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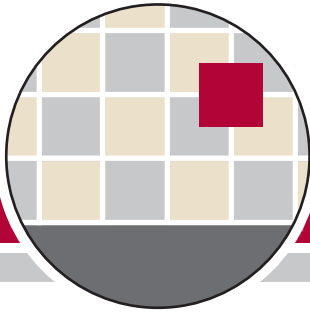
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Let's Talk About Text: Contracts, Claims, and Judicial Philosophy at the Federal Circuit

Andrew Langford¹

This Article began as a research project with the goal of examining the congruence of Federal Circuit claim construction doctrine and American contract interpretation doctrine. But during a review of the Federal Circuit's own contract law cases, a broader picture emerged—one of a court struggling to interpret legal documents, particularly contracts and patents. This Article describes how the Federal Circuit's contract interpretation doctrine parallels claim construction doctrine and ends by discussing implications for scholars and attorneys in the field of patent law.

I. A TALE OF TWO METHODOLOGIES

R. Polk Wagner and Lee Petherbridge describe the ideological divide at the Federal Circuit as a split between “procedural” and “holistic” methodologies.² The procedural approach favors a rigid evidentiary hierarchy. For the procedural jurist, the plain and ordinary meaning of words will typically be dispositive of interpretive issues. Extrinsic evidence, other than dictionaries, is generally disregarded by courts applying the procedural methodology.³ The holistic methodology, by contrast, is less rigid than the procedural methodology, and it is more willing to ignore an evidentiary hierarchy in favor of relying on the most compelling evidence presented in a particular case.⁴ A court utilizing the holistic methodology might begin an analysis by discussing the prosecution history or expert testimony, while courts relying on the procedural approach will always dutifully begin with plain language.

A similar divergence is reflected more generally, and more famously, in the field of statutory interpretation. Hypertextualists tend to focus on words in isolation, and they often

1. J.D. Candidate, Class of 2013, Indiana University Maurer School of Law. All alterations to quotations are my own unless otherwise indicated. Special thanks is due to Professors Greg Castanias, Mark D. Janis, and Mike Mattioli for their welcome feedback on this Article. All views expressed and mistakes made are my own.

2. R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1111 n.19 (2004).

3. *Id.*

4. *Id.*

defer to dictionary definitions.⁵ Pragmatic textualists are more inclined to rely on context and extrinsic evidence of usage.⁶ For example, the phrase “uses a gun,” read in context, would normally be read to mean “uses a gun as a weapon,” not as “uses a gun for any purpose.”⁷

II. CONTEMPORARY CONTRACT INTERPRETATION

Two divergent schools of contract interpretation exist today: what can be labeled the “four corners school” and the “Corbin school.”⁸ The four corners school relies on the text of the document itself—if there is no facial ambiguity based on the plain language of the contract, then no resort to extrinsic evidence can be had.⁹ Evidence of trade usage and custom is excluded from consideration under this approach.¹⁰

The Corbin school rejects the proposition that words have “plain” or “objective” meanings that can be discerned simply by reading a document. Instead, Corbin’s analysis looks to the surrounding factual context to understand what the parties intended the words to mean. Corbin’s philosophy is embodied in the Restatement, which, in contrast to the four corners school, allows evidence of trade usage and custom to be introduced to show that a facially unambiguous contract does, in fact, mean something else entirely.¹¹ Further, the Restatement always allows courts to consider extrinsic evidence, without regard to facial ambiguity.¹² The

5. *Id.* at 1131.

6. *See* *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (arguing that statutes should be construed in the context of the surrounding language and ordinary usage). The *Texas Digital* line of cases can be described as hypertextualism tempered by checking the dictionary definition against the intrinsic record. *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193 (Fed. Cir. 2002). *Phillips*, which diplomatically rejected the *Texas Digital* approach, can be described as weak pragmatic textualism because the opinion is still hostile to extrinsic evidence. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1324 (Fed. Cir. 2005) (en banc).

7. *See, e.g.*, *Smith v. United States*, 508 U.S. 223 (1993) (relying on dictionary definitions to hold that exchanging a gun for drugs was “using” a gun “during and in relation to . . . [a] drug trafficking crime” (alterations in original); *id.* at 241–46 (Scalia, J., dissenting) (relying on common usage, surrounding statutory language, and other legal texts to read the statute as requiring that a gun be used as a weapon, to the exclusion of other “uses”).

8. Samuel Williston is often associated with the harsh four corners approach. *See* Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005). However, because Williston’s treatise does not adopt the extreme view I am describing here, I will not associate Williston with it. *See* 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 33:38 (4th ed. 2011) (noting that extrinsic evidence of surrounding circumstances is always relevant).

9. *See* *LaSalle Nat’l Bank v. Serv. Merch. Co.*, 827 F.2d 74, 78 (7th Cir. 1987) (“If the language of the contract unambiguously provides an answer to the question at hand, the inquiry is over.”).

10. *See, e.g.*, *Independence Twp. v. Reliance Bldg. Co.*, 437 N.W.2d 22, 24 (Mich. Ct. App. 1989) (“[W]here a contract is not ambiguous, evidence of custom and practice in an industry is not admissible.”).

11. RESTATEMENT (SECOND) OF CONTRACTS § 220 cmt. d (1981) (“There is no requirement that an ambiguity be shown before usage can be shown The normal effect of a usage on a written contract is to vary its meaning from the meaning it would otherwise have.”).

12. *Id.* § 202 (“Words and other conduct are interpreted in light of all the circumstances.”).

rationale for this approach is that a document that seems clear on its face may have meant something very different to the parties. Without the benefit of extrinsic evidence to provide context, a court has no way to know if it has arbitrarily interpreted the contract in a fashion that the parties never contemplated.¹³

The same divergence Wagner and Petherbridge have identified on the Federal Circuit is also present in contract law generally: the four corners approach is procedural, while Corbin's philosophy is holistic.

This Article's discussion of contract law will focus on the role of trade usage and custom in contract interpretation. This focus has been adopted for two reasons. First, the most authoritative sources recognize that evidence of trade usage and custom is always relevant.¹⁴ Thus, any break from the dominant approach is instructive as to the overall jurisprudence of the Federal Circuit—that is, it illustrates that something has driven the Federal Circuit away from prevailing doctrinal views. Second, trade usage has a unique relationship to claim construction, because trade usage is analogous to patent law's cardinal claim construction rule: claims must be given the meaning they would have to a person of ordinary skill in the art. Similarly, trade usage is concerned with what a given term means from the perspective of merchants in a particular commercial field.

III. CONTRACT INTERPRETATION AT THE FEDERAL CIRCUIT

Consistent with its emphasis on intrinsic evidence when interpreting patent claims, the Federal Circuit leans toward the “four corners” approach to contract interpretation.¹⁵ To see how the Federal Circuit arrived at this stance, it is useful to look to the development of the doctrine and to see how the court has struggled with the role of extrinsic evidence. Excluding extrinsic evidence in contract law creates more problems for the procedural jurist than it does in patent law, because in patent law, judges can rely on the specification and prosecution history as a sort of quasi-extrinsic, textual evidence. In other words, patent law treats the specification and prosecution history as incorporated by reference into the claims, even though it is only the claims that are being interpreted.

13. Corbin's approach is not without its own weaknesses. Extensive reliance on extrinsic evidence can increase the duration, complexity, and expense of litigation. It injects more uncertainty into the interpretive process, and thus makes it more difficult for negotiating parties to evaluate their relative bargaining positions. Corbin's philosophy also creates incentives for litigants to engage in an *ex post facto* attempt to rewrite the contract in light of their litigation goals, even by perjury.

14. *See, e.g., id.* § 220; U.C.C. § 2-202 (2004); 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 555 (1960); 12 LORD, *supra* note 8, § 34:5.

15. *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1434 (Fed. Cir. 1996) (“To resolve the debate, then, we must first determine whether the release language in [the agreement] is unambiguous. Only in the event of an ambiguity may we examine extrinsic or parol evidence.”). When interpreting licensing agreements, the Federal Circuit follows regional law. This Part will focus on government contracts, which represent the CAFC's own unique jurisprudence. The CAFC's approach to applying state contract law would be an interesting topic for further research, because it might demonstrate that the CAFC applies state law standards differently than the state courts.

In 1965, the then-United States Court of Claims held in *Gholson, Byars, and Holmes Construction Co. v. United States* that trade usage could be admitted as extrinsic evidence, even where a document is unambiguous on its face.¹⁶ Shortly after the *Gholson* decision, the Court of Claims issued several opinions holding that trade usage could *not* be introduced where the document is clear on its face; these later holdings did not cite *Gholson*.¹⁷ The conflict created by these latter cases led the Postal Service Board of Contract Appeals to hold that “[*Gholson*] cannot be read broadly and must be limited strictly to the facts of that case.”¹⁸

A line of cases illustrates the same split occurring at the Federal Circuit. The 1996 *McAbee Construction, Inc. v. United States*¹⁹ decision is illustrative of a strict procedural methodology. McAbee, a landowner, granted the Army Corps of Engineers an easement to use its land as a disposal site for construction materials.²⁰ Before the construction materials were dumped on McAbee’s land, the ground elevation ranged from 135 to 160 feet.²¹ The Corps returned the land at an elevation of 183 feet.²² McAbee alleged that the Corps had breached the contract by violating an understanding that the land would be returned at an elevation no greater than 165 feet.²³ The relevant contract provision authorized the Corps to “deposit fill, spoil and waste material [on McAbee’s land] . . . and to perform any other work necessary and incident to the construction of the project.”²⁴ The contract also contained an integration clause.²⁵

The court began by recognizing that binding Court of Claims precedents required the admission of parol evidence to show whether a contract is integrated.²⁶ But the court immediately demonstrated its hostility to that proposition when it stated that “[t]he parties here explicitly stated that the contract was fully integrated” and that consequently “McAbee carri[e]d an extremely heavy burden in overcoming this attestation to the document’s finality and completeness.”²⁷ The court found that McAbee had “pointed to no extrinsic evidence that supports its assertion that the contract was not fully integrated.”²⁸ In an analysis that

16. 351 F.2d 987 (Ct. Cl. 1965).

17. *See Merando, Inc. v. United States*, 475 F.2d 603 (Ct. Cl. 1973); *Nw. Indus. Piping, Inc. v. United States*, 467 F.2d 1308 (Ct. Cl. 1972); *S.S. Silberblatt, Inc. v. United States*, 433 F.2d 1314 (Ct. Cl. 1970).

18. *Appeal of Marion Constr. Co.*, 1977 WL 2622 (P.S.B.C.A. 1977).

19. *McAbee Constr., Inc.*, 97 F.3d at 1434.

20. *Id.* at 1433.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1433 (alterations in original).

25. *Id.*

26. *Id.* at 1434. “An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.” RESTATEMENT (SECOND) OF CONTRACTS § 209 (1981).

27. *McAbee Constr., Inc.*, 97 F.3d at 1434.

28. *Id.*

seems tautological, the court discounted extrinsic evidence showing that McAbee had pressed the Corps on the subject of ground elevation because no ground elevation limitation was ultimately included in the contract.

The *McAbee* court next asked whether the contract was ambiguous, such that extrinsic evidence of an agreement on ground elevation could be shown. The court recited the familiar standard that if the “provisions are clear and unambiguous, they must be given their plain and ordinary meaning, and the court may not resort to extrinsic evidence to interpret them.”²⁹ “To permit otherwise would cast ‘a long shadow of uncertainty over all transactions’ and contracts.”³⁰

In a highly formalistic analysis, the court found the document unambiguous. “The language of the easement expressly permitted the Corps to deposit fill and waste on McAbee’s land, and to perform any other work on the tract as long as it was ‘necessary and incident’ to the project. Consequently, the trial court’s conclusion that the absence of a height restriction created an ambiguity is incorrect.”³¹ Under this strange interpretation, the Corps could have been within its rights to return the land to McAbee with the deposited waste stacked a mile high.

To understand how rigid this interpretation was, it is useful to consider the opinion of the court below, which had found for McAbee. The trial court relied on the following extrinsic evidence: (1) a map provided to McAbee by the Corps showing an elevation of 165 feet, which was presented to the plaintiffs in response to their concerns about excessive dumping; (2) evidence that the government had otherwise assured McAbee about the 165 foot height limitation; and (3) testimony from the government’s own real estate appraiser stating that the government’s valuations were premised on a land elevation of about 165 feet.³² Yet the court concluded that “no extrinsic evidence . . . supports [McAbee’s] assertion that the contract was not fully integrated,” nor did this evidence show an ambiguity.³³

An earlier example of procedural methodology at the Federal Circuit is *R.B. Wright Construction Co. v. United States*.³⁴ The case involved three contracts between a construction company and the Department of the Army to perform miscellaneous repairs on several World War II era barracks. The contracts called for three coats of paint, including a primer coat, to be applied to all of the barracks’ walls.³⁵ The problem was

29. *Id.* at 1435 (internal quotation marks and citations omitted).

30. *Id.* (citations omitted).

31. *Id.*

32. W. Stanfield Johnson, *Interpreting Government Contracts: Plain Meaning Precludes Extrinsic Evidence and Controls at the Federal Circuit*, 34 PUB. CONT. L.J. 635, 647 (2005).

33. *McAbee Constr., Inc.*, 97 F.3d at 1434.

34. 919 F.2d 1569 (Fed. Cir. 1990).

35. *Id.* at 1569.

that many of the walls already had several coats of paint on them. Because primer is intended to be applied to bare surfaces, not paint, a coat of primer would have actually made the finished paint job inferior in quality.³⁶ When the contractor did not apply primer to certain walls that had already been painted, the government ordered R.B. Wright to do so. R.B. Wright complied but sued to recover the cost of complying with the government's request.

The court held that the plain meaning of the contract required three coats of paint, including primer.³⁷ The panel majority rejected R.B. Wright's trade practice evidence, holding that "[n]either a contractor's belief nor customary practice . . . can make an unambiguous contract provision ambiguous."³⁸ Judge Plager dissented, arguing that the case was "not so much a problem of legal interpretation as it [was] of common sense."³⁹

A panel consisting of Judges Plager, Rader, and Rich confronted the split created by *Gholson, McAbee, and R.B. Wright in Metric Constructors, Inc. v. NASA*.⁴⁰ There, a construction contract required "new lamps" to be "installed immediately prior to the completion of the project."⁴¹ Metric contended that this provision applied only to "defective, burned out, or broken lamps."⁴² NASA, on the other hand, argued that the contract required the replacement of all lamps, known as "relamping" in the industry.⁴³ Under *McAbee and R.B. Wright*, it would seem obvious that NASA had the better side of the argument—the plain language inescapably requires that all lamps be replaced. And yet the panel reversed the decision below, which had relied on plain language.

The court engaged in a lengthy analysis of the conduct of the government under similar contracts, as well as the parties' conduct and other surrounding circumstances.⁴⁴ Because the panel's review of the evidence demonstrated that the contract contained a latent ambiguity, the court construed the contract against the drafter and limited "new lamps" to "defective, burned out, or broken lamps."⁴⁵ In its recitation of the governing legal standards, the court began uncharacteristically by stating that "[w]hen a contract is susceptible to more than one reasonable interpretation, it contains an ambiguity."⁴⁶ This is a clear contrast to cases that begin by reciting the plain language standard.

36. *Id.* at 1574 (Plager, J., dissenting).

37. *Id.* at 1571.

38. *Id.* at 1572.

39. *Id.* at 1573–74.

40. 169 F.3d 747 (Fed. Cir. 1999).

41. *Id.* at 749.

42. *Id.*

43. *Id.*

44. *Id.* at 749–50.

45. *Id.* at 753–54.

46. *Id.* at 751.

The court's discussion of the role of trade usage is very Corbin-esque.

Excluding evidence of trade practice and custom because the contract terms are “unambiguous” on their face ignores the reality of the context in which the parties contracted. That context may well reveal that the terms of the contract are not, and never were, clear on their face. On the other hand, that context may well reveal that contract terms are, and have consistently been, unambiguous.⁴⁷

“Thus, to interpret contract terms, the context and intention [of the contracting parties] are more meaningful than the dictionary definition.”⁴⁸ The panel went so far as to say that “evidence of trade practice and custom is part of the *initial assessment* of contract meaning.”⁴⁹ In support of these propositions, the court discussed *Gholson* and cited Williston, Corbin, and the Restatement.⁵⁰

The panel immediately qualified these broad statements in an effort to fit them together with the plain language cases. Trade practice and usage could not be used “to create an ambiguity where a contract was not reasonably susceptible of differing interpretations at the time of contracting,”⁵¹ and evidence of trade practice and usage should be admitted “only where a party makes a showing that it relied reasonably” on the meaning of the words at the time of contracting.⁵² In spite of these efforts at harmonization, *Metric Constructors* cannot be squared with *R.B. Wright* and *McAbee*.

Metric Constructors was followed roughly two years later by *Jowett, Inc. v. United States*, another influential decision.⁵³ There, a contract stated that “duct installation” was not required on “ceilings which form plenums.”⁵⁴ The dispute was over whether Jowett, a construction firm hired by the Army Corps of Engineers, had to install insulation on the ducts within the ceilings.⁵⁵ Jowett introduced affidavits from four construction firm executives stating that there was a well-established trade practice of not insulating such ducts.⁵⁶ The trial court declined to give any weight to the evidence of a trade practice because it conflicted with the plain language of the contract, and the panel agreed.⁵⁷

47. *Id.* at 752.

48. *Id.* (internal quotation marks omitted) (alterations in original).

49. *Id.*

50. *Id.* at 753 (“The *Gholson* rule and these principles of contract interpretation find general support in authoritative legal commentaries. The commentaries agree that courts should use evidence of trade practice and custom not only to determine the meaning of an ambiguous provision, but to determine whether a contract provision is ambiguous *in the first instance*.”).

51. *Id.* at 752. This is the gloss that *Metric Constructors* uses to distinguish *R.B. Wright*. *Id.*

52. *Id.*

53. 234 F.3d 1365 (Fed. Cir. 2000).

54. *Id.* at 1366.

55. *Id.* at 1367.

56. *Id.*

57. *Id.* at 1367, 1370.

The *Jowett* court began by citing *McAbee* for the plain language approach, followed by a citation to *Metric Constructors* that omitted all of its expansive language.⁵⁸ The panel was clearly disturbed by *Jowett*'s (correct) view that *Metric Constructors* "enables industry practice to create an ambiguity, even before the language of the contract is itself analyzed to determine if an ambiguity lies within *the four corners* of the contract."⁵⁹ *Jowett* read *Metric Constructors* as exclusively relying on the fact that the trade term "relamping" was omitted from the contract.⁶⁰ Hence, evidence of trade practice was "irrelevant" unless there was "a *specific term* that has a well-understood meaning in the industry and that was used in, or omitted from, the contract."⁶¹ Evidence of "a supposed common industry practice" is "simply irrelevant where the language of the contract is unambiguous on its face."⁶²

It is hard to read *Jowett* as anything but an attempt to limit the applicability of *Metric Constructors* to its facts. Indeed, *Jowett* has the unfortunate effect of turning *Metric Constructors* into a hypertextual holding, when the entire rationale behind the decision was to avoid blind adherence to plain language. Rather than following the rule that "evidence of trade practice and custom is part of the initial assessment of contract meaning,"⁶³ the panel outright refused to consider trade practice because it deemed the language of the contract to be unambiguous.

Jowett's gloss on *Metric Constructors* was reaffirmed in *Hunt Construction Group v. United States*.⁶⁴ There, the court held that trade practice "may be useful," but because there was no "term of art included or omitted" in the contract, "the contract's unambiguous terms govern[ed]."⁶⁵ Thus, within a span of two years, *Metric Constructors* went from being a decision *requiring* the consideration of trade practice evidence to a decision that merely describes a helpful approach for when a specific term of art is at issue. This view of trade practice and usage is inconsistent with leading secondary sources that do not limit consideration of trade practice and usage to particular terms of art.⁶⁶

Another blow was dealt to the holistic methodology by *Coast Federal Bank, FSB v. United States*, an en banc *Winstar* case.⁶⁷ The opinion unanimously rejects the consideration of any

58. *Id.* at 1368. The complete quotation used was as follows: "In interpreting a contract, a court may accept evidence of trade practice and custom. However, 'a court should accept evidence of trade practice only where a party makes a showing that it relied reasonably on a competing interpretation of the words when it entered into the contract.'" *Id.* (quoting *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999)).

59. *Id.*

60. *Id.* at 1369 ("[*Metric Constructors*] based [its holding] on the absence of the term 'relamping' from the contract.").

61. *Id.* at 1369–70.

62. *Id.* at 1369.

63. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999).

64. 281 F.3d 1369 (Fed. Cir. 2002).

65. *Id.* at 1373.

66. *See supra* note 13.

67. 323 F.3d 1035 (Fed. Cir. 2003) (en banc).

extrinsic evidence when the agreement’s language is unambiguous.⁶⁸ The court did, however, discuss extrinsic evidence and found it consistent with the plain language.⁶⁹ That could explain why the opinion was unanimous, in spite of the repeated recitation of the plain language rule.

Teg-Paradigm Environmental, Inc. v. United States,⁷⁰ a 2006 panel opinion, illustrates the difficulties the court has created by failing to overrule any of its prior holdings regarding extrinsic evidence. The opinion contains a *Phillips v. AWH Corp.*-like⁷¹ recitation of the approaches to contract interpretation already discussed, but the opinion does not acknowledge the conflicts between these precedents. The court begins by citing *Metric Constructors* for the proposition that “the language of [the] contract must be given [the] meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.”⁷² The panel’s discussion of Federal Circuit contract interpretation doctrine thus begins by contravening the axiomatic rule that contracts should be construed as intended by the parties, not according to the perspective of a tort-style reasonably prudent person.⁷³

Next, the court cites *McAbee* and *Coast Federal* for the proposition that unambiguous language controls, to the exclusion of all extrinsic evidence.⁷⁴ Yet the next sentence cites *Coast Federal* for the proposition that the court may look to extrinsic evidence to confirm the plain meaning, without explaining how a court can consider extrinsic evidence while simultaneously ignoring it.⁷⁵ The court goes on to recite the test for ambiguity—whether the contract is “susceptible to more than one reasonable interpretation”—which then justifies using extrinsic evidence to effectuate “the parties’ intent at the time they executed the contract.”⁷⁶

The opinion continues, “[e]ven when a contract is unambiguous, it may be appropriate to turn to one common form of extrinsic evidence—evidence of trade practice and custom.”⁷⁷ This statement cannot be reconciled with the rule in *Metric Constructors* that evidence of trade practice and usage is to be considered at the outset of every case.⁷⁸ The court cites both *Jowett* and *Metric Constructors* in this portion, without acknowledging their conflicting language.⁷⁹

68. *Id.* at 1040.

69. *Id.*

70. 465 F.3d 1329 (Fed. Cir. 2006).

71. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1311–24 (Fed. Cir. 2005) (en banc) (analyzing numerous rules and canons of claim construction).

72. *Teg-Paradigm*, 465 F.3d at 1338.

73. *But see* *Tri-Star Elecs. Int’l, Inc. v. Preci-Dip Durtal SA*, 619 F.3d 1364, 1367 (Fed. Cir. 2010) (“In the case of contracts, the avowed purpose and primary function of the court is the ascertainment of the intention of the parties.”) (quoting *Alvin Ltd. v. United States Postal Serv.*, 816 F.2d 1562, 1565 (Fed. Cir. 1987)).

74. *Teg-Paradigm*, 465 F.3d at 1338.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999).

79. *Teg-Paradigm*, 465 F.3d at 1338.

In the final paragraph of the legal standard to be applied, the court deals with the parol evidence rule. Parol evidence may not “add or otherwise modify the terms” of an integrated agreement, except where the evidence of other agreements is “incorporated into the contract.”⁸⁰ The panel finishes by stating that the parol evidence rule does not bar extrinsic evidence “when the plain and ordinary meaning is not clear,” citing the Restatement, Corbin on Contracts, and, strangely, a law review article.⁸¹ “Armed with these rules, we turn to the issues TEG raises on appeal.”⁸²

Turning to the facts, the court was faced with a contract for asbestos removal that required various building materials to “be cleaned to a degree that no traces of debris or residue are visible by the Observation Services Contractor.”⁸³ The issues were whether this provision required the contractor to remove asbestos from pores and cracks, and what constituted “debris or residue.”⁸⁴ The court held that the plain language covered debris or residue contained within pores and cracks, as long as the asbestos was visible.⁸⁵ The panel looked to extrinsic evidence to confirm its interpretation of the plain meaning and found that the negotiation history supported its interpretation. Because the provision had been discussed by the parties in a conference call, the panel held that it was clear the contractor had understood it.⁸⁶ The court found evidence of trade usage inadmissible on this point because no *particular* term of art was at issue.⁸⁷ However, with respect to the meaning of “debris or residue,” which was not defined by the document, the court affirmed the lower court’s use of an industry standard to define the meaning of “debris or residue” in the asbestos removal industry.⁸⁸

The case law discussed above illustrates doctrinal confusion spawned out of disagreement over methodology, and later cases continue to display disagreement.⁸⁹ Some opinions rely on

80. *Id.* 1338–39.

81. *Id.* at 1339.

82. *Id.*

83. *Id.* at 1333.

84. *Id.* at 1339.

85. *Id.*

86. *Id.*

87. *Id.* at 1340.

88. *Id.* at 1340–41.

89. *See* Daewoo Eng’g & Const. Co. v. United States, 557 F.3d 1332 (Fed. Cir. 2009) (affirming Court of Federal Claims’ interpretation of an ambiguous contract on a clear error standard) (citing *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988)). Note that the panel had to rely on a 1988 precedent as authority for its holding that a question of fact existed, and *Beta Systems* itself cited no precedent for its holding that ambiguity creates a question of fact. Rather, *Beta Systems* simply cited Williston and Corbin’s treatises. *Beta Systems, Inc.*, 838 F.2d at 1183; *see also* *Bell BCI Co. v. United States*, 570 F.3d 1337 (Fed. Cir. 2009) (relying on *McAbee* to reverse the lower court’s contract interpretation, which had involved findings of fact, because the majority found the contract unambiguous; Judge Newman dissented); *Thomas Creek Lumber & Log Co. v. Kempthorne*, 250 F. App’x 316, 318 (Fed. Cir. 2007) (refusing to consider extrinsic evidence in light of the “unambiguous” meaning of “as is”).

plain meaning almost exclusively, while others place consideration of certain extrinsic evidence on roughly equal footing with plain meaning. The result is a collection of panel opinions that appear to set out a *Phillips v. AWH Corp.*-style list of rules, some of which de facto overrule others, without an en banc resolution. The Federal Circuit's current contract interpretation doctrine is also inconsistent with several authoritative secondary sources that permit evidence of trade practice and usage to be introduced under all circumstances.⁹⁰ Williston on Contracts even cites *McAbee* as an example of an improper approach to extrinsic evidence.⁹¹

IV. CLAIM CONSTRUCTION AND THE METHODOLOGICAL TUG OF WAR

Conflicts between the holistic and procedural methodologies are, perhaps, even more apparent in claim construction law than they are in contract law. Two particular divisions on the court have close analogs in the court's contract law jurisprudence. The first is whether extrinsic evidence can create a question of fact in claim construction. The second is whether dictionary definitions are entitled to greater weight than the specification. As with contract interpretation, some discussion on the development of claim construction law is necessary.

In *Markman v. Westview Instruments, Inc.* (“*Markman II*”), the Supreme Court concluded that claim construction is a matter of law to be decided by the presiding judge.⁹² Shortly after the *Markman* decision, the Federal Circuit issued the 1996 *Vitronics Corp. v. Conceptor, Inc.* decision.⁹³ The opinion, written by future Chief Judge Michel, was essentially a handbook for claim construction, and the panel's approach largely parallels the guidance provided by the Federal Circuit's own en banc resolution of the *Markman* case (“*Markman I*”).⁹⁴

Under *Vitronics*, the claim construction analysis proceeds in four steps. First, the “ordinary and customary meaning” of the claim language must be ascertained.⁹⁵ Second, the specification must be reviewed to determine if the patentee has “used any terms in a manner inconsistent with their ordinary meaning.”⁹⁶ Third, courts may consider the prosecution history.⁹⁷ Fourth, if any ambiguity remains, courts can consider extrinsic evidence.⁹⁸ On

90. See *supra* note 13.

91. 11 LORD, *supra* note 8, § 32:7 (“[P]ronouncements can be found in numerous cases to the effect that evidence of the circumstances surrounding the execution of a contract may be admitted, like any other parol evidence, only where the contract's meaning is ambiguous. These decisions in truth, reflect a misunderstanding both of the scope and purpose of the parol evidence rule.”).

92. 517 U.S. 370, 391 (1996).

93. 90 F.3d 1576 (Fed. Cir. 1996).

94. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (en banc) *aff'd*, 517 U.S. 370 (1996).

95. *Vitronics*, 90 F.3d at 1582.

96. *Id.*

97. *Id.* at 1582–83.

98. *Id.* at 1583.

this point the opinion is clear that extrinsic evidence is not to be relied on where possible.⁹⁹ Similar to the court’s contract decisions, the panel states that extrinsic evidence “may not be used to vary or contradict the claim language.”¹⁰⁰ As to the outcome of the case itself, the panel held that the district court had erred in its claim construction by relying on expert testimony where the claims were unambiguous and the trial court’s claim construction excluded the only disclosed embodiment.¹⁰¹

In the years following *Markman* and *Vitronics*, the court fractured in various ways. One split occurred over whether conflicting extrinsic evidence could create questions of fact in claim construction. This question has obvious parallels in contract law, where the prevailing view is that an ambiguity creates a question of fact. The Federal Circuit also applies the rule that ambiguities create questions of fact, though few of the court’s decisions seem to find a contract ambiguous.¹⁰²

In *Fromson v. Anitec Printing Plates, Inc.*, a panel was tasked with determining the meaning of “anodized” in a method claim directed to anodizing aluminum.¹⁰³ The dispute was over whether the term “anodized oxide coating” encompassed both porous and non-porous oxides.¹⁰⁴ The plain and ordinary meaning of anodized includes both types of oxides, but the specification disclosed only porous oxides.¹⁰⁵ The district court resolved the issue by crediting disputed expert testimony showing that key benefits of the claimed invention could only be realized with a porous oxide.¹⁰⁶ As a result, the district court excluded non-porous oxides from the claim scope, even though doing so was inconsistent with both the plain meaning and *Vitronics*.¹⁰⁷

Notably, *Fromson* does not cite *Vitronics* and does not recite the plain language standard. Instead, the panel begins by stating that “the first resource [for interpreting claims] is the patent specification of which they are a part.”¹⁰⁸ *Fromson* did advance a plain language argument because the dictionary definition encompassed both porous and non-porous oxides. But the panel dismissed the plain language by stating that while “*Markman* presents

99. The panel’s recitation of the standard for claim construction, in fact, does not speak in terms of an affirmative grant of discretion to district courts to consider extrinsic evidence. Rather, the opinion’s discussion of extrinsic evidence begins by stating that “[i]n most situations, an analysis of the intrinsic evidence alone will resolve any ambiguity in a disputed claim term. In such circumstances, it is improper to rely on extrinsic evidence.” *Id.* The opinion’s tone indicates that reliance on extrinsic evidence is almost always illegitimate.

100. *Id.* at 1584.

101. *Id.* at 1585.

102. *See supra* note 89.

103. 132 F.3d 1437, 1439 (Fed. Cir. 1997).

104. *Id.* at 1442–43.

105. *Id.* at 1447–48 (Mayer, C.J., concurring).

106. *Id.* at 1442–43.

107. *Id.*

108. *Id.* at 1442.

a *useful general rule*, it is adaptable to the needs of a particular case.”¹⁰⁹ This allusion to pragmatic flexibility is very indicative of a holistic approach. The structure of the panel’s analysis is even more telling of the methodology being employed. The headings in the section of the opinion analyzing claim construction appear in the following order: “The Specification,” “The Prosecution History and Prior Art,” “Extrinsic Evidence,” and “Claim Differentiation.”¹¹⁰ No heading exists for plain language, and the doctrine of claim differentiation is analyzed dead last. The panel went on to affirm the district court’s claim construction, based primarily on the district court’s resolution of conflicting expert testimony.¹¹¹

Chief Judge Mayer concurred and related that, based on his own personal knowledge, Fromson’s explanation of the plain meaning of “anodized” was correct.¹¹² But, in a bold move, Chief Judge Mayer stated that the affirmance was based on facts “found from conflicting evidence [e.g., expert testimony], which [were] not clearly erroneous.”¹¹³

The statements regarding factfinding deference in *Fromson* were a catalyst for the well-known and much-discussed en banc decision in *Cybor v. FAS Technologies, Inc.*, which overruled *Fromson* and decided that claim construction has no factual component.¹¹⁴ *Cybor* represents a significant victory for the procedural methodology. Precluding extrinsic evidence from creating a question of fact implicitly assumes that claim construction issues can always be resolved by looking to the four corners of the intrinsic record.¹¹⁵

The court also split over whether dictionaries trump the specification as an interpretive tool. Again, this split has an analog in contract law. In contract law, the four corners of the document include incorporated documents; likewise, the file wrapper of the patent itself is treated as a fully integrated document.¹¹⁶ Thus, awarding primary significance to dictionary definitions, in effect, places the four corners on a lower pedestal than dictionary definitions.

109. *Id.* at 1444

110. *Id.* at 1442–45.

111. *Id.* at 1445.

112. *Id.* at 1447–48 (Mayer, C.J., concurring).

113. *Id.* at 1448.

114. 138 F.3d 1448 (Fed. Cir. 1998) (en banc). All three judges from the *Fromson* panel wrote or joined separate opinions in *Cybor*.

115. Of course, *Cybor* may be driven by more than simple faith in the utility of the intrinsic record. Commentators have long speculated that *Cybor* is animated by functional considerations arising from the Federal Circuit’s unique judicial mission. See Jeffrey Peabody, *Under Construction: Towards a More Deferential Standard of Review in Claim Construction Cases*, 17 FED. CIRCUIT B.J. 505, 523–25 (2008) (listing some common policy-based explanations of *Cybor*). *Cybor* has also been defended on the ground that many seemingly “factual” inquiries are treated as matters of law. See R. Carl Moy, 1 MOY’S WALKER ON PATENTS § 4:17 (4th ed. 2012) (referring to analyses of legislative intent in statutory interpretation as an example of the often counterintuitive “fact/law” distinction).

116. See, e.g., *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 978 (Fed. Cir. 1995) (en banc) (“The patent is a fully integrated written instrument.”) *aff’d*, 517 U.S. 370 (1996).

This strict evidentiary hierarchy is indicative of a very strong application of the procedural methodology.

Vitronics stated that the specification is “the single best guide to the meaning of a disputed term” and that the specification “acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication.”¹¹⁷ By contrast, *Texas Digital Systems, Inc. v. Telegenix, Inc.* is exemplary of a post-*Markman* line of cases staking out a different approach wherein dictionaries would often be dispositive of claim construction issues.¹¹⁸

Texas Digital established a “presumption in favor of a dictionary definition” for disputed claim terms.¹¹⁹ The presumption could be rebutted in two ways. First, a dictionary definition could be altered “where the patentee, acting as his or her own lexicographer, has clearly set forth an explicit definition of the term different from its ordinary meaning.”¹²⁰ Second, the presumption could be rebutted where “the inventor has disavowed or disclaimed scope of coverage, by using words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope.”¹²¹

The *Texas Digital* panel’s rejection of a specification-centric approach to claim construction is reminiscent of the *Jowett* panel’s rejection of the *Metric Constructors* approach to trade usage. The *Texas Digital* panel felt that “[c]onsulting the written description and prosecution history as a threshold step in the claim construction process, before any effort is made to discern the ordinary and customary meanings attributed to the words themselves, invites a violation of our precedent counseling against importing limitations into the claims.”¹²² Similarly, in *Jowett*, the panel rejected the proposition that trade usage should be considered as a threshold step because it required looking outside the “four corners” before plain meaning had been considered.¹²³

Both *Cybor* and *Texas Digital* were the subject of a granted petition for rehearing en banc in *Phillips v. AWH Corp.*¹²⁴ In addition to the questions presented in the petition, Chief Judge Rader specially requested the parties to brief whether claim construction is “amenable to resolution by resort to strictly algorithmic rules,” or if claim construction is “better achieved by using the order or tools relevant in each case . . . thus entrusting trial courts to interpret

117. *Vitronics*, 90 F.3d at 1582.

118. 308 F.3d 1193 (Fed. Cir. 2002). For examples of other procedural decisions involved in this split of authority, see *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359 (Fed. Cir. 2002), *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985 (Fed. Cir. 1999). For examples of holistic decisions, see *Wang Labs., Inc. v. Am. Online, Inc.*, 197 F.3d 1377 (Fed. Cir. 1999), *O.I. Corp. v. Tekmar Co.*, 115 F.3d 1576 (Fed. Cir. 1997).

119. *Texas Digital*, 308 F.3d at 1204.

120. *Id.*

121. *Id.*

122. *Id.*

123. See *supra* notes 53–62 and accompanying text.

124. 415 F.3d 1303, 1324 (Fed. Cir. 2005) (en banc).

claims as a contract or statute?”¹²⁵ Chief Judge Rader’s request was, to a great extent, a request for the parties to brief the relative merits of the procedural and holistic methodologies. The ultimate opinion of the court, however, addresses only *Texas Digital* and leaves *Cybor* intact.¹²⁶

The case itself turned on the meaning of the term “baffles.”¹²⁷ Specifically, the dispute was over whether, in an invention directed to modular panels for “vandalism-resistant walls,” the term “baffles” included a structure that is disposed at a right angle.¹²⁸ A structure disposed at a right angle would not have achieved one of the invention’s benefits, the deflection of projectiles.¹²⁹

The court’s analysis began with a dictionary definition, which encompassed structures at right angles, and moved on to note that only the dependent claims specifically recited the projectile deflection function.¹³⁰ Based on those two facts, and because the specification did not indicate that all embodiments were required to perform the projectile deflection function, the court concluded that “baffles” should be interpreted by its plain and ordinary meaning.¹³¹ This analysis mirrors the approach set out in *Vitronics*.¹³²

The *Phillips* opinion, not unlike *Teg-Paradigm*,¹³³ contains a comprehensive recitation of virtually every canon of claim construction, with leanings toward the *Vitronics* and *Markman I* “guidelines,” and, of these varied approaches to claim construction, the opinion only explicitly criticizes the *Texas Digital* line of cases. From the perspective of patent law, the language *Phillips* uses to reject *Texas Digital* seems like a major victory for the holistic methodology. *Phillips* states that evidence need not be analyzed in a particular order.¹³⁴ The opinion also states that “there is no magic formula or catechism for conducting claim construction.”¹³⁵ These views are consistent with the holistic methodology’s rejection of an inflexible evidentiary hierarchy. The opinion also echoes Corbin when it states that reliance on dictionaries “focuses the inquiry on the abstract meaning of words rather than on the meaning of claim terms within the context of the patent.”¹³⁶ But, from the perspective of contract law, *Phillips* is not really a holistic decision at all because intrinsic evidence (i.e.,

125. Order Vacating Judgment and Granting Rehearing En Banc, 376 F.3d 1382 (Fed. Cir. 2005) (en banc) (Rader, J., concurring).

126. *Phillips*, 415 F.3d at 1328 (expressly declining to revisit *Cybor*).

127. *Id.* at 1309.

128. *Id.* at 1309, 1327.

129. *Id.* at 1325.

130. *Id.* at 1324–25.

131. *Id.* at 1327.

132. See *supra* notes 93–101 and accompanying text.

133. See *supra* notes 70–88 and accompanying text.

134. *Phillips*, 415 F.3d at 1324.

134. *Id.*

135. *Id.* at 1321.

136. *Id.* at 1324 (stating that courts are not barred from considering any evidence “as long as those sources are not used to contradict claim meaning that is *unambiguous* in light of the intrinsic evidence”).

the four corners) still governs under virtually all circumstances.¹³⁷ Indeed, *Phillips* itself used a stipulated dictionary definition as the starting point for the analysis. When viewed in that light, *Phillips* is really just a rejection of the most extreme form of dictionary-based hypertextualism embodied by *Texas Digital*. Under *Phillips*, extrinsic evidence is still disfavored and cannot be introduced to modify seemingly unambiguous intrinsic evidence.¹³⁸ Moreover, perhaps in an attempt to attract more judges to the majority opinion, *Phillips* does not explicitly overrule any cases. This means that, as with contract law, the contradictory precedents technically remained on the books after *Phillips*.¹³⁹

Wagner and Petherbridge found that, on average, the number of holistic opinions did not increase immediately after *Phillips*.¹⁴⁰ They suggest six possibilities, and this Article will relate three.¹⁴¹ First, *Phillips* changed nothing because it did not expressly overrule prior cases.¹⁴² Second, *Phillips* created a black box that allows judges to do whatever they want.¹⁴³ Third, litigants had not yet had time to begin advocating based on *Phillips*.¹⁴⁴ Regrettably, no empirical study has analyzed methodology in the post-*Phillips* era beyond Wagner and Petherbridge's April 15, 2007 cutoff date.

In this author's view, the key import of *Phillips* was to ensure that every panel would be required to consider the patent's specification. Unfortunately, that leads to the logical contradiction of interpreting claims via the specification without importing limitations from it.¹⁴⁵ In fact, as *Retractable Technologies* shows, the legacy of *Phillips* appears to be a continued divide on the court over the issues *Cybor* and *Phillips* were meant to resolve.

Judge Moore and Chief Judge Rader read *Phillips* as authorizing deviation from plain meaning only when the patentee clearly disavows claim scope or acts as his own lexicographer.¹⁴⁶ By

137. *Id.*

138. Westlaw KeyCite™ describes *Texas Digital* as “called into doubt” by *Phillips*.

139. R. Polk Wagner & Lee Petherbridge, *Did Phillips Change Anything? Empirical Analysis of the Federal Circuit's Claim Construction Jurisprudence* 16 (Pub. Law & Legal Theory Research Paper No. 11-33), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909028.

140. *Id.* at 20–23.

141. *Id.* at 21.

142. *Id.* at 22.

143. *Id.* at 23.

144. *Id.* at 23.

145. See *Marine Polymer Techs., Inc. v. Hemcon, Inc.*, 672 F.3d 1350 (Fed. Cir. 2012) (en banc) (affirming claim construction by an equally divided court, largely because of a dispute over the role of the specification in limiting claims); *Medegen MMS, Inc. v. ICU Med., Inc.*, 317 F. App'x 982, 989–90 (Fed. Cir. 2008) (Walker, J., dissenting) (criticizing the majority for reversing the district court where the district court had imported limitations from the specification only after concluding that the invention would not work without those limitations).

146. See *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1371 (Fed. Cir. 2011) (Moore, J., dissenting from denial of rehearing en banc) (“The specification may shed light on the plain and ordinary meaning. However, the specification cannot be used to narrow a claim term—to deviate from the plain and ordinary meaning—unless the inventor acted as his own lexicographer or intentionally disclaimed or disavowed claim scope.”).

contrast, Judge Lourie, who dissented from the *Phillips* majority's claim construction,¹⁴⁷ seems to have concluded that claims ought to be limited by the disclosure in a manner slightly reminiscent of the pre-1836 central claiming regime.¹⁴⁸ Judge Plager concurs.¹⁴⁹ As a practical matter, this division on the court is very significant—just ask Retractable Technologies. But from the perspective of this Article, this dispute is much ado about nothing. The judges are arguing for competing evidentiary hierarchies. In other words, this is a judicial brouhaha over whether “you get what you disclose” is a more accurate statement than “the name of the game is the claim.”¹⁵⁰ Regardless of the outcome, a relatively strict, hierarchical approach that relies on the four corners will prevail.

The dispute over *Cybor* and deference in claim construction is far more significant. Three of the judges dissenting from denial of rehearing en banc in *Retractable Technologies* expressed a desire to explore a regime where some manner of factfinding deference is shown to district court claim constructions. And in a 2006 denial of rehearing en banc in the *Amgen Inc. v. Hoechst Marion Roussel, Inc.* case, six judges expressed similar desires.¹⁵¹ Because showing factfinding deference in claim construction requires an admission that the four corners are often inadequate to resolve issues of document interpretation, one can expect entrenched disagreement in this area. It is, therefore, not surprising that the court's division over deference in claim construction has persisted for well over a decade.

CONCLUSION

The objective of this Article has not been to argue that the holistic methodology is superior to the procedural methodology, or vice versa. Rather, the goal has been to demonstrate that divisions on the Federal Circuit may grow out of fundamentally different approaches to interpreting legal documents and not out of disagreement over the proper construction of the patent statutes or reasonable disagreement over how to resolve close cases. If this proposition is true, then it demonstrates that some splits on the Federal Circuit may run so deeply that they will only be fully and finally resolved by changing the composition of the court.¹⁵² From the discussion above, several general conclusions can be drawn.

147. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1328–30 (Fed. Cir. 2005) (en banc) (Lourie, J., concurring in part and dissenting in part).

148. *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1305 (Fed. Cir. 2011) (“[W]e strive to capture the scope of the actual invention.”).

149. *Id.* at 1311 (Plager, J., concurring).

150. *See Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 632 F.3d 1246, 1255 n.2 (using these phrases to describe the dispute).

151. 469 F.3d 1039 (Fed. Cir. 2006) (order denying rehearing en banc) (concurring and dissenting opinions by Judges Dyk, Gajarsa, Linn, Michel Moore, Newman, and Rader).

152. Several judges are eligible for senior status, or have opted to take senior status recently. As the composition of the Federal Circuit turns over, it is entirely possible that a new generation of Federal Circuit judges will revisit the *Cybor* regime, and, perhaps, fundamentally change claim construction law.

The Federal Circuit's contract interpretation jurisprudence substantially parallels its claim construction law. In both situations, the documents are interpreted from the perspective of an objective third party. The court begins by looking to the plain language of the document, which includes the specification and the prosecution history in the case of a patent. If the plain language is unambiguous, the inquiry is usually over. If the plain language *is* ambiguous, then the court may consider extrinsic evidence in an attempt to resolve the ambiguity. In both contract interpretation and claim construction, courts may use extrinsic evidence to confirm their understanding of unambiguous language. However, one key difference between the two doctrines is the treatment of trade usage and practice. In contract law, extrinsic evidence regarding specific terms of art may be considered. By contrast, in claim construction, resort to any extrinsic evidence is generally disfavored. In contract interpretation, the court rarely finds any issue of underlying fact that need be resolved, and, under *Cybor*, claim construction can never involve a question of fact as a matter of law.¹⁵³

The court does not cite patent cases in contract cases, or vice versa,¹⁵⁴ but the parallels in the doctrines are difficult to explain without acknowledging that the court's overall judicial philosophy influences how it interprets written documents. Indeed, the court's refusal to follow contract doctrine that became commonly accepted as early as the 1960s is indicative of the judges' underlying philosophies. This suggests that patent advocates and scholars should remain abreast of the court's contract interpretation cases, or at least the en banc opinions. In doing so, students of patent law can obtain a better understanding of the court's overall jurisprudence, and also a better understanding of how particular judges may weigh certain evidence.¹⁵⁵ For example, *Metric Constructors* was an opinion by Chief Judge Rader, while *Jowett* and *Hunt Construction* were both opinions written by Judge Dyk. None of the *Metric Constructors* judges sat for *Jowett* or *Hunt Construction*.

Separate opinions chastising a panel for failing to consider extrinsic evidence, and vice versa, could be a way to identify holistic judges or to predict divisions on the court.¹⁵⁶ Having an extra set of cases to draw data from is particularly helpful when trying to understand the mindset of newer judges like Judge Reyna and Judge

153. *But see* *Daewoo Eng'g & Const. Co. v. United States*, 557 F.3d 1332 (Fed. Cir. 2009) (affirming Court of Federal Claims' interpretation of an ambiguous contract on a clear error standard).

154. For example, *Phillips* has never been cited in a contracts case. *But see* *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000) ("We agree that the parties to a contract, *just like patent applicants*, can be their own lexicographers.").

155. It is hard to imagine a clearer window into a judge's mind than Chief Judge Mayer's concurrence in *Fromson v. Anitec Printing Plates, Inc.*, 132 F.3d 1437 (Fed. Cir. 1997), where the chief judge threw down a gauntlet over the factual component of claim construction. *Id.* at 1448 ("We are affirming his claim construction as a matter of law based on the facts he found from conflicting evidence, which are not clearly erroneous.").

156. *See* *R.B. Wright Constr. Co. v. United States*, 919 F.2d 1569, 1573 (Fed. Cir. 1990) (Plager, J., dissenting).

Wallach.¹⁵⁷ Extra data sets will become even more important in the near future as several Federal Circuit judges are already eligible for senior status.

However, engaging in a stereotype-the-judge analysis is also an invitation to error. *McAbee* was a very formalistic opinion written by Judge Mayer, and joined by Judge Newman and Chief Judge Rader. Yet Chief Judge Rader penned the highly holistic opinion in *Metric Constructors*. The *McAbee* panel also accounted for every *Cybor* dissenter.¹⁵⁸ In sum, judges can be difficult to predict, and every case presents its own problems.

Finally, it is worth noting that of all the contract cases discussed in this Article, only one case permitted extrinsic evidence to overcome plain language. In *Metric Constructors*, the plain duty to replace all lamps was limited to a duty to replace defective lamps. Most of the other cases found extrinsic evidence to be consistent with the plain language, though some cases refused to consider extrinsic evidence altogether.¹⁵⁹ The Federal Circuit's contract interpretation cases thus indicate that, in a claim construction dispute, the party relying on plain language will be significantly more likely to prevail than the party making an argument that relies on extrinsic evidence.¹⁶⁰ In other words, the old adage still rings true, the name of the game is the claim (for now). ■

157. *See Dow Chem. Co. v. Nova Chems. Corp.*, No. 2010-1526, 2012 WL 265838, at *10–23 (Fed. Cir. Jan. 24, 2012) (nonprecedential opinion) (Reyna, J., dissenting) (criticizing the majority for claiming it had refused to consider extrinsic evidence when the majority also stated that the extrinsic evidence favored its interpretation, and undertaking an extensive independent review of the extrinsic evidence as required by Delaware contract law).

158. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) (en banc) (concurring and dissenting opinions by Judges Mayer, Newman, and Rader).

159. *See supra* Part III.

160. That is not necessarily a bad thing. There is much to commend about the commercial certainty and litigation efficiencies that an evidentiary hierarchy can provide, as Wagner and Petherbridge argued in their empirical analysis of claim construction. *See Wagner & Petherbridge, supra* note 140, at 27–33 (criticizing the *Phillips* decision on various grounds, and in particular for not embracing the procedural methodology's "plain language" approach more vigorously).