

2018 SUPPLEMENT
TO
STATUTORY INTERPRETATION: A PRAGMATIC APPROACH
William D. Popkin

Copyright © 2018
William D. Popkin
All Rights Reserved

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

Chapter 2

From 1900 to the 1960s – Purposive Interpretation

2.04 Interaction of purpose and substantive canons

a) Rule of lenity

ii) Tie-Breaker?

(C) Smith v. United States

Page 67

Add the following

Compare the “use a firearm” case with *Murphy v. Smith*, 138 S.Ct. 784 (2018), where the dissenters urged that the meaning of the text depended on looking at more words than the majority considered. The Court (in an opinion by Justice Gorsuch) dealt with a statute which stated that “a portion of the [prisoner’s] judgment (not to exceed 25%) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant.” The prisoner won his case and the lower court exercised discretion to order that only 10% of the judgment should be applied to the fee award, with the rest payable by the defendant. The Court held that the court did not have this discretion; it had to apply 25% of the judgment toward satisfaction of the attorney’s fee award.

The Court stated, first, that “the word ‘shall’ usually creates a mandate, not a liberty, so the verb phrase ‘shall be applied’ tells us that the district court has some nondiscretionary duty to perform.” And, second, that the phrase “to satisfy the amount of the attorney’s fees awarded” set forth the purpose of the nondiscretionary duty, and “to satisfy” usually means to discharge an obligation in full. Sotomayor’s dissent (joined by Ginsburg, Breyer, and Kagan) stressed that the statute did not merely say “to satisfy,” but said “applied to satisfy.” This additional text, they argued, implied that the “obligation need not be intended to discharge the obligation in full.”

Chapter 3

Contemporary History – Declining Faith in Judging and Legislating

3.05 Pragmatism

Page 107

Add the following

c) The Gluck & Posner study of Court of Appeals judges

Interviews with forty two Court of Appeals judges, as reported in Gluck & Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L.Rev. 1298 (2018), shed light on pragmatic statutory interpretation – in three senses of the term: eclecticism (taking account of multiple criteria); pragmatism (concern with consequences); and common law judging (taking it case by case). One motive for the study was that the “vast majority of statutory interpretation cases are resolved by the federal courts of appeals, not by the Supreme Court, even though the Supreme Court’s practice has received nearly all of the attention from academics and practitioners.”

Here are a few of the significant quotes from the study, with page references in parentheses.

Eclecticism (Eskridge & Frickey’s cable metaphor)

“The approach that emerged [] is not a single approach at all but rather what might be described as intentional eclecticism.” (1302)

“Our overarching impression [] was one of widespread eclecticism” (1313) – for some judges this was “intentional”, as a way of reaching the “correct result”; others said it is a way of “doing what the legislature wanted”.

One judge defend eclecticism by saying that “the essence of being a judge is the human factor”. (1314)

Although the judges did not describe themselves as eclectic, that is what emerged as the “dominant judicial approach”. (1342-1343)

One judge said that when the text did not give an answer, “why wouldn’t you want to be eclectic”. (1343)

Pragmatism (consequentialism; Posner’s approach)

“Many acknowledged the need for pragmatism—judging with common sense and an eye on consequences”. (1302-03)

To the extent that appellate judges are doing more common law type judging in the statutory context than previously assumed, pragmatism may be playing a bigger role than most judges (Posner excluded) have previously publicly acknowledged.” (1315)

“more emphasis on context and pragmatics than either plain text or purpose”. (1322)

CHAPTER 3 -- Contemporary History – Declining Faith in Judging and Legislating

Common law judging (vs. Scalia)

“Only a few judges articulated any general theory of their own interpretive approach. Most resisted the very question Instead they told us they move case by case, in almost a common law fashion.” (1314)

Many judges “‘never thought about’ how they developed their approach. Most said their approach was ‘experiential’”; “that they do not have a ‘theory’”; one said that “‘I’m just a common law judge, and I make sense of it’”. (1350)

What judges do vs. what judges say in opinions

An apparent caveat regarding the pragmatic explanation of judging is the tendency for many judges to rely on formal interpretive criteria (especially the linguistic canons). Gluck & Posner responded by noting a distinction between how judges actually went about interpreting legislation and what they said they did in their opinions (what the authors call the tension between an internal and external sense of the judicial role). In general, they noted that some judges seemed to “grasp at whatever supports are available to reinforce a conclusion and to help explain decisions in ways that are both acceptable to colleagues of different political persuasions, and that also sound sufficiently ‘opinion-like’ for the general public. Indeed, we heard a lot about statutory interpretation doctrine as a way to express results in opinions, rather than as a tool that actually decides cases.” (1314) More specifically, some judges explained their commitment to the canons (a version of formalism) as the result of a sense of what the public perceives as appropriate in writing an opinion: “Most of the judges indicated that they are not fully explicit, in their opinions, about what seems to be a common law-type decisionmaking approach”; and “public legitimacy [] require[s] more formalistic reasoning” including “doctrinal use of the canons.” (1353) And: “Many [judges] utilize at least some canons of construction, but for reasons that range from ‘window dressing,’ to canons as vehicles of opinion writing, to a view that they are actually useful decision tools.” (1302)

Legitimacy?

The authors’ description of actual judging left them with the critical unanswered question that pragmatists often confront: “Are there legal doctrines that could guide interpretive pragmatism?” (1314)

d) U.S. Supreme Court; textualism vs. pragmatism

In *Husted v. A. Philip Randolph Institute*, 138 S.Ct. 1833 (2018) (Alito, J.), the Court (5-4) upheld Ohio’s procedure to remove names from its voting rolls. The issue was whether the National Voter Registration Act [NVRA] prohibited Ohio’s actions which, the Court concluded, followed the NVRA “to the letter.” The Court noted:

[T]he National Voter Registration Act [NVRA] requires States to “conduct a general program that makes a reasonable effort to remove the names” of voters who are ineligible “by reason of” death or change in residence. § 20507(a)(4). The Act also prescribes requirements that a State must meet in order to remove a name on change-of-residence grounds. §§ 20507(b), (c), (d).

The most important of these requirements is a prior notice obligation. Before the NVRA, some States removed registrants without giving any notice. The NVRA changed that by providing in § 20507(d)(1) that a State may not remove a registrant’s name on change-of-residence grounds unless either (A) the registrant confirms in writing that he or

CHAPTER 3 -- Contemporary History – Declining Faith in Judging and Legislating

she has moved or (B) the registrant fails to return a preaddressed, postage prepaid “return card” containing statutorily prescribed content. This card must explain what a registrant who has not moved needs to do in order to stay on the rolls, *i.e.*, either return the card or vote during the period covering the next two general federal elections. § 20507(d)(2)(A). And for the benefit of those who have moved, the card must contain “information concerning how the registrant can continue to be eligible to vote.” § 20507(d)(2)(B). If the State does not send such a card or otherwise get written notice that the person has moved, it may not remove the registrant on change-of-residence grounds. See § 20507(d)(1). . . .

When Congress clarified the meaning of the NVRA's Failure-to-Vote Clause in Help America Vote Act [HAVA], here is what it said: “[C]onsistent with the [NVRA], . . . no registrant may be removed *solely* by reason of a failure to vote.” § 21083(a)(4)(A). The meaning of these words is straightforward. “Solely” means “alone.” Webster's Third New International Dictionary 2168 (2002); American Heritage Dictionary 1654 (4th ed.2000). And “by reason of” is a “quite formal” way of saying “[b]ecause of.” C. Ammer, American Heritage Dictionary of Idioms 67 (2d ed.2013). Thus, a State violates the Failure-to-Vote Clause only if it removes registrants for no reason other than their failure to vote. . . .

[W]e conclude that the Failure-to-Vote Clause, as originally enacted, referred to sole causation. And when Congress enacted HAVA, it made this point explicit. It added to the Failure-to-Vote Clause itself an explanation of how it is to be read, *i.e.*, in a way that does not contradict subsection (d). And in language that cannot be misunderstood, it reiterated what the clause means: “[R]egistrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote.” § 21083(a)(4)(A). In this way, HAVA dispelled any doubt that a state removal program may use the failure to vote as a factor (but not the sole factor) in removing names from the list of registered voters.

The Court contrasted its textualist arguments with the dissent's more pragmatic approach. It stated:

Sotomayor's dissent says nothing about what is relevant in this case—namely, the language of the NVRA—but instead accuses us of “ignor[ing] the history of voter suppression” in this country and of “uphold[ing] a program that appears to further the . . . disenfranchisement of minority and low-income voters.” Those charges are misconceived.

And:

The dissents have a policy disagreement, not just with Ohio, but with Congress. But this case presents a question of statutory interpretation, not a question of policy. We have no authority to second-guess Congress or to decide whether Ohio's [procedure] is the ideal method for keeping its voting rolls up to date. The only question before us is whether it violates federal law. It does not.

The Court is surely right that policy concerns about potential voter suppression and disenfranchisement influenced the dissent's interpretation of the law. The question is whether those concerns are relevant to statutory interpretation.

Chapter 4

The Text

4.02 Routine sources of uncertainty

b) Ambiguity

ii) Syntactic ambiguity

Page 117

Add the following

The missing “Oxford” comma. O’Connor v. Oakhurst Dairy, 851 F.3d 69 (1st Cir 2017), involved the absence of a serial comma, also known as the “Oxford comma,” so named because it was used by the Oxford University Press. This comma appears after “B” in the series such as A, B, and C. Other style books discourage its use.

The issue was whether delivery drivers for the dairy company were exempt from the overtime pay law. The statute provided an exemption applied to workers engaged in “the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution” of certain products. If the exemption used a serial comma to mark off the last activity in the list (“distribution”), the exemption would apply to the drivers (who engaged in distribution) and they would not be entitled to overtime pay. The drivers argued that, without the comma, the statutory exemption only applied to drivers who engaged in “packing” and that is something they did not do. The court held that the text of the law was ambiguous and held for the drivers: “[B]ecause, under Maine law, ambiguities in the state’s wage and hour laws must be construed liberally in order to accomplish their remedial purpose, we adopt the drivers’ narrower reading of the exemption.”

The court noted the advice in the Maine drafting manual that drafters not use serial commas, but also noted that guidance in most other states and in Congress differs from Maine, warning that the absence of serial commas can create ambiguity.

4.04 Internal context

Page 151

Add the following

f) Scalia’s influence

Scalia’s influence has given textualism a prominence and, arguably, a preeminence in statutory interpretation that it did not previously enjoy. But the Gluck & Posner study (discussed in Chapter 3.05 – Pragmatism) found that judges were less enthusiastic about Scalia’s textualism than some might have thought. Their study states: “None [of the judges] from across the political and theoretical spectrum [] was willing to associate himself or herself with ‘textualism’ without qualification” (131 Harv. L.Rev. at 1302,1310). And: “Even the text-centric judges described themselves in such terms as ‘textualist-pragmatist’ or ‘textualist-contextualist’” (id. at 1310).

The study also addressed several of the variations on textualism.

CHAPTER 4 – The Text

Whole text: “very few judges told us they read the entire statute, or even begin their analysis [] with the text of the statute.” (1310)

Dictionaries: “Dictionaries are mostly disfavored.” (1310, 1317); 17 of 42 judges interviewed advocated using dictionaries; others use dictionaries to identify technical meanings or multiple meanings (1317).

Starting with the text: “In the end, both judges who start with the words of the statute and those who do not seem to us to engage in essentially the same mode of contextual analysis, which defies categorization as either textualist or purposivist. They begin by trying to understand the statute, the problem the statute addresses, and the issue in the case at a broad level of generality.” (1317)

Chapter 5

External Context – Purpose and Intent

5.04 Conflict of text and context

b) Holy Trinity today

Add the following

Page 193

Comment – Judge/Justice Gorsuch

If the Holy Trinity doctrine reaches the Supreme Court in the near future, Judge Gorsuch’s opinion as a court of appeals judge will be noteworthy. See *Lexington Insurance Co. v. Precision Drilling Co.*, 830 F.3d 1219 (10th Cir. 2016):

Lexington's invocation of the absurdity doctrine is no more persuasive than (or really more than a repackaging of) its speculation about legislative intentions. To be sure, at one time some thought a court could override even unambiguous statutory texts like the one before us in order to avoid putatively absurd consequences in their application. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459–62 (1892). But this court some years ago all but rejected at least this particular form of the absurdity doctrine. And it seems highly unlikely that the Wyoming Supreme Court would prove any more receptive to it today, for it has recently and expressly held that “where a statute is ... plain and unambiguous . . . courts construing the [statute] should not be concerned with the consequences resulting therefrom.”

This makes sense, too. To label a statute's consequences “absurd,” a court usually must again engage in the doubtful business of guessing at hidden legislative intentions, offering this time the particular guess that the legislature couldn't possibly have “intended” a particular consequence to flow from its handiwork. And guesses about legislative intentions are, as we've seen, never a proper basis for overruling plain statutory language. Any attempt to use absurdity doctrine to overrule plain statutory text would invite all the well-documented problems associated with trying to reconstruct credibly the intentions of hundreds of individual legislators. Deploying the doctrine in this fashion would also, like all judicial efforts to assert the primacy of hidden intentions over plain text, risk offending the separation of powers by purporting to endow a court with the power to disregard a possible statutory application not because of its linguistic implausibility but because of a judgment about the implausibility of its consequences as a matter of social policy—a judgment that seems a good deal more legislative than judicial in character. Any attempt to use absurdity doctrine in this way would, as well, risk granting to courts the power to negate a statute's application as irrational without first making the determination—normally and properly required for lawful judicial intervention—that the statute's application fails to clear the exceedingly low threshold of due process or equal protection rational basis review. . . . That's a vision of the judicial function that risks both relieving legislatures of accountability for the laws they write and reducing their incentive to tailor those laws carefully. And a vision that threatens due process (fair notice) problems by foisting retroactively on litigants textual interpretations they would have had difficulty imagining when arranging their affairs. . . .

CHAPTER 5 – External Context – Purpose and Intent

This is not to say absurdity doctrine has no role left to play when it comes to seemingly clearly worded statutes. Take the scrivener's error. Sometimes a statute will misspell “third party” as “third partly.” Antonin Scalia & Bryan A. Garner, *Reading Law* 235 (2012). Or provide that the “winning party” rather than the “losing party” must pay the other side's reasonable attorney's fees. *Id.* In cases like these, the error in the statute is so “unthinkable” that any reasonable reader would know immediately both (1) that it contains a “technical or ministerial” mistake, and (2) the correct meaning of the text. *Id.* at 237–38. When these demanding conditions are met, a court may invoke the doctrine to enforce the statute's plain meaning, much as it might in cases where a modifier is misplaced or the grammar otherwise mangled but the meaning plain to any reasonable reader. Cabined in this way, the absurdity doctrine seeks to serve a “linguistic rather than substantive” function, *Jaskolski v. Daniels*, 427 F.3d 456, 462 (7th Cir. 2005) (Easterbrook, J.), and does not depend nearly as much on doubtful claims about legislative intentions, risk nearly as much interference with the separation of powers, or pose anything like the same sort of fair notice problems as its more virulent cousin. Instead, it aims only to enforce a meaning reasonable parties would have thought plain all along.

5.04 Conflict of text and context

d) Drafting errors—Not gibberish

Comments and Questions

Page 201

Add the following

4. *Query.* Judge Gorsuch says that a court could invoke the absurdity canon to correct a text which provided that the “winning party” rather than the “losing party” must pay the other side's reasonable attorney's fees. Is that provision any more unthinkable than requiring someone to file “before December 31”?

5. *Another drafting error.* Lemper & Bruce, *Beware the Scrivener’s Error: Curing the Drafting Error in the Federal Registration Defense to Trademark Dilution Claims*, 19 *Tex. Intell. Prop. L.J.* 169 (2011), report the following drafting error in writing a 2006 law. The error was in providing that a valid registration of a trademark shall be a bar to an action for dilution claims under federal as well as state law. An earlier draft of the bill in Congress provided:

The ownership by a person of a valid registration . . . shall be a complete bar to an action against that person, with respect to that mark, that is brought by another person under the common law or a statute of a State and that seeks to prevent dilution by blurring or dilution by tarnishment, or that asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark.

CHAPTER 5 – External Context – Purpose and Intent

The law as passed by Congress provided:

The ownership by a person of a valid registration . . . shall be a complete bar to an action against that person, with respect to that mark, that --

(A)

(i) is brought by another person under the common law or a statute of a State; and

(ii) seeks to prevent dilution by blurring or dilution by tarnishment; or

(B) asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark.

The separate subsection (B) would apply to federal claims, because it is not limited (as was subsection (A)) to state claims.

Lemper & Bruce argue that the following text was intended, as (in their view) evidenced by legislative history and policy rationales for the law:

The ownership by a person of a valid registration . . . shall be a complete bar to an action against that person, with respect to that mark, that--(A) is brought by another person under the common law or a statute of a State; and (B) (i) seeks to prevent dilution by blurring or dilution by tarnishment; or (ii) asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark.

Could a court “correct” the statute so that it only barred claims under state (but not federal) law? Would Justice Gorsuch “correct” the statute?

5.08 Legislative intent and severing an unconstitutional part of a statute

Comment

Page 240

Add the following

The Court and Thomas’ dissent. In *Murphy v. National Collegiate Athletic Ass’n*, 138 S.Ct. 1461 (2018), the Court held that the Professional and Amateur Sports Protection Act (PASPA) unconstitutionally commandeered state action by prohibiting *state authorization* of sports gambling on competitive sporting events. The relevant Constitutional provision was the 10th Amendment which states that all legislative powers not conferred on Congress was reserved for the States.

This holding required the Court to decide whether the unconstitutional provision could be severed from other provisions of the law that were not before the Court – one of which was a provision prohibiting *States from operating* a sports gambling scheme. The standard the Court adopted for deciding whether or not the remaining constitutional portions of the statute can be severed and survive was as follows: “[I]t must be evident that [Congress] would not have enacted those provisions which are within its power[,] (citing the *Alaska Airlines* case) [and] in conducting that inquiry, we ask whether the law remains ‘fully operative’ without the invalid provisions, but ‘we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.’”

Applying that standard, the Court held that leaving the prohibition of *state operation* of sports gambling schemes in effect would “result [in a] a scheme sharply different from what Congress contemplated when PASPA was enacted. . . . If Congress had known that States would be free to authorize

CHAPTER 5 – External Context – Purpose and Intent

sports gambling in privately owned casino, would it have nevertheless wanted to prevent States from running sports lotteries? That seems most unlikely.” It was unlikely because state-run lotteries are considered more benign than casino gambling, which has generally been regarded as far more dangerous.

The most interesting feature of this case was Justice Thomas’ concurrence, which questioned the Court’s approach to “modern severability” analysis. He began this way: “I write separately [] to express my growing discomfort with our modern severability precedents.” He then continued:

Because courts cannot take a blue pencil to statutes, the severability doctrine must be an exercise in statutory interpretation. In other words, the severability doctrine has courts decide how a statute operates once they conclude that part of it cannot be constitutionally enforced. [U]nder this view, the severability doctrine is [] dubious [].

[T]he severability doctrine does not follow basic principles of statutory interpretation. Instead of requiring courts to determine what a statute means, the severability doctrine requires courts to make “a nebulous inquiry into hypothetical congressional intent.” It requires judges to determine what Congress would have intended had it known that part of its statute was unconstitutional. But it seems unlikely that the enacting Congress had any intent on this question; Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional. Without any actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be. More fundamentally, even if courts could discern Congress’ hypothetical intentions, intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment. Because we have “a Government of laws, not of men,” we are governed by “legislated text,” not “legislators’ intentions”—and especially not legislators’ *hypothetical* intentions. Yet hypothetical intent is exactly what the severability doctrine turns on, at least when Congress has not expressed its fallback position in the text. . . .

In sum, our modern severability precedents are in tension with longstanding limits on the judicial power. And, though no party in this case has asked us to reconsider these precedents, at some point, it behooves us to do so.

Chapter 7

Change

7.04 Textualism and change

c) More examples

Page 333

Add the following

7. *Sexual preference discrimination as “sex discrimination”?*

In *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2018) (en banc), the court held that discrimination by an employer based on the sexual preference of a gay man violated Title VII of the Civil Rights Act of 1964, which prohibited discrimination “because of . . . sex.” The court stated that “sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.” In reaching this conclusion, it emphasized the “changing legal landscape.”

The court emphasized that the employer’s decision rested on a *gender stereotype* that privileged heterosexual relationships. This stereotyping amounted to discrimination “because of sex” because “[s]exual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be,” on non-conformity with gender norms.

The prohibited discrimination was not limited to evils with which Congress was concerned in 1964, when the law was passed. Thus, later cases held that the law prohibited sexual harassment and a hostile workplace environment, neither of which was likely to be a concern of the enacting Congress. In this connection, the court cited *Oncale* (523 U.S. 75 (1998)), which held that Title VII prohibited male-on-male sexual harassment. The court insisted that sexual orientation discrimination was a “reasonably comparable evil to sexual harassment and male-on-male harassment.”

The court embraced the “comparative test,” which asked “whether the employee’s treatment would have been different but for that person’s sex.” It cited a case (*Hively*, 853 F.3d 339 (7th Cir. 2017)), which upheld a Title VII claim by a lesbian professor, comparing the lesbian who was denied promotion (a gender non-conforming woman) with a male professor who preferred women (a gender conforming man) and who would have been promoted.

A dissent (by Judge Lynch) stressed the historical context for the 1964 law, which was (to say the least) not sympathetic to claims by gays and lesbians (noting, among other things, that same-sex relations were criminalized in most states). It invoked this context, not to rely on the specific intent of the enacting Congress, but to determine the *public meaning* of the statutory phrase “because of sex.”

The dissent agreed that the public meaning of the 1964 law applied to situations not within the contemplation of Congress in 1964, but only when those situations fit within the purpose of the text. That purpose was to protect people from discrimination that disadvantaged one sex compared to another sex and to prevent “gender inequality.” Thus, sexual harassment, a hostile workplace environment, gender norm stereotyping (such as expecting a certain way to dress or a level of aggression or lack of aggression in dealing with others) were all prohibited because the same behavior would not have been visited upon or expected of the opposite sex. More broadly, sexual harassment, a hostile workplace environment and gender

CHAPTER 7 – Change

norm stereotyping was not only behavior that would not have been visited upon the other sex but has been “a principal obstacle to the equal participation of women in the workplace.”

Put somewhat differently, the public meaning of the text prevents discrimination based on sex (which means biologically male or female), not sexual orientation. The 1964 law was aimed at discrimination against individuals “that differentially disadvantage men vis-à-vis women or women vis-à-vis men. That is what the language of the statute means to an ordinary ‘fluent speaker of the English language.’” Thus, discrimination against a gay man but not a gay woman (or vice versa) would be covered by the statute because it was sex discrimination. But sexual orientation was a different kind of prejudice, focused on a different category of people than gender discrimination. Just as the 1964 law did not reach age and disability discrimination (until later), so the 1964 law did not reach sexual orientation discrimination.

8. *Stock options as “money remuneration”?*

Wisconsin Central Ltd. v. United States, ___ S.Ct. ___ (2018), concerned the taxation of “money remuneration” received by railroad employees to fund their pension plans. The Court (5-4) (Gorsuch, J.) held that the text was clear in excluding stock options from “money remuneration.” It stressed that the “ordinary meaning” of “money” when Congress adopted the law in 1937 was “as a medium of exchange,” citing 1942 and 1933 Dictionaries (including Webster’s and Black’s). Because stock options could not be used as a medium of exchange, even though they could be bought and sold for money, they were not “money.”

The Court rejected the dissent’s argument that the Court was “trapped in a monetary time warp, forever limited to those forms of money commonly used in the 1930s. While every statute’s meaning is fixed at the time of enactment, new applications may arise in light of changes in the world. So ‘money,’ as used in this statute must always mean a ‘medium of exchange.’ But what qualifies as a ‘medium of exchange’ may depend on the facts of the day. Take electronic transfers of paychecks. Maybe they weren’t common in 1937, but we do not doubt they would qualify today as ‘money remuneration’ under the statute’s original public meaning. The problem with the government’s and the dissent’s position today is not that stock and stock options weren’t common in 1937, but that they were not then – and are not now – recognized as mediums of exchange.”

The dissent (by Justices Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan) stressed a different definition of “money,” other than as a medium of exchange – citing 1933 dictionaries that define “money” as “property [that] is convertible into money.” It noted that top executives were often compensated in both cash and stock and stock options; if asked how much money they made last year, it would make no sense for them to leave out stock and stock options. Moreover, a paycheck cannot be used as a medium of exchange to buy groceries but would certainly be considered “money remuneration.”

The dissent also relied on “traditional tools of interpretation” – specifically a “purpose” to exclude from taxation “in-kind benefits that are nonmonetary – either because they [we]re nontransferable or otherwise difficult to value.” It gave as an example of such in-kind benefits the provision to railroad employees of free transportation benefits at the time when Congress enacted the statute. Unlike stock options, these benefits would be difficult to value. The dissent therefore defined “money” to include property readily transferable into money, whether or not it was a “medium of exchange.” Looked at from the broader perspective of statutory interpretation theory, the majority and dissent differed about how to characterize the meaning of a text to include things that were not common when the law was passed.

CHAPTER 7 – Change

Questions

1. How does the “money remuneration” case compare to other “change” cases: is a woman voter entitled to be on a jury, which is chosen from “voters”; is a bicycle a “carriage”; is a farmer-plus (a large vertically integrated farmer-processor-distributor) a “farmer” entitled to an anti-trust exemption; is faxing “telephoning”; is a 911 call a “statement”; is a haybine a “mower”?

2. Why does Justice Gorsuch refer to the “*public* meaning” of the statutory text?

3. Is Justice Gorsuch’s equating of “money” with “medium of exchange” like Judge Easterbrook’s conception of the “function” of statutory language in the haybine case? How do we know the function of the statutory language?

Chapter 8

Administrative Interpretation

8.02 Super-Deference – Chevron

a) Determining whether the statute is uncertain: Legislative intent (traditional tools of interpretation) vs. textualism

p. 342

Add the following

Comment – The Future of Chevron?

1. In *SAS Institute Inc. v. Iancu*, 138 S.Ct. 1348 (2018), the Court held (5-4) (Gorsuch, J.), that the Patent Office must decide *all* of the claims that a petitioner has challenged when it engaged in inter partes review of a patent claim. The Court relied on the plain text of the law, which directs that “[i]f an inter partes review is instituted and not dismissed under this chapter, the [Board] *shall issue* a final written decision with respect to the patentability of *any patent claim challenged by the petitioner*. . . .” (emphasis added). The Court concluded that “[t]his directive is both mandatory and comprehensive. The word ‘shall’ generally imposes a nondiscretionary duty. And the word ‘any’ naturally carries ‘an expansive meaning.’ When used (as here) with a ‘singular noun in affirmative contexts,’ the word ‘any’ ordinarily ‘refer[s] to a member of a particular group or class without distinction or limitation’ and in this way ‘impl[ies] *every* member of the class or group.’ Oxford English Dictionary (3d ed., Mar. 2016), www.oed.com/view/Entry/8973 (OED) (emphasis added). So when [the statute] says the Board’s final written decision ‘shall’ resolve the patentability of ‘any patent claim challenged by the petitioner,’ it means the Board *must* address *every* claim the petitioner has challenged.”

Justice Ginsburg’s dissent refers to the Court’s “wooden reading” of the statute.”

As for *Chevron*, the Court stated:

[T]he Director [of the Patent Office] suggest[s] that, however this Court might read the statute, he should win anyway because of *Chevron*. Even though the statute says nothing about his asserted [] power, the Director says the statute is at least ambiguous on the propriety of the practice and so we should leave the matter to his judgment. For its part, SAS replies that we might use this case as an opportunity to abandon *Chevron* and embrace the “‘impressive body’” of pre-*Chevron* law recognizing that “‘the meaning of a statutory term’” is properly a matter for “‘judicial [rather than] administrative judgment.’” But whether *Chevron* should remain is a question we may leave for another day. Even under *Chevron*, we owe an agency’s interpretation of the law no deference unless, after “employing traditional tools of statutory construction,” we find ourselves unable to discern Congress’s meaning. [Editor – Notice that, for Gorsuch, the “traditional tools of interpretation” are what the text says.] . . . The Director may (today) think his approach makes for better policy, but policy considerations cannot create an ambiguity when the words on the page are clear. Neither may we defer to an agency official’s preferences because we imagine some “hypothetical reasonable legislator” would have favored that approach. Our duty is to give effect to the text that 535 *actual* legislators (plus one President) enacted into law.

CHAPTER 8 – Administrative Interpretation

Justice Gorsuch's rejection of reliance on a "hypothetical reasonable legislator" was a direct response to Justice Breyer's understanding of *Chevron* and, more particularly, to Breyer's very different approach to statutory interpretation ("asking what [] legislators would likely have intended"):

In referring to *Chevron*, I do not mean that courts are to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision. Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have. I recognize that Congress does not always consider such matters, but if not, courts can often implement a more general, virtually omnipresent congressional purpose—namely, the creation of a well-functioning statutory scheme—by using a canon-like, judicially created construct, the hypothetical reasonable legislator, and asking what such legislators would likely have intended had Congress considered the question of delegating gap-filling authority to the agency.

2. *Pereira v. Sessions*, ___ S.Ct. ___ (2018) (8-1), concerned the cancellation of removal of nonpermanent residents if they have been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of application for cancellation. The ten years period stops running, however, when the alien is served a "notice to appear under sec. 1229(a). That section provides that a notice to appear shall specify "the time and place at which the [removal] proceeding will be held." A government *regulation* stated that the notice shall only provide information about the time and place of the proceeding "where practicable." The Court held that the statutory text requiring notice of time and place was too clear to allow for *Chevron* deference to a contrary government position.

Justice Kennedy wrote a concurrence, expressing concern with *Chevron* deference:

[A]t least six Courts of Appeals, citing *Chevron*, concluded that [the statute] was ambiguous and then held that the [government's] interpretation was reasonable. The Court correctly concludes today that those holdings were wrong because the [government's] interpretation finds little support in the statute's text. In according *Chevron* deference to the [government's] interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned, and whether the [government's] interpretation was reasonable. . . .

The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. Given the concerns raised by some Members of this Court (Editor – Justices Thomas and Gorsuch], it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary. See, e.g., *Arlington v. FCC*, 569 U.S., at 312–316 (Roberts, C. J., dissenting).

Justice Alito's dissent found the statute ambiguous, noting that "[i]n recent years, several Members of this Court have questioned *Chevron*'s foundations. But unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law."

CHAPTER 8 – Administrative Interpretation

3. *Wisconsin Central Ltd. v. United States*, ___ S.Ct. ___ (2018), decided the same day as *Pereira*, concerned the taxation of “money remuneration” received by railroad employees to fund their pension plans. The Court held that the text was clear in excluding stock options from “money remuneration.” But four dissenters thought the text was unclear and invoked *Chevron* (and *Skidmore*) to defer to the government’s contrary view. At least these four Justices (Breyer, Ginsburg, Sotomayor and Kagan), along with Alito in *Pereira*, seem willing to apply *Chevron*. (This case is especially interesting for what it says about interpreting an older text in light of contemporary understandings, as explained in Chapter 7.)

Chapter 9

Legislative History

9.04 Constitutional arguments about relying on legislative history

a) Scalia

Page 385

Add the following

In *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752 (2018), Justice Sotomayor wrote for a unanimous Court, citing several dictionaries to support an interpretation of the word “respecting” in the phrase “statement respecting the debtor’s financial condition.” But Part III-B of her opinion, joined by only six Justices, also cited a House Committee Report to support the Court’s interpretation. Justices Thomas, Alito, and Gorsuch did not join Part III-B, carrying on Justice Scalia’s tradition of noting their objection to relying on legislative history.

9.05 Critique of reliance on Committee Reports (other than constitutional objections)

e) Who is winning the battle over the appropriate judicial use of legislative history

Page 398

Add the following

The Gluck & Posner study (discussed in Chapter 3.05 – Pragmatism) noted that “all [the judges consult legislative history]” (131 Harv. L. Rev. at 1302, 1310); and all but one judge said they used legislative history, with “liberal” judges saying they use it in moderation, maybe because of Scalia, and “conservatives” judges saying Scalia went too far (id. at 1324). The fact that lawyers’ briefs usually discuss legislative history makes it hard for judges to avoid its influence (whatever they say in their opinions) (id. at 1325). As a side note, the authors observe that Roberts, Alito, and Gorsuch all used legislative history when they were on the Courts of Appeals (id. at 1325).

9.05 Critique of reliance on Committee Reports (other than constitutional objections)

f) Should it matter whether the text is clear or unclear?

Add the following

Page 400

iii) Scalia vs. Stevens redux (Thomas, Alito, Gorsuch vs. Sotomayor, Breyer)

Digital Realty Trust, Inc. v. Somers, 138 S.Ct. 767 (2018), was an occasion for Justices Thomas, Alito, and Gorsuch to take the Scalia position on legislative history, while Justices Sotomayor and Breyer carried on the Stevens position. (Both Roberts and Kennedy joined the majority.) Justice Thomas wrote an opinion concurring in part and concurring in the judgment joining the majority “only to the extent it relies on the text” of the law. He objected to the Court’s discussion of the statute’s purpose “derive[d] from a single Senate Report. Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for [the law] with the same intent, we are a government of laws, not of men, and are governed by what Congress enacted rather than what was intended.”

CHAPTER 9 – Legislative History

Justice Sotomayor responded that the Senate Report was “an appropriate source” to consider. Her comments defend against the charge that judges will manipulate reliance on legislative history to serve their own purposes. She stated: “Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of the law. Just as courts are capable of assessing the reliability and utility of evidence generally, they are capable of assessing the reliability and utility of legislative-history materials.”

She also relied on an understanding of how Congress works, which responds to the charge that legislators use legislative history to manipulate results. She emphasized that committee reports are a “particularly reliable source to which we can look to ensure fidelity to Congress’ intended meaning”; that such reports are “typically circulated at least two days before” floor consideration of a bill and “provide Members of Congress and their staffs with information about a bill’s context, purposes, policy implications, and details (citing Katzmann, *Judging Statutes* (2014))”; and that “legislative staffers view committee and conference reports as the most reliable type of legislative history (citing a Gluck & Bressman empirical study, 65 *Stan. L. Rev.* 901 (2013)).”

Finally, she stresses that legislative history is “particularly helpful when a statute is ambiguous or deals with especially complex matters,” but that “even when [] a statute’s meaning can be clearly discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text.” Moreover, “confirming our construction of a statute by considering reliable legislative history shows respect for and promotes comity with a coequal branch of Government.”

Chapter 10

How Is the Law of Statutory Interpretation Made?— Legislature, Judiciary, and Federalism Issues

10.02 The binding effect of a judicial approach to statutory interpretation?

Page 448

Add the following

Many observers have noted that judicial approaches to statutory interpretation have neither stare decisis nor precedential effects (either in the court that issues an opinion or in lower courts, even though there was no other area of law of which this was true. Several comments in the Gluck & Posner study (discussed in Chapter 3.05 – Pragmatism) support that observation: the Supreme Court “does not treat its methodological rules as binding precedent on the lower courts” (131 Harv. L. Rev. at 1301); “Virtually all [the judges] expressed doubt that the Supreme Court’s interpretive methodology binds the lower courts . . .” (id. at 1302).

The actual tally of judges was more complex. Six judges said that the Supreme Court can and does dictate statutory interpretation rules (id. at 1344-1345). Fifteen judges said that the Court cannot dictate such rules but differed on the reason. Some said that interpretive rules were “common sense” or useful guides” but were not “legal principles.” Others posed the “most challenging jurisprudential question” – why interpretation seems so “much more inherently personal” to the judge than other legal issues (id. at 1345). Eleven judges made up a third group who believed that the Court could dictate interpret methodology but had so far failed to decide on a consistent approach (id. at 1346).

Gluck & Posner speculate that there is a reluctance to use methodological precedent, because an “approach that is closer to a common law and/or pragmatic approach may be less amenable to doctrinalization by methodological precedent than an approach that is truly guided by the canons . . .” (id. at 1353).

Chapter 11

Extending Statutes

11.03 Federal Common Law

b) Unique federal interest

ii) Jurisdictional grants

B) Law of Nations

Page 477

Add the following

In *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386 (2018), the Court (5-4) refused to extend the *Sosa* decision to a suit by a foreign plaintiff against a foreign banking corporation for actions on foreign soil which allegedly benefited terrorists. Kennedy also made some statements that linked the issue of federal common law under ATS to the more general question of inferring private causes of action, discussed in Chapter 12.

Chapter 12

Inferring Private Causes of Action From Statutes

12.02 Federal statutes

d) The current Court's skepticism

Page 518

Add the following

In *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386 (2018), the Court (5-4) refused to infer a cause of action under the Alien Tort Statute in a suit by a foreign plaintiff against a foreign banking corporation for actions on foreign soil which allegedly benefited terrorists. Some of what the Court said suggests a more general reluctance to infer a private cause of action about which the statute is silent. The Court stated that its conclusion

is consistent with this Court's general reluctance to extend judicially created private rights of action. The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has “recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” *Alexander v. Sandoval*, 532 U.S. 275, 286–287 (2001)). That is because “the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.” *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1857 (2017).

The Court also alluded to its recent narrow reading of a cause of action under *Bivens*. “Thus, in *Malesko* the Court held that corporate defendants may not be held liable in *Bivens* actions. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Allowing corporate liability would have been a “marked extension” of *Bivens* that was unnecessary to advance its purpose of holding individual officers responsible for “engaging in unconstitutional wrongdoing.” *Malesko*, 534 U.S. at 74. Whether corporate defendants should be subject to suit was “a question for Congress, not us, to decide.” *Id.* at 72.

Justice Gorsuch’s concurring opinion in *Jesner* was even more concerned about federal courts inferring a cause of action. He first questioned whether *Sosa* was correctly decided. But, assuming *Sosa* was good law, he argued:

A group of foreign plaintiffs wants a federal court to invent a new cause of action so they can sue another foreigner for allegedly breaching international norms. In any other context, a federal judge faced with a request like that would know exactly what to do with it: dismiss it out of hand. Not because the defendant happens to be a corporation instead of a human being. But because the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches. For reasons passing understanding, federal courts have sometimes treated the Alien Tort Statute as a license to overlook these foundational principles. I would end ATS exceptionalism. We should refuse invitations to create new forms of legal liability. And we should not meddle in disputes between foreign citizens over international norms. . . . Whatever powers courts may possess in ATS suits, they are powers judges should be doubly careful not to abuse.

Chapter 13

Statutory Patterns

13.02 Conflict Between Prior and Later Statutes—The “No Repeal by Implication” Doctrine

a) Substantive statutes

Page 538

Add the following

Here is a more recent case that refused to permit a later statute to override an earlier law, relying in part on the “no repeal by implication” doctrine. In *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), the issue was whether the earlier 1925 Federal Arbitration Act (FAA) allowed enforcement of a contract between employers and employees that prevented employees from bypassing case-by-case individualized arbitration and instead rely on class actions to enforce their claims. A class action is a vastly more effective way to obtain a hearing of employees’ claims than costly case-by-case hearings for every individual employee. Justice Gorsuch’s wrote a textualist majority opinion for the Court (5-4), rejecting Justice Ginsburg’s dissent that balanced the policies of the earlier FAA and the later National Labor Relations Act (NLRA) to favor the right of employees to bring class actions.

Justice Gorsuch first discussed the FAA, focusing on the Act’s Savings clause, which stated that courts could refuse to enforce an arbitration agreement “upon such grounds as exist at law or equity for the revocation of any contract.” The Court held that this clause could not help employees “because the saving clause recognizes only defenses that apply to ‘any’ contract. In this way the clause establishes a sort of ‘equal-treatment’ rule for arbitration contracts. The clause ‘permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’ At same time, the clause offers no refuge for ‘defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’ Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by ‘interfer[ing] with fundamental attributes of arbitration.’ This is where the employees’ argument stumbles. They don’t suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees’ argument seeks to interfere with one of arbitration’s fundamental attributes.”

The Court then turned to the argument that the later NLRA overrode the FAA. Gorsuch’s analytical framework posited that “in approaching a claimed conflict [between the NLRA and the FAA] we come armed with the ‘strong presumption’ that repeals by implication are ‘disfavored’ and that ‘Congress will specifically address’ preexisting law when it wishes to suspend its normal operations in a later law.” The relevant text of the later NLRA was a guarantee “of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid of protection.” The majority relied on the *eiusdem generis* canon (citing *Circuit City*) to limit application of the italicized phrase to the right to organize unions and bargain collectively, “not to express approval or disapproval of arbitration,” especially regarding class actions that were “hardly known when the NLRA was adopted in 1935.” Gorsuch added:

CHAPTER 13 – Statutory Patterns

[T]he term “other concerted activities” should, like the terms that precede it, serve to protect things employees ‘just do’ for themselves in the course of exercising their right to free association in the workplace, rather than “the highly regulated, courtroom-bound activities of class and joint litigation.” None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

In a more policy-oriented vein, Justice Gorsuch stated: “[T]he employees’ theory runs afoul of the usual rule that Congress ‘does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.’ Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules — not least the Federal Rules of Civil Procedure [and] the Arbitration Act []. It’s more than a little doubtful that Congress would have tucked into the mousehole of Section 7’s catchall term an elephant that tramples the work done by these other laws; flattens the parties’ contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn’t even administer.” [Editor – Could Gorsuch have said that the NLRA would have to bark louder to override the policies underlying the FAA?]

Justice Ginsburg’s dissent relied on the broad text of the NLRB that provided employee protection, previously noted in italics: “to engage in other concerted activities for the purpose of collective bargaining *or other mutual aid of protection* (emphasis added).” She asserted that this statutory language “spoke more embracively” than a simple reference to joining unions and collective bargaining. As for the ejusdem generis canon, “[c]ourts must take care [] not to deploy the canon to undermine Congress’ efforts to draft encompassing legislation.” In this connection, she argued that the NLRA was “the more pinpointed, subject-matter specific legislation” than the FAA (in effect, invoking “the specific prevails over the general” approach to applying the “no implied repeal” doctrine).

Ginsburg’s dissent also stressed the policy underlying the NLRA, which was to help employees “match their employers’ clout in setting the terms and conditions of employment.” As for the FAA, Ginsburg argued that its policy was never to disadvantage employees, citing Justice Stevens dissent in *Circuit City*.