Kritzer *supra* note 166, at 36 (finding that *Bush v. Gore* had only a modest short-term effect on public knowledge of the Supreme Court and "essentially nil" effect on approval and disapproval of the Supreme Court).

168. Jamieson & Hennessy, *supra* note 166, at 900 (finding that "[r]oughly six in 10 Americans (62%) say the courts in their state are legislating from the bench rather than interpreting the law" and that "75% say a judge's ruling is influenced by his or her politics to a great or moderate extent"); Keith Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!* 4–5 (Syracuse Univ. Coll. of Law Faculty Scholarship, Paper 56, 2009), *available at* http://ssrn.com/abstract=1404600 (citing a 2005 survey finding that "an astounding 82 percent of those surveyed believed that the partisan background of judges influences court decisionmaking either some or a lot" and that "[a] majority of poll respondents agreed that even though judges

unconvinced by judicial efforts to offer legal opinions adverting to rule-of-law values. Either way, moving away from the avoidance maneuver and toward transparent justification in cases of interpretive choice would not alter the public's perception of the courts or of the judicial enterprise.

Even if the general public remains ignorant of the avoidance maneuver, the attentive public must be considered. When certain issues come before the courts, attentive segments of the public pay close attention.[169] One might argue that, unlike the general public, this attentive segment of the public will sometimes care enough about substantive issues to become informed about the reasoning offered in certain legal opinions.[170] Might the avoidance maneuver preserve or

always say that their decisions flow from the law and the Constitution, many judges are in fact basing their decisions on their own personal beliefs").

169. *See* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 64–71 (1990) (discussing and defining the attentive public versus the inattentive public); Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1527 (2006) (commenting that "[s]tudy after study has shown that the public knows very little about the Court or its decisions, but that levels of awareness differ as between the attentive public . . . and the nonattentive public"); Doris Graber, *Mediated Politics and Citizenship in the Twenty-First Century*, 55 ANN. REV. PSYCHOL. 545, 563 (2004) ("While average citizens play important political roles in democracies, the bulk of the burden for political action has always been born by elected and appointed public officials and by citizens with above-average interest in politics whom scholars call 'the attentive public.' At best, that category comprises no more than 10% of the citizenry."); Richard Lehne & John Reynolds, *The Impact of Judicial Activism on Public Opinion*, 22 AM. J. POL. SCI. 896, 901 (1978) (noting the difference between the attentive and the inattentive public and explaining that "[a]n unusually controversial court decision appears able to cross the attention threshold of some of those for whom the judicial system is not a matter of everyday concern"); *see also* Jon A. Krosnick, *Government Policy and Citizen Passion: A Study of Issue Publics in Contemporary America*, 12 POL. BEHAV. 59, 72–75 (1990) (discussing the hypothesis that only small segments of the public will likely care about any given policy issue).

170. Alternatively, the attentive public may care primarily about the substance of Supreme Court decisions and relatively little about whether they are driven by extant legal principles or by extralegal considerations. For example, public reaction to *Bush v. Gore* predictably split sharply along party lines. Kritzer, *supra* note 166, at 36. Presumably, if substantive outcomes were not central to the public's reaction, then the divide between favorable and unfavorable evaluations would not have split so clearly along partisan lines. The strong negative public reaction to the 2005 Supreme Court decision on eminent domain, *Kelo v. City of New London*, 545 U.S. 469 (2005), is also consistent with the idea that substance is more important than legal reasoning in the attentive public's evaluation. *Kelo* applied existing legal principles on eminent domain. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 664 (3d ed. 2006). Nonetheless, *Kelo* "generated a massive backlash from across the political spectrum." Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2101 (2009). If the attentive public is more concerned with substantive outcomes than the intricacies of the justifications offered in judicial opinions, then the avoidance maneuver's impact on attentive segments of the public will be of minimal significance.

enhance the legitimacy of judicial decisionmaking in the eyes of attentive segments of the public?

The problem that the avoidance maneuver encounters with the attentive public is the same problem that it faces with other attentive constituencies—lawyers and their clients. In the rare instances when the attentive public cares enough about substantive legal or policy issues to delve into the particulars of judicial reasoning, the attentive public will quickly recognize the avoidance maneuver as artifice. Lawyers have strong professional incentives to pay close attention to the reasoning of judicial opinions. Their duty to render competent legal representation requires it. Whether out of economic or other motivations, members of the attentive public may also develop strong reasons to pay attention to the particulars of judicial reasoning. If and when members of the attentive public acquaint themselves with the details of judicial reasoning, they will likely come to the same understandings as lawyers who study judicial opinions out of professional necessity.

With the IDEA § 1415 fee-shifting provision, for example, parents of children with disabilities may be motivated to acquaint themselves with the IDEA, and even with cases interpreting the IDEA. If members of this attentive public were to read the various IDEA federal court opinions, three points would become just as conspicuous to them as to any lawyer reviewing the cases to prepare for professional representation: First, some federal court opinions applied text over conflicting legislative-intent injunctive interpretive principles. Second, other federal court opinions applied legislative intent over conflicting textual injunctive interpretive principles. Third, despite explicit or implicit claims to the contrary, no federal court was able to establish a definitive and indisputable ordering principle governing whether unambiguous text or contrary unambiguous legislative intent should prevail. Like attorneys, the attentive portion of the public would thus come to understand that the outcome in a case of interpretive choice does not depend on the law of interpretation, but rather on legally unconstrained judicial discretion and extralegal considerations.[171]

171. Consider two constitutional cases, *Roe v. Wade*, 410 U.S. 113 (1973), and *Bush v. Gore*, that have generated close and impassioned attention from interested segments of the public. It is unlikely that the losing attentive interest groups were convinced that the law had decided the outcomes in those cases. In both instances, the groups likely believed that legally unconstrained judicial discretion and extralegal considerations were determinative.

Ultimately, the supposed legitimacy-preserving benefits of the avoidance maneuver depend on the notion that no one will notice its sleight of hand. And, for the most part, no one will notice. The general public simply does not get involved in the minutiae of the reasoning or the justifications offered in judicial opinions. But for those who are paying attention—attorneys and their clients or an attentive segment of the public—the sleight of hand is *too* noticeable and, therefore, is unlikely to succeed.

Whereas the legitimacy-enhancing benefits of the avoidance maneuver are speculative at best, the costs associated with transparent justification are minimal or even nonexistent. Again, transparent justification itself is not at odds with or contrary to rule-of-law values. The nature of the law of interpretation, with its lack of ordering principles, generates interpretive choices and scenarios under which the law of interpretation cannot fully determine outcomes. Transparent justification would not *produce* this state of affairs but would instead merely acknowledge its existence.

Just as the avoidance maneuver preserves the legitimacy of judicial decisionmaking only if it succeeds in deceiving relevant audiences, transparent justification damages the legitimacy of judicial decisionmaking only if it offers relevant audiences damaging information that they did not previously know. But transparent justification does not provide any information that interested audiences do not already know or that, upon examination, is not already obvious.

Thus, had the majority and dissenting opinions in *Arlington Central* openly stated that the law of interpretation does not definitively determine whether unambiguous text trumps unambiguous contrary legislative intent, the opinions would not have provided any information that the lawyers did not already know, at least on some level. Attorneys realize and can explain to their clients that the law of interpretation does not definitively settle whether unambiguous text or unambiguous legislative intent is superior. They know that in cases like *Arlington Central*, the outcome will turn more on legally unconstrained discretionary decisions of the judges than on the law of interpretation. The litigation history of *Arlington Central* confirms this reality: several opinions privileged the clear text of the IDEA over its contrary but clear legislative history,[172] and other

172. *See, e.g.*, *supra* text accompanying notes 79–81, 87–89.

opinions did the exact opposite,[173] but no opinion offered an incontrovertible and authoritative rule determining whether text or contrary intent should prevail.[174] Courts employing transparent justification would announce that the law of interpretation does not determine how a court should interpret the IDEA. Yet because any attorney who has read the relevant legal materials and accompanying cases will plainly see this anyway, transparent justification itself would not erode the legitimacy of courts or judicial decisionmaking any more than the phenomenon of interpretive choice itself already has.

In the end, most of the merits and demerits of both the avoidance maneuver and transparent justification turn on the understandings and intellectual capabilities of the relevant audiences. On the one hand, assume that lawyers, clients, and attentive audiences already know or can easily come to understand both that the law of interpretation is not determinative in cases of interpretive choice and that courts often exercise legally unconstrained discretion. In that case, the avoidance maneuver will fail to achieve an illusion of adherence to rule-of-law values. Transparent justification, in turn, has no downside cost, as nobody in the relevant audience will be surprised to be informed that the law of interpretation cannot fully determine outcomes. On the other hand, assume that lawyers, clients, and attentive audiences do not realize that courts often exercise legally unconstrained discretion. In that case, perhaps the avoidance maneuver will succeed in perpetuating their ignorance and, thereby, in preserving an illusion of adherence to rule-of-law values.

But could it possibly be true that those few who pay close attention to the finer points of reasoning and justification offered in judicial opinions will fail to understand that the law of interpretation alone does not determine outcomes in cases of interpretive choice? Those who favor the avoidance maneuver and oppose transparent justification are put in the difficult position of arguing that practicing attorneys, their clients, and attentive segments of the public are ignorant of—or are incapable of discovering—basic and easily verifiable features of the law of interpretation.

173. *See, e.g.*, *supra* text accompanying notes 89–99.

174. *See supra* notes 76–77.

C. How the Avoidance Maneuver Erodes the Honesty and Quality of Judicial Opinions, Diminishes the Legitimacy of Courts, and Fails To Constrain Discretion

Several additional points speak in favor of transparent justification and against the avoidance maneuver. First, adherence to rule-of-law values is but one of several considerations relevant to judicial legitimacy.[175] A judicial decision that genuinely adheres to rule-of-law values might still lack legitimacy if it produces a dreadful substantive outcome.[176] Similarly, a judicial decision produced by a denial of due process is of dubious legitimacy, even if it genuinely adheres to other rule-of-law values.[177] The point is not to suggest that adherence to rule-of-law values is unimportant, but rather that adherence to rule-of-law values is one of several competing factors that helps assess the legitimacy of a judicial decision. In their zeal to create an illusion of adherence to rule-of-law values, courts deploying the avoidance maneuver seem to have discounted other important considerations.

Importantly, courts deploying the avoidance maneuver discount the legitimacy-eroding effects of misrepresenting the law of interpretation. Even conceding the tenuous proposition that the avoidance maneuver's illusion of adherence to rule-of-law values produces a legitimacy-preserving effect, the avoidance maneuver requires courts to be dishonest about the nature of the law of interpretation and the role it plays in determining outcomes. This dishonesty diminishes or even annuls any purported legitimacy-

175. Both Professors Joseph Raz and Frank Cross make this point. JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210, 228 (1979) ("[The] rule of law . . . . has always to be balanced against competing claims of other values."); Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 209 (2009) (reviewing POSNER, *supra* note 34) (arguing that "[t]he rule of law is certainly exalted in our society, but [that] its virtue must be kept in perspective" and that competing values are also important to legitimacy).

176. *See* Cross, *supra* note 175, at 209 (arguing that popular preferences or pragmatic concerns can be as important as adherence to rule-of-law values and, thus, that *Lochner v. New York*, 198 U.S. 45 (1905), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), "were bad decisions even if they were consistent with the rule of law," and *Brown v. Board of Education*, 247 U.S. 483 (1954), "was a good decision even if it was inconsistent with [rule-of-law] value[s]"); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 971–73 (2008) (discussing how factors other than fidelity to the rule of law are important to the legitimacy of the courts and how, in some instances, fidelity to the rule of law can harm the legitimacy of the courts).

177. Imagine, for example, a judge who accepts a bribe in exchange for granting summary judgment to the bribe offeror. Such a judicial decision would be illegitimate under any reasonable conception, even if it happened to adhere to the unambiguous requirements of uncontradicted preexisting legal norms.

preserving effect that the avoidance maneuver's façade of adherence to rule-of-law values might produce.[178] Those who defend the avoidance maneuver as a lesser evil when compared with transparent justification necessarily must argue against candor and in favor of deception.

Second, the avoidance maneuver is problematic not only because of what it includes in an opinion—misrepresentation of the law of interpretation—but also because of what it leaves out: public discussion of the decisive extralegal factors. By casting the law of interpretation as determinative, a court avoids discussion of the extralegal factors that had an influence over the disposition of the issue at hand. Transparent justification, in contrast, would oblige courts to publicly account for and discuss these determinative extralegal factors. In *Arlington Central*, the law of interpretation could not have determined whether statutory text or contrary legislative intent should have prevailed. Yet neither the majority nor the dissent offered a public discussion of the determinative extralegal factors. This omission erodes the legitimacy of the Court's decision.

Consider how the losing litigant in *Arlington Central* might analyze the legitimacy of the Court's decision. The Court's majority argued that the law of interpretation favored textualist rather than intentionalist injunctive principles. Despite the rule-of-law pretensions in the Court's opinion, the losing litigant knows that the law of interpretation did not determine the outcome, that extralegal considerations drove the Court's choice, and that in other cases the same Court chose to privilege intent over text.[179] Yet rather than explicate the determinative extralegal factors, the Court minimized the role of judicial discretion and extralegal factors and cast its decision as dictated by the law of interpretation. Losing in litigation is

178. *See* Idleman, *supra* note 164, at 1309–10 ("The conventional wisdom . . . is apparently that candor is an ideal toward which judges should almost always aspire and that any exceptions to this rule are few and far between. . . . [T]he normative position that judges ought to be forthcoming in their pronouncements would appear to be virtually unassailable. It might seem difficult to imagine . . . a theory of judging that would explicitly reject the conventional wisdom in favor of a view that judges may be anything less than candid." (footnote omitted)).

179. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133–29 (2000) (favoring legislative intent over clear contrary statutory text); Anita S. Krishnakumar, *The Hidden Legacy of* Holy Trinity Church*: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1081–82 (2009) ("Although the statutory text clearly gave the FDA authority to regulate 'drugs' and 'devices,' the Court . . . concluded that Congress could not have intended . . . to give the FDA authority to regulate, and in effect ban, tobacco products." (quoting 21 U.S.C. § 321(g)–(h) (1994 & Supp. III 1998))).

hard. Losing and realizing that the Court sidestepped a public airing of the decisive factors and instead offered vaporous legal fictions as a justification is harder. Had the Court employed transparent justification rather than the avoidance maneuver, at least the losing litigant would have had the consolation of a candid public accounting of the decisive extralegal factors.

Third, transparent justification might do more than the avoidance maneuver to constrain judicial discretion. An obligation to offer a public discussion of the extralegal factors that motivated the selection of certain injunctive interpretive principles might inhibit courts from relying on certain publicly unacceptable extralegal considerations. In *Arlington Central*, for example, had the Court employed transparent justification, the discussion might have centered on publicly palatable extralegal factors that would have bolstered the legitimacy of the decision. For example, as an extralegal reason for favoring text over contrary legislative intent, the Court could have said that its approach would create incentives for Congress to engage in more careful legislative drafting.[180] The dissent, in turn, might have argued that enforcing the most natural textual meaning would simply create unnecessary work for Congress, which would have to waste time amending the text of the statute.[181] Although these are extralegal policy considerations, not part of the law of interpretation, they are nonpartisan, principled, and aimed at improving the legislative process. As such, these sorts of extralegal considerations would have been publicly palatable and might have even bolstered the legitimacy of the Court's decision.

By contrast, the Justices in the majority presumably would not have stated that they favored textualist principles over intentionalist principles merely because the former produced the outcome most consistent with the politically conservative interest of minimizing the

180. *See* Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 685 n.30 (1999) (discussing and citing works that suggest that textualist statutory interpretation can improve the legislative process); Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 204 (1992) ("One often-cited goal of textualism is to induce Congress to legislate with care and precision.").

181. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 113–16 (1991) (Stevens, J., dissenting) (suggesting that the examples of statutory amendments passed by Congress in response to textualist interpretations counsel against textualism and in favor of intentionalism); *see also* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 909–11 (2000) (finding that textualist bankruptcy code decisions necessitate congressional override more often than do pragmatic interpretive decisions).

impact and cost of government regulation. Such a statement would only have eroded the perceived legitimacy of the Court's decision. Because the avoidance maneuver does not oblige courts to publicly discuss determinative extralegal factors, publicly unacceptable extralegal factors can determine outcomes far too easily. Transparent justification, however, might in some instances deter courts from relying on these unacceptable factors.[182]

Fourth and relatedly, transparent justification might push courts to engage in more careful self-analysis, which could encourage decisions of higher quality. Under the avoidance maneuver, it is very easy for courts to simply cite an applicable injunctive interpretive principle that supports a given interpretation and call it a day. Transparent justification would instead force courts to ask and answer additional questions: Does the law of interpretation sanction competing applicable injunctive interpretive principles? If so, why should a court choose a particular injunctive interpretive principle—and consequent interpretation—over a competing injunctive interpretive principle and consequent interpretation? These additional questions might push courts to consider angles that they might not otherwise have considered.

This argument should not be overstated. At the Supreme Court level, the Justices usually have ample opportunity and incentive to consider every angle and every potentially applicable interpretive principle. Some of the opinions issued by lower federal courts on IDEA § 1415, however, offered no evidence that the courts even considered competing injunctive interpretive principles.[183] These opinions are consistent with the notion that the avoidance maneuver enables courts to engage in a somewhat perfunctory analysis of applicable principles of interpretation. Had these courts been operating under the obligations of transparent justification, they might have engaged in a deeper and more thorough analysis of the law of interpretation. This, in turn, could only have positive effects on the quality of their decisions.

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182. Judge Richard Posner makes a similar point in defending pragmatic judging. Judge Posner argues that, contrary to conventional wisdom, if judges acknowledge that they often exercise legally unconstrained discretion, they will be more circumspect in exercising discretion than if they operate under the false impression that the law dictates outcomes. POSNER, *supra* note 34, at 252.

183. Those lower court opinions that deployed the second variation of the avoidance maneuver by offering no discussion of competing interpretive principles are most consistent with this idea. *See supra* text accompanying notes 122–28.

Finally, if transparent justification engenders deeper analysis of the law of interpretation, over time it could prompt courts to improve the law of interpretation, or even to develop now-absent ordering principles. Currently, the law of interpretation offers little more than legal platitudes for grappling with interpretive choices. The avoidance maneuver allows courts to freely select reliance on a text-over-intent platitude: "[W]hen the statute's language is plain, the sole function of the courts at least where the disposition required by the text is not absurd is to enforce it according to its terms."[184] Alternatively, courts deploying the avoidance maneuver can freely select an intent-over-text platitude: when "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters[,] . . . . the intention of the drafters, rather than the strict language, controls."[185] Transparent justification would obligate courts to go beyond these legal platitudes and acknowledge that the law of interpretation does not resolve interpretive choices. And if courts are forced to acknowledge the limits of the law of interpretation, they might develop principled ways for resolving those limits. Thus, were courts to jettison the avoidance maneuver and employ transparent justification, courts would be obliged to publicly analyze on a case-by-case basis the merits and demerits of privileging text or contrary legislative intent. Such analysis could generate principles more clearly specifying the circumstances under which text will presumptively trump conflicting legislative intent, and vice versa. These generalized principles could, over time and in a common-law fashion, congeal into new ordering principles that are incorporated into the law of interpretation.

In the end, however, the strongest reasons for favoring transparent justification have nothing to do with improving the quality of decisions or the development of ordering principles. To be sure, these are significant side benefits that might accrue from a shift to transparent justification. But even ignoring these side benefits, one single consideration makes transparent justification superior to the avoidance maneuver: judicial candor. Simply stated, courts should be expected to offer transparent, honest, and complete descriptions of

184. Dodd v. United States, 545 U.S. 353, 359 (2005) (alteration in original) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000)) (internal quotation marks omitted); *see also supra* note 58.

185. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)) (internal quotation mark omitted); *see also supra* note 49.

the law of interpretation in their opinions. When courts deploy the avoidance maneuver, they fail to live up to this obligation. Instead, they inaccurately claim or imply that the law of interpretation grants certain injunctive interpretive principles priority over other injunctive interpretive principles. A presumption must always stand against misleading or incomplete descriptive accounts of legal norms in judicial opinions.[186] Extraordinary circumstances might justify rebutting that presumption in some situations. The avoidance maneuver, however, is not reserved for extraordinary circumstances. It is standard operating procedure in legal opinions that deal with interpretive choice.

CONCLUSION

This Article has used *Arlington Central*'s classic conflict between statutory text and contrary legislative intent to explore fundamental features of the law of interpretation and the way courts address interpretive choice. Several central points have been advanced. First, the law of interpretation does not give courts much aid in resolving interpretive choices. The law of interpretation sanctions competing injunctive interpretive principles, but it offers no ordering principles for resolving conflicts among them. Thus, in *Arlington Central*, the law of interpretation left the Supreme Court free to choose between two opposing interpretations of equal legal validity and force. Ultimately, legally unconstrained judicial discretion driven by extralegal factors—rather than the law of interpretation—was decisive.

Second, although the law of interpretation cannot resolve interpretive choices, courts nonetheless explicitly or implicitly claim that it can. In *Arlington Central* and related lower federal court cases, none of the opinions acknowledged the central role judicial discretion and extralegal factors had played in choosing between statutory text and conflicting legislative intent. Instead, the Justices applied the avoidance maneuver and claimed that the law of interpretation favors text over intent, or vice versa. In so doing, the Court misrepresented

186. *See* Idleman, *supra* note 164, at 1309 ("[T]he basic rule that judges ought to be candid in their opinions that they should neither omit their reasoning nor conceal their motives seems steadfastly to have held its ground."); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979) (arguing that Justices may not actually rely on reasons not stated in their opinions); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–38 (1987) (arguing that candor is required in judicial opinions).

the law of interpretation and failed to publicly discuss the pivotal extralegal factors that had determined whether text or legislative intent ultimately prevailed.

Third, courts deploy the avoidance maneuver to enable the reasoning in judicial opinions to adhere to rule-of-law values and thereby to preserve the legitimacy of judicial decisionmaking. Opinions responding to interpretive choices with the avoidance maneuver, however, necessarily misrepresent the law of interpretation. This misrepresentation diminishes any value derived from the appearance of adherence to the rule of law.

Finally, given the problems inherent in the avoidance maneuver, this Article advances transparent justification as an alternative approach. Unlike the avoidance maneuver, transparent justification does not misrepresent the law of interpretation. Moreover, transparent justification would better constrain judicial discretion by pressing courts to publicly grapple with determinative extralegal factors. This, in turn, would also encourage courts to develop the ordering principles that this area of the law lacks. Any rule-of-law motivation for embracing the avoidance maneuver, or for rejecting transparent justification, is unconvincing. The mere fact that a court proclaims that the law of interpretation grants text precedence over intent, or vice versa, does not make it so. Nor does it persuade anyone who has reason to scrutinize judicial reasoning in cases involving interpretive choices. Moreover, admitting that the law of interpretation does not resolve an interpretive choice does not tell interested observers anything they do not already know.

This Article began with a series of questions: What should a court do when the text of a statute strongly points to one statutory meaning, but strong evidence of legislative intent suggests an entirely different statutory meaning? Should a court follow the most natural reading of the text, even though it would upset the expectations of the enacting legislature? Or should a court adopt a reading that matches the clearly expressed intent and understanding of the enacting legislature, even if that reading is at odds with the statutory text?

Ultimately, this Article does not counsel courts to favor either statutory text or legislative intent. Instead, it simply counsels against reflexive deployment of the avoidance maneuver. Courts have overestimated both the legitimacy-preserving effect of the avoidance maneuver and the legitimacy-eroding effect of transparent justification. In cases involving interpretive choices, legally unconstrained judicial discretion and extralegal factors necessarily

will be decisive. The mode of justification, whether it be avoidance or transparent justification, cannot alter this essential reality. At the very least, therefore, the avoidance maneuver should not be so universally and unquestioningly deployed. Courts should take transparent justification seriously. If they do, many courts will recognize the pitfalls of avoidance and the benefits of transparent justification.

APPENDIX

EXPERT-WITNESS FEES UNDER IDEA § 1415

No.	Case	Type of Court
1	Goldring v. District of Columbia, 416 F.3d 70 (D.C. Cir. 2005)	Circuit Court
2	Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 (2d Cir. 2005), *vacated*, 548 U.S. 291 (2006)	Circuit Court
3	Mo. Dep't. of Elementary & Secondary Educ. v. Springfield R-12 Sch. Dist., 358 F.3d 992 (8th Cir. 2004)	Circuit Court
4	T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469 (7th Cir. 2003)	Circuit Court
5	Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003)	Circuit Court
6	Arons v. N.J. State Bd. of Educ., 842 F.2d 58 (3d Cir. 1988)	Circuit Court
7	S.W. v. Bridgeton Bd. of Educ., No. Civ. 05-0043(RBK), 2006 WL 469655 (D.N.J. Feb. 24, 2006)	District Court (Unpublished)
8	P.R. v. Bridgeton Bd. of Educ., No. Civ.A. 05-42(FLW), 2006 WL 231665 (D.N.J. Jan. 31, 2006)	District Court (Unpublished)
9	C.H. *ex rel.* M.H. v. Jefferson Twp. Bd. of Educ., Civil Action No. 05-39 (HAA), 2005 WL 4122172 (D.N.J. Dec. 20, 2005)	District Court (Unpublished)
10	Burgess v. Paterson Bd. of Educ., No. Civ. 04-2620, 2005 WL 2290290 (D.N.J. Sept. 20, 2005)	District Court (Unpublished)
11	Riggins v. Millville Bd. of Educ., No. Civ. 04-3575(RBK), 2005 WL 1863666 (D.N.J. Aug. 2, 2005)	District Court (Unpublished)
12	Goldring v. District of Columbia, No. Civ.A.02-1761 JDB, 2005 WL 3294005 (D.D.C. May 26, 2005)	District Court (Unpublished)
13	Czarniewy v. District of Columbia, No. Civ.A. 02-1496(HHK), 2005 WL 692081 (D.D.C. Mar. 25, 2005)	District Court (Unpublished)
14	Bd. of Educ. v. I.S. *ex rel.* Summers, 358 F. Supp. 2d 462 (D. Md. 2005)	District Court (Published)
15	Hiram C. v. Manteca Unified Sch. Dist., No. S-03-2568 WBS KJM, 2004 WL 4999156 (E.D. Cal. Nov. 5, 2004)	District Court (Unpublished)
16	Goldring v. District of Columbia, No. Civ.A.02-1761 JDB, 2004 WL 3608893 (D.D.C. July 21, 2004)	District Court (Unpublished)

No.	Case	Type of Court
17	Noyes v. Grossmont Union High Sch. Dist., 331 F. Supp. 2d 1233 (S.D. Cal. 2004)	District Court (Published)
18	Arons v. New York, No. 04 Civ. 0004 (DLC), 2004 WL 1124669 (S.D.N.Y. May 20, 2004)	District Court (Unpublished)
19	Mr. & Mrs. S. v. Timberlane Reg'l Sch. Dist., No. Civ. 03-260-JD, 2004 WL 502614 (D.N.H. Mar. 15, 2004)	District Court (Unpublished)
20	Gross *ex rel.* Gross v. Perrysburg Exempted Vill. Sch. Dist., 306 F. Supp. 2d 726 (N.D. Ohio 2004)	District Court (Published)
21	Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., No. 99 Civ. 9294(CSH), 2003 WL 21694398 (S.D.N.Y. July 22, 2003), *aff'd*, 402 F.3d 332 (2d Cir. 2005), *vacated*, 548 U.S. 291 (2006)	District Court (Unpublished)
22	Brillon *ex rel.* Brillon v. Klein Indep. Sch. Dist., 274 F. Supp. 2d 864 (S.D. Tex. 2003), *rev'd in part*, 100 Fed. App'x 309 (5th Cir. 2004)	District Court (Published)
23	R.E. v. N.Y.C. Bd. of Educ., Dist. 2, No. 02 Civ. 1067(DC), 2003 WL 42017 (S.D.N.Y. Jan. 6, 2003)	District Court (Unpublished)
24	T.D. v. LaGrange Sch. Dist. No. 102, 222 F. Supp. 2d 1062 (N.D. Ill. 2002), *rev'd in part*, 349 F.3d 469 (7th Cir. 2003)	District Court (Published)
25	DiBuo v. Bd. of Educ. of Worcester Cnty., No. Civ. S 01-1311, 2002 WL 32909389 (D. Md. Jan. 23, 2002)	District Court (Unpublished)
26	Brandon K. *ex rel.* Larry K. v. New Lenox Sch. Dist., No. 01 C 4625, 2001 WL 34049887 (N.D. Ill. Dec. 3, 2001), *vacated*, DiBuo *ex rel.* DiBuo v. Bd. of Educ., 309 F.3d 184 (4th Cir. 2002)	District Court (Unpublished)
27	Brandon K. v. New Lenox Sch. Dist., No. 01 C 4625, 2001 WL 1491499 (N.D. Ill. Nov. 23, 2001)	District Court (Unpublished)
28	B.D. v. DeBuono, 177 F. Supp. 2d 201 (S.D.N.Y. 2001)	District Court (Published)
29	Pazik v. Gateway Reg'l Sch. Dist., 130 F. Supp. 2d 217 (D. Mass. 2001)	District Court (Published)
30	P.G. v. Brick Twp. Bd. of Educ., 124 F. Supp. 2d 251 (D.N.J. 2000)	District Court (Published)
31	Mr. J. v. Bd. of Educ., 98 F. Supp. 2d 226 (D. Conn. 2000)	District Court (Published)
32	Woodside v. Sch. Dist. of Phila. Bd. of Educ., No. CIV. A. 99-1830, 2000 WL 92096 (E.D. Pa. Jan. 27, 2000)	District Court (Unpublished)
33	P.L. *ex rel.* L. v. Norwalk Bd. of Educ., 64 F. Supp. 2d 61 (D. Conn. 1999)	District Court (Published)
34	Mayo v. Booker, 56 F. Supp. 2d 597 (D. Md. 1999)	District Court (Published)

No.	Case	Type of Court
35	Mr. & Mrs. B. *ex rel.* W.B. v. Weston Bd. of Educ., 34 F. Supp. 2d 777 (D. Conn. 1999)	District Court (Published)
36	Dale M. *ex rel.* Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 29 F. Supp. 2d 925 (C.D. Ill. 1998), *rev'd*, 237 F.3d 813 (7th Cir. 2001)	District Court (Published)
37	Eirschele v. Craven Cnty. Bd. of Educ., 7 F. Supp. 2d 655 (E.D.N.C. 1998)	District Court (Published)
38	B.K. v. Toms River Bd. of Educ., 998 F. Supp. 462 (D.N.J. 1998)	District Court (Published)
39	S.D. v. Manville Bd. of Educ., 989 F. Supp. 649 (D.N.J. 1998)	District Court (Published)
40	C.G. *ex rel.* Mr. & Mrs. G. v. New Haven Bd. of Educ., 988 F. Supp. 60 (D. Conn. 1997)	District Court (Published)
41	Cynthia K. v. Bd. of Educ. of Lincoln-Way High Sch. Dist., No. 95 C 7172, 1996 WL 164381 (N.D. Ill. Apr. 1, 1996)	District Court (Unpublished)
42	Indep. Sch. Dist. No. 283, St. Louis Park, Minn. v. S.D., 948 F. Supp. 892 (D. Minn. 1996)	District Court (Published)
43	E.M. v. Millville Bd. of Educ., 849 F. Supp. 312 (D.N.J. 1994)	District Court (Published)
44	Bailey v. District of Columbia, 839 F. Supp. 888, 892 (D.D.C. 1993), *abrogated by* Fischer *ex rel.* Fischer v. District of Columbia, 517 F.3d 570 (D.D.C. 2008)	District Court (Published)
45	Aranow v. District of Columbia, 780 F. Supp. 46 (D.D.C.1992)	District Court (Published)
46	Field v. Haddonfield Bd. of Educ., 769 F. Supp. 1313 (D.N.J. 1991)	District Court (Published)