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STATUTORY INTERPRETATION

A PRAGMATIC APPROACH

2019 SUPPLEMENT

William D. Popkin

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Chapter 1

The Rise of Legislation and the Reaction of Common Law Courts

1.03 18th-19th Centuries – United States material

a) 1776-1789

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Add the following

vi) Judicial power – Common law vs. statutory interpretation

It should be obvious that the issue of statutory interpretation in the United States concerns the scope of the judicial power. That is the point of framing the issue as involving Separation of Powers under our Constitution. One view (my own) is that the Constitution left open the scope of the "separate" judicial power and that there was room for judicial discretion in the exercise of "judgment." Manning took a more restrictive view, that judging in the United States was different from England, rejecting equitable interpretation.

In Gamble v. United States, 139 S.Ct. 1960 (2019), Justice Thomas developed his own version of the restrictive view of judicial power, based on the difference between English common law decisionmaking and our constitutional structure. The case actually dealt with the dual sovereignty doctrine – allowing the federal government to prosecute someone for the same crime for which the defendant was guilty under state law and vice versa. The Court upheld the dual sovereignty doctrine, relying heavily on stare decisis. Justice Thomas' solo and lengthy concurrence disagreed with the majority's deferential approach to stare decisis.[1] His opinion is relevant to statutory interpretation for two reasons. First (and most importantly), he perceives a sharp difference between courts deciding the common law and courts interpreting a legal text (such as the Constitution and a statute). I suspect that some of what he said is likely to appeal to other textualists in cases that deal explicitly with statutory interpretation outside of the stare decisis context. Second, he rejects a super-stare decisis approach to cases interpreting legislation (a doctrine which has appealed to many judges).

Here is some of what he said:

> I write separately to address the proper role of the doctrine of *stare decisis*. In my view, the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law. . . . We should restore our *stare decisis* jurisprudence to ensure that we exercise "mer[e] judgment," which can be achieved

[1] "Liberal" justices are obviously concerned about the potential weakening of the Court's approach to precedent (i.e. the abortion issue). See Knick v. Township of Scott, ___ S.Ct. ___ (2019), 2019 WL 2552486 (Kagan, J.) ("Just last month, when the Court overturned another longstanding precedent, Justice Breyer penned a dissent. See Franchise Tax Bd. of Cal. v. Hyatt, 139 S.Ct. 1485 (2019). He wrote of the dangers of reversing legal course 'only because five Members of a later Court' decide that an earlier ruling was incorrect. He concluded: 'Today's decision can only cause one to wonder which cases the Court will overrule next.' Well, that didn't take long. Now one may wonder yet again."

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through adherence to the correct, original meaning of the laws we are charged with applying. In my view, anything less invites arbitrariness into judging.

The Court currently views *stare decisis* as a "'principle of policy'" that balances several factors to decide whether the scales tip in favor of overruling precedent. Among these factors are the "workability" of the standard, "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." The influence of this last factor tends to ebb and flow with the Court's desire to achieve a particular end, and the Court may cite additional, ad hoc factors to reinforce the result it chooses. But the shared theme is the need for a "special reason over and above the belief that a prior case was wrongly decided" to overrule a precedent. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 864 (1992). The Court has advanced this view of *stare decisis* on the ground that "it promotes the evenhanded, predictable, and consistent development of legal principles" and "contributes to the actual and perceived integrity of the judicial process." This approach to *stare decisis* might have made sense in a common-law legal system in which courts systematically developed the law through judicial decisions apart from written law. But our federal system is different. The Constitution tasks the political branches—not the Judiciary—with systematically developing the laws that govern our society. The Court's role, by contrast, is to exercise the "judicial Power," faithfully interpreting the Constitution and the laws enacted by those branches. Art. III, §1.

A proper understanding of *stare decisis* in our constitutional structure requires a proper understanding of the nature of the "judicial Power" vested in the federal courts. . . . That "Power" is—as Chief Justice Marshall put it—the power "to say what the law is" in the context of a particular "case" or "controversy" before the court. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). It refers to the duty to exercise "judicial discretion" as distinct from "arbitrary discretion." The Federalist No. 78, at 468, 471.

That means two things, the first prohibitory and the second obligatory. First, the Judiciary lacks "force" (the power to execute the law) and "will" (the power to legislate). . . . Second, "judicial discretion" requires the "liquidat[ion]" or "ascertain[ment]" of the meaning of the law. At the time of the founding, "to liquidate" meant "to make clear or plain"; "to render unambiguous; to settle (differences, disputes)." Therefore, judicial discretion is not the power to "alter" the law; it is the duty to correctly "expound" it.

This understanding of the judicial power had long been accepted at the time of the founding. But the federalist structure of the constitutional plan had significant implications for the exercise of that power by the newly created Federal Judiciary. Whereas the common-law courts of England discerned and defined many legal principles in the first instance, the Constitution charged federal courts primarily with applying a limited body of written laws articulating those legal principles. This shift profoundly affects the application of *stare decisis* today.

Stare decisis has its pedigree in the unwritten common law of England. . . . In the common-law system, *stare decisis* played an important role because "judicial decisions [were] the principal and most authoritative evidence that [could] be given of the existence of such a custom as shall form a part of the common law." Accordingly, "precedents and rules must be followed, unless flatly absurd or unjust," because a judge must issue judgments "according to the known laws and customs of the land" and not "according to his private sentiments" or "own private judgment." In other words, judges were expected

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to adhere to precedents because they embodied the very law the judges were bound to apply.

"[C]ommon law doctrines, as articulated by judges, were seen as principles that had been discovered rather than new laws that were being made." . . . Importantly, however, the common law did not view precedent as unyielding when it was "most evidently contrary to reason" or "divine law." The founding generation recognized that a "judge may *mistake* the law." And according to Blackstone, judges *should* disregard precedent that articulates a rule incorrectly when necessary "to vindicate the old [rule] from misrepresentation." He went further: When a "former decision is manifestly absurd or unjust" or fails to conform to reason, it is not simply "bad law," but "not law" at all. This view—that demonstrably erroneous "blunders" of prior courts should be corrected—was accepted by state courts throughout the 19th century.

This view of precedent implies that even common-law judges did not act as legislators, inserting their own preferences into the law as it developed. Instead, consistent with the nature of the judicial power, common-law judges were tasked with identifying and applying objective principles of law—discerned from natural reason, custom, and other external sources—to particular cases. . . .

Federal courts today look to different sources of law when exercising the judicial power than did the common-law courts of England. The Court has long held that "[t]here is no federal general common law." *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938). Instead, the federal courts primarily interpret and apply three bodies of federal positive law—the Constitution; federal statutes, rules, and regulations; and treaties. That removes most (if not all) of the force that *stare decisis* held in the English common-law system, where judicial precedents were among the only documents identifying the governing "customs" or "rules and maxims." We operate in a system of written law in which courts need not—and generally cannot—articulate the law in the first instance. The Constitution, federal statutes, and treaties *are* the law, and the systematic development of the law is accomplished democratically. Our judicial task is modest: We interpret and apply written law to the facts of particular cases.

Underlying this legal system is the key premise that words, including written laws, are capable of objective, ascertainable meaning. As I have previously explained, "[m]y vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions." Accordingly, judicial decisions may incorrectly interpret the law, and when they do, subsequent courts must confront the question when to depart from them.

Given that the primary role of federal courts today is to interpret legal texts with ascertainable meanings, precedent plays a different role in our exercise of the "judicial Power" than it did at common law. In my view, if the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent. Federal courts may (but need not) adhere to an incorrect decision as precedent, but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law. A demonstrably incorrect judicial decision, by contrast, is tantamount to *making* law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power.

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When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it. This view of *stare decisis* follows directly from the Constitution's supremacy over other sources of law—including our own precedents. . . . The same principle applies when interpreting statutes and other sources of law: If a prior decision demonstrably erred in interpreting such a law, federal judges should exercise the judicial power—not perpetuate a usurpation of the legislative power—and correct the error. . . .

In sum, my view of *stare decisis* requires adherence to decisions made by the People—that is, to the original understanding of the relevant legal text—which may not align with decisions made by the Court. . . . Considerations beyond the correct legal meaning, including reliance, workability, and whether a precedent "has become well embedded in national culture," S. Breyer, Making our Democracy Work: A Judge's View 152 (2010), are inapposite. In our constitutional structure, our role of upholding the law's original meaning is reason enough to correct course.

Although precedent does not supersede the original meaning of a legal text, it may remain relevant when it is not demonstrably erroneous. As discussed, the "judicial Power" requires the Court to clarify and settle—or, as Madison and Hamilton put it, to "liquidate"—the meaning of written laws. This need to liquidate arises from the inability of human language to be fully unequivocal in every context. Written laws "have a range of indeterminacy," and reasonable people may therefore arrive at different conclusions about the original meaning of a legal text after employing all relevant tools of interpretation. It is within that range of permissible interpretations that precedent is relevant. If, for example, the meaning of a statute has been "liquidated" in a way that is not demonstrably erroneous (*i.e.*, not an impermissible interpretation of the text), the judicial policy of *stare decisis* permits courts to constitutionally adhere to that interpretation, even if a later court might have ruled another way as a matter of first impression. . . . Reasonable jurists can apply traditional tools of construction and arrive at different interpretations of legal texts. . . .

Although this case involves a constitutional provision, I would apply the same *stare decisis* principles to matters of statutory interpretation. I am not aware of any legal (as opposed to practical) basis for applying a heightened version of *stare decisis* to statutory interpretation decisions. Statutes are easier to amend than the Constitution, but our judicial duty is to apply the law to the facts of the case, regardless of how easy it is for the law to change. Moreover, to the extent the Court has justified statutory *stare decisis* based on legislative inaction, this view is based on the "patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant." Finally, even if congressional silence could be meaningfully understood as acquiescence, it still falls short of the bicameralism and presentment required by Article I and therefore is not a "valid way for our elected representatives to express their collective judgment. . . . "

Our judicial duty to interpret the law requires adherence to the original meaning of the text. For that reason, we should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous.

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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 it was the dissenters who 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 also said "applied to satisfy." This additional text, they argued, implied that the "obligation need not be intended to discharge the obligation in full."

iii) More than tie-breaker?

Page 68

Add the following

In United States v. Thompson/Center Arm Co., 504 U.S. 505 (1992), the rule of lenity was favorably invoked. The statute taxed anyone "making" a "firearm." The question was whether a gun manufacturer "makes" a firearm when it packages a mail-order kit which can be used to make both a firearm and another weapon, which did not fit the technical statutory definition of "firearm." A majority of the Court applied the rule of lenity, with a plurality explicitly noting that violation of the statute attracted not only a tax but also a criminal sanction (without proof of willfulness).

In Doerfler, Can a Statute Have More than One Meaning, 94 N.Y.U.L.Rev. 213 (2019), the author argues that the same text in the *same* statute can have more than one meaning depending on the context in which it is applied. This argument goes beyond the conventional view that the same text can have different meanings in *different* statutes and is based on the idea (developed more fully later in this book) that the audience for the law affects how the law is interpreted. A major example relied on by Doerfler is the difference between the civil and criminal application of the same law, a difference that the Court did *not*

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consider in the Thompson/Center case. In other words, Doerfler argues that a person who makes a firearm can mean one thing when the law taxes someone (a civil case) and another thing when the law imposes a criminal penalty.

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Chapter 3

Contemporary History – Declining Faith in Judging and Legislating

3.05 Pragmatism

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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 say 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)

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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 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

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> 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. . . . [I]n 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.

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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 Diary, 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 before 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.

COMMENT ON RELEVANCE OF DRAFTING MANUAL

The court in the Oxford comma case did *not* rely on the Maine legislature's drafting manual, which raised the broader question whether a drafting manual should be reliable evidence of statutory meaning. Consider (critically) the following comments. (1) Legislators are aware of its contents so the manual is good evidence of specific legislative intent. (2) Perhaps specific intent is irrelevant. Legislators might want courts to follow the manual as a way of assuring a consistent approach to interpretation and constraining judicial discretion. (3) Or perhaps consistency and limiting judicial discretion are values served by following the manual, whatever legislators intend.

In Hart, State Legislative Drafting Manuals and Statutory Interpretation, 126 Yale L.J. 438 (2016), the author argues that the manuals are useful tools of statutory interpretation. The article also provides an exhaustive study of the contents of state drafting manuals.

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4.03 Authors and audiences

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Add the following

c) Native American audience

One context in which the understanding of the audience for a legal text prevails concerns treaties with Indian Nations. In Washington State Dept. of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2019), a treaty with the Yakama Nation reserved to the Nation "the right, in common with citizens of the United States, to travel upon all public highways." All five Justices in the majority agreed "that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855."; and "When we're dealing with a tribal treaty, [] we must 'give effect to the terms as the Indians themselves would have understood them.'" Writing for three Justices, Breyer stated that although "[t]he words 'in common with' on their face could be read to permit application to the Yakamas of general legislation (like the legislation before us) that applies to all citizens, Yakama and non-Yakama alike [,] this Court concluded the contrary because that is not what the Yakamas understood the words to mean in 1855."

However, the decision cannot automatically be extended to other situations because of how at least some treaty negotiations with Native Americans occurred – specifically, that "the treaty negotiations were conducted in, and the treaty was written in, languages that put the Yakamas at a significant disadvantage. The parties negotiated the treaty in Chinook jargon, a trading language of about 300 words that no Tribe used as a primary language. The parties memorialized the treaty in English, a language that the Yakamas could neither read nor write."

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.

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).

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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)

4.07 When textualists disagree

Page 166

Add the following

a. Stevens' dissent in Circuit City directly challenges the claim that textualism is minimalist by reducing judicial discretion. Cases in which textualist judges disagree about the meaning of the text provide some support for his argument. For example, in BNSF Railway Co. v. Loos, 139 S.Ct. 893 (2019), Ginsburg wrote for a 7-2 *majority* (joined by Alito and Kavanaugh) and Gorsuch wrote a dissent (joined by Thomas). The Court held that the portion of an award to an employee under the Federal Employers' liability Act attributable to lost wages due to an injury were taxable as "compensation" under the Railroad Retirement Tax Act (RRTA) and therefore subject to withholding by the railway-employer.

Consistent meaning. The Court noted that both the Social Security Act and the RRTA were passed during the Depression to ensure financial security in old age. SSA tax and benefits depend on "wages," which the Court deemed the equivalent of "compensation" under RRTA. And case law had interpreted "wages" to include payment for lost wages (for example, back pay for a wrongful discharge and severance pay). You should recognize this as relying on the presumption that similar words in different statutes have similar meanings.

No surplusage. The Court also noted that the RRTA explicitly excluded from "compensation" for time lost certain types of sick pay and disability pay. These exclusions would be "entirely superfluous if [] the RRTA broadly excludes from 'compensation' any and all pay received for time lost." You should recognize this as an application of the "no surplusage" canon.

The *dissent* stressed a different understanding of the word "compensation." As for the text, the dissent cited Black's Dictionary to support its view that "compensation" meant the package of benefits the employer provides to an employee for services rendered, not payment to compensate for an injury. It rejected reliance on case law arising under the SSA, which interpreted a different statute involving a different factual context.

b. In Republic of Sudan v. Harrison, 139 S.Ct. 1048 (2019), the Court interpreted a service of process provision of the Foreign Sovereign Immunities Act of 1976 (sec, 1608(a)(3)). That provision specified as a method of service the sending of the relevant documents "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The Court held that this provision was only satisfied by service at the principal office of the foreign minister in the Sudan. Service at the embassy in Washington was insufficient. By an 8-1 vote, Justice Alito (joined by Gorsuch and Kavanaugh) held that "[t]he most natural reading of this language is that service must be mailed directly to the foreign minister's office in the foreign state," although he conceded that this was not the only "plausible reading of the statutory text." The "key term [] is the past participle 'addressed.' . . . And the noun 'address' [] means 'the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with (citing several dictionaries). Since a foreign nation's embassy in the United States is neither the residence nor the usual place of business of that nation's foreign minister and is not a place of business where the

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minster can customarily be found, the most common understanding of the minister's 'address' is inconsistent with the interpretation" of the law that permits service at the embassy.

Justice Thomas wrote a dissent arguing that the majority's view was "not the 'most natural reading'" of the law, because the text specified the person, not the place, to whom service should be addressed. The dissent stressed that another provision of the law (sec. 1608(a)(4)) explicitly refers to both the person and the *place* of service. The absence of explicit "place" language in sec. 1608(a)(3) undermined the majority's conclusion. The majority agreed that the contrast between sections 1608(a)(3&4) cut in the dissent's favor but that was outweighed by countervailing arguments.

Thomas hinted that the majority's position was influenced by policy: "[The Court's] bright-line rule may be attractive from a policy perspective, but the [statute] neither specifies nor precludes the use of any particular address."

c. In Home Depot U.S.A., Inc. v. Jackson, 139 S.Ct. 1743 (2019), Justice Thomas (a committed textualist) wrote for a 5-4 majority, joined by the four "liberal" justices. Justice Alito wrote a dissent, joined by Roberts, Gorsuch, and Kavanaugh. Both purported to rely on a textualist analysis. The case involved a plaintiff-lender who sued a debtor-defendant; the debtor-defendant counterclaimed against a third party.

The issue was the meaning of "defendant" in two statutes. More specifically, the question was whether a counterclaim defendant was the kind of "defendant" who could remove a case from state to federal court. 28 U.S.C. sec. 1441(a) allowed a "defendant" to remove a case in any "civil action" over which a federal court would have "original jurisdiction." 28 U.S.C. 1453(b) (CAFA) allowed removal by "*any* defendant without the consent of all defendants." The Court held that "defendant" in both statutes referred only to the party sued by the original plaintiff.

As for sec. 1441(a), Justice Thomas agreed that it was "plausible" to read "defendant" to include a counterclaim defendant but argued that this was not the "best" reading. He stated his approach as follows: "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," citing Scalia & Garner to the effect that the "text must be construed as a whole." Thomas' main argument was that the statute referred to removal of a "civil action" over which the court has "original jurisdiction." And the only civil action over which the court has original jurisdiction is the action defined by the plaintiff's complaint, not the action defined by a counterclaim.

As for sec. 1453(b), the Court conceded that this was a "closer question," because it allowed removal by "any" defendant" ("any" ordinarily carrying an "expansive" meaning). But this clause, the Court argued, merely removed limits on removal, and did not expand the types of parties entitled to removal.

The dissent disagreed with the Court's interpretation of both sections of the U.S. Code, based on the plain meaning of "defendant." It began with sec. 1453(b) because of the use of the modifier "any" before "defendant." Before launching into its textual analysis, however, the dissent noted that denying removal created a loophole in the law. Even though a plaintiff's claim against a defendant *could* be removed to federal court, the plaintiff could raise the same claim as a counterclaim against that defendant and thereby prevent removal. Although "what finally matters is the text," "a good interpreter also reads a text charitably, not lightly ascribing irrationality to its author." When the reading of the text "makes no sense as a policy matter, it had better purport to reflect the best reading of the text."

The dissent then returned to the text, stressing its understanding of the best reading. It argued that adjectives like "third-party" modify nouns (such as "defendant") but do not alter the meaning of the noun.

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For example, "full costs" are still "costs" and "zebra finches" are still "finches." Moreover, "any" has an "expansive meaning." "In ordinary language, replacing 'the Xs' with 'any X' will often make the term 'X' go from covering only paradigm instances of X to covering all cases." For example, compare "visitors to the prison may not use the phones except at designated times" with "visitors to the prison may not use any phones except at designated times." "On a natural reading, 'the phones' refers to telephones provided by the prison, whereas 'any phone' includes visitors' cellphones." Consequently, "any" defendant would include a defendant in a counterclaim.

[Editor – Note two issues raised by the dissent. First, it starts with a discussion of policy, raising the question whether its "best reading" is policy driven. Second, would (should) an interpreter normally rely on the paradigm reading of a text when the text contains no modifier? Paradigm reading (or prototypical meaning) is discussed in Chapter 5.]

[Editor – The dissent's discussion of sec. 1441(a) is omitted.]

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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. . . .

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> 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.

See also the following quote from Arlington Central School District Bd. of Educ. v. Murphy, 548 U.S. 291, 296-97 (2006), which is often said to end the federal courts' reliance on the Holy Trinity doctrine: "When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."

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"?

5.05 Context and permissible readings of the text

Page 212

Add the following

Comment about how textualists determine the meaning of a text – Dictionary, Corpus Linguistics, Ordinary Concept

The discussion of the meaning of "representatives" in Chisom v. Roemer is a good occasion to consider some of the methods by which textualists determine the meaning of a statutory text. We have already considered some of these issues – whether to focus on one or two words, on a whole phrase, on the whole statute, or on multiple statutes. In the following paper, the author discusses various ways in which a text can acquire an original public meaning – specifically: reliance on the dictionary, corpus linguistics, and

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ordinary concept use. See Tobia, Kevin P., Testing Original Public Meaning (October 14, 2018) (available at SSRN: https://ssrn.com/abstract=3266082 or http://dx.doi.org/10.2139/ssrn.3266082).

After reading the following, can you characterize which approach to determining the meaning of "representatives" is used by Justices Stevens and Scalia?

Tobia observes that *dictionaries* tend to generate a more extensive list of usages but corpus linguistics generates prototypical uses.

The method by which *corpus linguistics* determines meaning is to search for the words that are most likely to appear in the same context as the search term. For example, the meaning of "vehicle" in the phrase "no vehicles in the park" will depend on the words typically used along with vehicle in ordinary speech. This will tend toward privileging "car" as the typical meaning even though a dictionary would support a more extensive list of meanings (Tobia references "airplane" as an example of a vehicle). Similarly, the prototypical meaning of a "bird" includes a robin but probably excludes a penguin, which would be a bird when applying a more extensive definition.

"*Ordinary concept use*" is a third way to determine meaning; the author explores this standard by asking law students, judges, and individuals not trained in the law how they would understand the meaning of a particular term.

The overall conclusion from the study is that these three standards result in different conclusions about the public meaning of a term. This requires, at the very least, a textualist's defense of the specific method chosen to determine the meaning of language used in a statute; without such defense, the choice of method will seem arbitrary.

QUESTION

1. An important observation made by the author is that there may be a difference between determining the meaning of a word in isolation and the meaning of a word as part of a rule. Tobia states: "[O]ne might wonder how dictionaries and corpus linguistics perform in assessing the meaning of a term in the context of a *rule*." He gives as an example that "the meaning of 'vehicle' [might be] significantly different in the context of the rule 'no vehicles in the park.'" He argues that this does not equate the determination of the public meaning with relying on some presumed purpose of the rule, but that "the meaning of 'vehicle' is different in the context of [a] legal *rule*." Does this come close to arguing that the subject matter of a law can influence the meaning of a word like "representatives" – that is, a voting rights act protecting against race discrimination. Put differently, can Stevens' majority opinion be understood as a version of textualism.

2. Is Scalia's choice of a probable meaning similar to using a prototypical or paradigmatic (corpus linguistics) approach to determining the meaning of a statutory text?

5.05 Context and permissible readings of the text

Other examples of purpose/text interaction

Page 215

Add the following

4. *Purpose vs. text (when statute refers to another law).* In Jam v. International Finance Corp., 139 S.Ct. 759 (2019), the text of the International Organizations Immunities Act of 1945 (IOIA) granted

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international organizations such as the World Health Organization the "same immunity from suit . . . as is enjoyed by foreign governments." When adopted in 1945 foreign governments enjoyed virtually absolute immunity but that immunity is today inapplicable to certain commercial activities, based on a 1952 State Department position and a 1976 statute (the Foreign Sovereign Immunities Act). The issue was whether the immunity granted to international organizations was frozen as of 1945 or evolved along with changes in the immunity of foreign governments.

The Court argued that the text (the "same as" language) favored the "evolutionary" approach. The clearer way to freeze the law would be a text providing absolute immunity or a text stating that it incorporated the law of foreign sovereign immunity as of a particular date. The Court rejected the argument that the purpose of the 1945 IOIA statute and the 1976 Foreign Sovereign Immunity Act were different, so that the broader immunity initially provided by the IOIA persisted, stating: "We ordinarily assume, 'absent a clearly expressed legislative intention to the contrary,' that "the legislative purpose is expressed by the ordinary meaning of the words used." Whatever the ultimate purpose of [1945] international organization immunity may be [,] the immediate purpose of the immunity provision is expressed in language that Congress typically uses to make one thing continuously equivalent to another."

The Court confirmed its "evolving meaning" conclusion by relying on the "reference" canon of interpretation, which states that, "when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. . . . In contrast, a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments." The IOIA's reference to immunity enjoyed by foreign governments was a general rather than a specific reference, and therefore to an external body of potentially evolving law, not to a specific provision of another statute.

The Court's decision was 7-1, with Breyer filing a long dissent relying on the purpose of the IOIA, specifically, that the different purposes of the IOIA and Foreign Government Immunity Act. The length of the dissent suggests that Breyer felt the need to stake out a purposive approach to statutory interpretation in the face of a growing emphasis on textualism (especially after the retirement of Justice Stevens).

The dissent framed the issue as the "familiar" one of whether the statutory text was static or dynamic (changing over time). He doubted that "the language itself helps in this case. . . . Linguistics does not answer the temporal question. . . . [] [J]udges interpreting the words 'same . . . as' have long resolved ambiguity not by looking at the words alone, but by examining the statute's purpose as well. . . . There is no hard-and-fast rule that the statutory words 'as is' or the statutory words 'same as' require applying the law as it stands today." As the for the "reference" canon, "a canon is at most a rule of thumb," and, in any event, "the question whether a statute which has adopted another statute by reference will be affected by amendments made to the adopted statute is one of legislative intent and purpose."

Numerous passages in the dissent set forth Breyer's purposivist credo: "[A]ll interpretive roads here lead us to the same place, namely, to context, to history, to purpose, and to consequences. Language alone cannot resolve the statute's linguistic ambiguity."; "Statutory interpretation, [] is not a game of blind man's bluff.". His concluding paragraph is in the same vein: "My decision rests primarily not upon linguistic analysis, but upon basic statutory purposes. Linguistic methods alone, however artfully employed, too often can be used to justify opposite conclusions. Purposes, derived from context, informed by history, and tested by recognition of related consequences, will more often lead us to legally sound, workable interpretations—as they have consistently done in the past. These methods of interpretation can help voters hold officials accountable for their decisions and permit citizens of our diverse democracy to live together productively and in peace—basic objectives in America of the rule of law itself." Consistent with this

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approach to statutory interpretation, Breyer's dissent contains an extensive explanation of why broad immunity for international organizations, including their commercial activities, was essential to achieve the legislative purpose behind the IOIA.

5.08 Legislative intent and severing an unconstitutional part of a statute

Comment

Page 240

Add the following

Justice Thomas' view. 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 sports gambling in privately owned casinos, 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

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> 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.

Judge Kavanaugh's view. In PHH Corp. v. Consumer Financial Protection Bureau, 881 F.3d 75 (D.C.Cir. 2018), the Court held that the Consumer Financial Protection Bureau (CFPB) was constitutional. The issue was whether the President's power to remove the Bureau's Director could be limited to "cause". Two dissenters disagreed with the Court's holding but differed about whether to sever the unconstitutional "cause" requirement and leave the rest of the statute in effect (Judge Kavanaugh's view) or to strike down the entire statute (Judge Henderson's view).

Their views on severability are important. Judge Henderson argued that "the 111th Congress wanted the CFPB to be independent: free, that is, from industry influence and the changing political tides that come with accountability to the President. Severing [the cause] provision would yield an executive agency entirely at odds with the legislative design. In my view, the Congress would not have enacted [the law] in its current form absent for-cause removal protection. I believe, therefore, that the appropriate remedy for the CFPB's Article II problem is to invalidate Title X in its entirety."

As for the presence of a severability clause in the statute (which she describes as "boilerplate"), she stated:

> A severability clause can be probative of legislative intent but it is by no means dispositive. 2 Singer & Singer, § 44:8, at 627 ("Because of the frequency with which it is used, the separability clause is regarded as little more than a mere formality."). In the federal courts, a severability clause creates only a rebuttable "presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." Thus, the Supreme Court sometimes declines to sever an invalid provision despite a severability clause."

Judge Kavanaugh's dissent stated that "[s]everability is appropriate [] so long as (i) Congress would have preferred the law with the offending provision severed over no law at all; and (ii) the law with the offending provision severed would remain 'fully operative as a law.' Both requirements are met here. Through its express severability clause, the Dodd-Frank Act itself all but answers the question of presumed congressional intent. It will be the rare case when a court may ignore a severability provision set forth in the text of the relevant statute. I see no justification for tilting at that windmill in this case. [W]e also must look at 'the balance of the legislation' to assess whether the statute is capable 'of functioning' without the offending provisions 'in a manner consistent with the intent of Congress.' That prong of the analysis in essence turns on whether the truncated statute is 'fully operative as a law.' Here [] the Dodd-Frank Act and its CFPB-related provisions will remain 'fully operative as a law" without the for-cause removal restriction."

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See also "Fixing Statutory Interpretation," a Book Review of "Judging Statutes" by Judge Robert Katzmann, 129 Harv. L. Rev. 2118 (2014), where Judge Kavanaugh expressed skepticism of intent-based judgments in applying severability doctrine: "trying to guess what Congress would have wanted [is] an inherently suspect exercise."

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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," and 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

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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. Thus, firing a lesbian woman but not a gay man was illegal, but firing a lesbian woman but not a heterosexual man was legal.

8. *Stock options as "money remuneration"?*

Wisconsin Central Ltd. v. United States, 138 S.Ct. 2067 (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."

Questions

a. 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"?

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b. 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?

c. Why does Justice Gorsuch refer to the "*public* meaning" of the statutory text?

9. *"Contract of employment."*

New Prime Inc. v. Oliveira, 139 S.Ct. 532 (2019), discussed whether the exclusion of a "contract of employment" in sec. 1 of the Federal Arbitration Act applied to an independent contractor or only to an employee in an employer-employee relationship. The Court (per Gorsuch, J.) held that this phrase had an expansive meaning when the law was adopted in 1925, not restricted to an employee. It had the following to say about the possibility of the evolution of the text's meaning over time.

> In taking up this question, we bear an important caution in mind. "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.'" After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. We would risk, too, upsetting reliance interests in the settled meaning of a statute.
>
> . . . To many lawyerly ears today, the term "contracts of employment" might call to mind only agreements between employers and employees (or what the common law sometimes called masters and servants). Suggestively, at least one recently published law dictionary defines the word "employment" to mean "the relationship between master and servant." Black's Law Dictionary 641 (10th ed. 2014). But this modern intuition isn't easily squared with evidence of the term's meaning at the time of the Act's adoption in 1925. At that time, a "contract of employment" usually meant nothing more than an agreement to perform work. As a result, most people then would have understood § 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work.
>
> What's the evidence to support this conclusion? It turns out that in 1925 the term "contract of employment" wasn't defined in any of the (many) popular or legal dictionaries the parties cite to us. And surely that's a first hint the phrase wasn't then a term of art bearing some specialized meaning. It turns out, too, that the dictionaries of the era consistently afforded the word "employment" a broad construction, broader than may be often found in dictionaries today. Back then, dictionaries tended to treat "employment" more or less as a synonym for "work." Nor did they distinguish between different kinds of work or workers: All work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied.

The Court adds that many early 20th Century cases used the phrase "contract of employment" to include independent contractors and that sec. 1 itself excludes "contracts of employment of . . . any . . . class of *workers*" (emphasis added in opinion).

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Chapter 8

Administrative Interpretation

8.02 Super-Deference – Chevron

Page 359

Add the following

f) The future of Chevron

1. *Doubts about Chevron.* In the following three cases, a number of Justices expressed doubts about the continued viability of the Chevron doctrine.

a. 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."

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.

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"):

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> 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.

b. Pereira v. Sessions, 138 S.Ct. 2105 (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." An observer of how courts work could observe that precedents often decay before they are overruled and that questioning a precedent's foundations is one way that occurs.

c. BNSF Railway Co. v. Loos, 139 S.Ct. 893 (2019), dealing with the meaning of "compensation" in the Railroad Retirement Tax Act, also raised a *Chevron* issue, hinting at the demise of the Chevron doctrine. The IRS had long treated payments for periods of absence from service under the RRTA as

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"compensation." The Court noted this longstanding and consistent interpretation of the law, but never cited Chevron. The dissent noted that the employer only mentioned Chevron in final second of oral argument and then "[h]ated to cite it." The dissent (by Gorsuch and Thomas) signals its disapproval of Chevron, as follows: "Instead of throwing up our hands and letting an interested party [] dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute, the Court today buckles down to its job of saying what the law is in light of its text, its context, and our precedent. Though I may disagree with the result the Court reaches, my colleagues rightly afford the parties before us an independent judicial interpretation of the law. They deserve no less."

d. *Kavanaugh's views.* Justice Kavanaugh's comments about the difficulty of distinguishing a clear from an ambiguous text when applying the Chevron doctrine also suggest a willingness to abandon Chevron. In "Fixing Statutory Interpretation," See Book Review of "Judging Statutes" by Judge Robert Katzmann, 129 Harv. L. Rev. 2118 (2014). He notes the difficulty of deciding what level of clarity the judge requires to determine that the text is not ambiguous. Is 60-40 in favor of clarity enough or must it be 80-20? Some of his colleagues, he thinks, sometimes apply a 90-10 standard; others a 55-45 rule. And he thinks he probably applies something like a 65-35 test. And how does the judge decide if a statutory text meets whatever standard the judge uses? He says that "[d]etermining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity. It is difficult for judges (or anyone else) to perform that kind of task in a neutral, impartial, and predictable fashion." There is, moreover, "no definitive guide [] for determining whether statutory language is clear or ambiguous." Judge Kavanaugh is particularly worried about the difficulty of drawing the clarity-ambiguity line, "[b]ecause [when] judgments about clarity versus ambiguity turn on little more than a judge's instincts, it is harder for judges to ensure that they are separating their policy views from what the law requires of them."

Judge Kavanaugh's "solution" to the clarity-ambiguity problem is for "judges [to] strive to find the best reading of the statute. . . . [C]ourts could determine the best reading of the text of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any other appropriate semantic canons of construction." *Query*. Would the judge's effort to identify the "best reading of the statute" (relying on the whole text and the semantic canons) really minimize the uncertainty that currently exists in distinguishing a clear from an ambiguous text?

2. *Chevron and the nondelegation doctrine*. The prior cases suggested that it was up to the courts, not an agency, to interpret legislation. Suspicion of agency rulemaking also surfaces when the rival rulemakers are Congress and agencies. The specific issue is whether to allow Congress broad discretion to delegate rulemaking to an agency. Recent opinions by several Justices applying the "nondelegation" doctrine suggest that Congress lacks discretion to give agencies broad rulemaking power, a perspective that is also likely to call into question deference to agency rulemaking under Chevron.

It is well-established that the Constitution requires governing legislation to contain an "intelligible principle" to guide the agency's delegated power. As Kagan states in her plurality opinion in Gundy v. United States, ___ S.Ct. ___ (2019), 2019 WL 2527473, "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. . . . Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I." Kagan found such a principle in Gundy, which was consistent with the Court's dominant approach over the past decades to apply a very lax standard to uphold delegation of power to an agency.

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Three dissenters (in an opinion by Gorsuch, joined by Roberts and Thomas) had enough of this lax approach and would have held that the statute violated the Constitution. It applied a robust nondelegation doctrine and found that the law gave "unfettered discretion" to the administering agency. The dissenters cited the "major questions" doctrine used to decide whether the statute gives an agency discretion to make a rule under Chevron (established by the Mead case) as relevant to their suspicion of legislative delegations of power to an agency. They note that "[u]nder our precedents, an agency can fill in statutory gaps where 'statutory circumstances' indicate that Congress meant to grant it such powers. But we don't follow that rule when the 'statutory gap' concerns a question of deep 'economic and political significance' that is central to the statutory scheme."

Justice Alito joined the plurality because he could not say that "the statute lack[ed] a discernable standard that is adequate under the approach this Court has taken for many years," but he stated: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort." That makes four justices willing to take a jaundiced view of congressional legislation delegating power to agencies and (perhaps) the Chevron doctrine. Justice Kavanaugh did not participate in the Gundy decision.

8.04 Agency interpretation of its own Regulations – Auer deference

Page 365

Add the following

COMMENT – AUER SURVIVES (2019)

As the text suggests, there was an expectation that the Supreme Court might overrule *Auer* in 2019. It came close but didn't quite do it. The case is Kisor v. Wilkie, ___ S.Ct. ___ (2019), 2019 WL 2605554. A four-Justice plurality (Kagan, Ginsburg, Breyer, and Sotomayor) dismissed one of the major complaints about *Auer*, that it "encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. . . . [R]ecently, the concern about such self-delegation has appeared in opinions from this Court, starting with several from Justice Scalia calling for *Auer*'s reconsideration." Kagan argued that this "claim has notable weaknesses, empirical and theoretical alike. First, it does not survive an encounter with experience. No real evidence [] backs up the assertion." She cited a statement by "two noted scholars" that we "we are unaware of, and no one has pointed to, any regulation in American history that, because of *Auer*, was designed vaguely. Sunstein & Vermeule, 84 U. Chi. L. Rev., at 308." She also argued that "the argument's theoretical allure dissipates upon reflection. For strong (almost surely stronger) incentives and pressures cut in the opposite direction" because "clarity promotes compliance" and "regulated parties often push for precision from an agency, so that they know what they can and cannot do."

On the merits, a five-Justice majority (Kagan, Ginsburg, Breyer, Sotomayor, and Roberts) conceded that "[a]t times, this Court has applied *Auer* deference without significant analysis of the underlying regulation. At other times, the Court has given *Auer* deference without careful attention to the nature and context of the interpretation." But, the Court insisted, *Auer* did not "bestow[] on agencies expansive, unreviewable" authority. Instead, "[I]t gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions." The Court then explained several limits on *Auer* deference.

First, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. . . . And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction. . . . [A] court must 'carefully consider[]' the text, structure, history, and purpose of a

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regulation, in all the ways it would if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference."

Second, "[i]f genuine ambiguity remains [] the agency's reading must still be 'reasonable.' In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. . . . Some courts have thought [] that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.' And let there be no mistake: That is a requirement an agency can fail."

Third, "not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. . . . To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views. . . . Next, the agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely 'account [for] the presumption that Congress delegates interpretive lawmaking power to the agency.' So the basis for deference ebbs when '[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary' duties or 'fall[s] within the scope of another agency's authority.'" . . .

Fourth, "an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference. That means [] that a court should decline to defer to a merely 'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defend past agency action against attack.' For a similar reason, this Court has denied *Auer* deference when an agency interprets a rule that parrots the statutory text. An agency, we explained, gets no 'special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.'"

The Court concluded with a nod to *stare decisis*. "Overruling precedent is never a small matter." Adherence to precedent is "a foundation stone of the rule of law. . . [I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. . . . To be sure, *stare decisis* is 'not an inexorable command.' But any departure from the doctrine demands 'special justification'— something more than 'an argument that the precedent was wrongly decided.'"

Gorsuch's concurring opinion (joined by Thomas, Alito, and Kavanaugh) contains many objections to *Auer*, including some that also call into question the continued viability of *Chevron.* For example, he objects that "*Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a 'systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.'" And he links this objection to the Constitution: "[*Auer*] sits uneasily with the Constitution. Article III, §1 provides that the 'judicial Power of the United States' is vested exclusively in this Court and the lower federal courts. A core component of that judicial power is 'the duty of interpreting [the laws] and applying them in cases properly brought before the courts.' As Chief Justice Marshall put it, '[i]t is emphatically the province and duty of the judicial department to say what the law is.' And never, this Court has warned, should the 'judicial power . . . be shared with [the] Executive Branch.' Yet that seems to be exactly what *Auer* requires."

Gorsuch also notes that the "majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*." His

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comment about *Auer* and *Skidmore* echoes Roberts' suggestion in his concurrence that "that the distance between the majority and Justice Gorsuch is not as great as it may initially appear. The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise. Justice Gorsuch, meanwhile, lists the reasons that a court might be persuaded to adopt an agency's interpretation of its own regulation: The agency thoroughly considered the problem, offered a valid rationale, brought its expertise to bear, and interpreted the regulation in a manner consistent with earlier and later pronouncements. Accounting for variations in verbal formulation, those lists have much in common." This does not mean "that *Auer* deference is just the same as the power of persuasion discussed in *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944); there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions. But it is to say that the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation."

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Chapter 9

Legislative History

9.02 Analytical and historical frameworks

b) History

ii) England

Page 379

Backtracking

Add the following

In the Foreword by Lord Neuberger to Lowe & Potter, Understanding Legislation, pp. viii-ix (2018), the writer "confess[es] that one of my regrets is that, during my five years as President of the [English] Supreme Court, there was no opportunity to confront the question of whether we should reconsider [Pepper v. Hart]. When advising on an issue of statutory interpretation, a lawyer now almost always has to consider whether to trudge through Hansard to see if there is any relevant material, and in many such cases an adviser will conclude that such trawling must be done, if only for protective reasons. Having done the trawling, which can take a fair time and therefore involves significant costs to the client, it is difficult not to refer to the material in court, [] so further costs, also court time, are taken up. Yet the cases in which the material has made a difference to the outcome are very rare (if they exist at all) . . . . I would question whether the game is worth the candle."

9.03 Justifications for judicial use of committee reports

c) Committees as agents of parent chamber

Questions

Page 381

Add the following

3. In Digital Realty Trust, Inc. v. Somers, 138 S.Ct. 767 (2018), Justices Sotomayor justified relying on a Senate Report based on an understanding of how Congress works. 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"; and that "legislative staffers view committee and conference reports as the most reliable type of legislative history."

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9.04 Constitutional arguments about relying on legislative history

a) Scalia

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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 "conservative" judges saying Scalia went too far (id. at1324). 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

1. 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. 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."

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

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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 stressed 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."

2. In another recent case, the Court's majority held that a clear text blocked consideration of purpose, as evidenced by legislative history. "Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" See (Food Marketing Institute v. Argus Leader Media, ___ S.Ct. ___ (2019)), 2019 WL 2570624, Kagan joined the Court's opinion, but Breyer, Ginsburg and Sotomayor dissented.

iv) The clear text/ambiguity line; Judge Kavanaugh

The line between a clear and ambiguous text is important for many judges in deciding whether to rely on legislative history. As explained in the Chapter on Chevron, Justice Kavanaugh would replace the judge's decision about whether a text is clear or ambiguous with a "best reading" standard, in part to discourage a judge from implicitly relying on his or her own policy preferences. See "Fixing Statutory Interpretation," a Book Review of "Judging Statutes" by Judge Robert Katzmann, 129 Harv. L. Rev. 2118 (2014).

9.07 Changes in language during enactment process – Drafting history

c) Substituting language

ii) Substituting a statutory text for the text of a prior law

Questions and Comments

Page 417

Add the following

3. In BNSF Railway Co. v. Loos, 139 S.Ct. 893 (2019), Gorsuch's dissent relied on later changes to the text of a 1937 law to support his view that "compensation" did not includes payments to make up for wages lost due to a personal injury. He emphasized that "the statutory history I have in mind here isn't the sort of unenacted legislative history that often is [not] truly legislative (having failed to survive bicameralism and presentment) . . . . Instead, I mean here the record of *enacted* changes Congress made to the relevant statutory text over time, the sort of textual evidence everyone agrees can sometimes shed light on meaning."

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The dissent was referring to the fact that the original 1937 RRTA *explicitly* included payment for time lost as "compensation," but later versions of the statute deleted that text. "Congress's decision to remove the *only* language that could have fairly captured the damages here cannot be easily ignored."

The majority, however, argued that "compensation" in the original 1937 law included payments for lost wages attributable to personal injury and "[i]t would be passing strange for Congress to restrict substantially what counts as 'compensation' in a manner so oblique." In other words, Congress would have to "bark louder" to change the meaning of "compensation."

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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).

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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 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 (discussed in the Chapter 12).

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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 [534 U.S. 61 (2001)] 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.

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Chapter 13

Statutory Patterns

13.01 Super-text vs. policy coherence

b) Same text

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Add the following

In Taggart v. Lorenzen, 139 S.Ct. 1795 (2019, the Court made the following statement: "When a statutory term is 'obviously trans-planted from another legal source,' it 'brings the old soil with it.' Hall v. Hall, 138 S.Ct. 1118, 1128 (2018) (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947))." Does the Fogerty opinion support that view? Why should a court privilege the old soil rather than a meaning suggested by the new soil in which the statutory term is planted?

13.02 Conflict between prior and later statutes—The "No Repeal by Implication" doctrine

a) Substantive statutes

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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. Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018), dealt with the 1925 Federal Arbitration Act (FAA) which contained a provision which allowed enforcement of a contract that prevented employees from bypassing case-by-case individualized arbitration, so that they could 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 1925 FAA and the later 1935 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."

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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 (emphasis added)." The majority relied on the ejusdem generis canon 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." "[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."

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." 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 when 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.

13.03 Prior statutes constraining future law

b) Making it harder to change prior law

ii) Dictionary Acts

QUESTIONS AND COMMENTS

Page 552

Add the following

3. *Do statutory interpretation statutes entrench?* In Kisor v. Wilkie, ___ S.Ct. ___ (2019), 2019 WL 2605554, Justice Gorsuch's concurrence suggested that they might. He asked whether "Congress [can] *eliminate* the *Auer* presumption for future statutes? Perhaps—but legislation like that would raise questions, which the majority does not address, about the ability of one Congress to entrench its preferences by attempting to control the interpretation of legislation enacted by future Congresses."

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4. *Presumption that "person" not include sovereign; Dictionary Act definition*

In Return Mail, Inc. v. United States Postal Service, 139 S.Ct. 1853 (2019), the Court relied on the Dictionary Act to reinforce a longstanding presumption that "person" does not include the sovereign, as follows:

> The patent statutes do not define the term "person." In the absence of an express statutory definition, the Court applies a "longstanding interpretive presumption that 'person' does not include the sovereign," and thus excludes a federal agency like the Postal Service. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U. S. 765, 780–781 (2000.
>
> This presumption reflects "common usage." It is also an express directive from Congress: The Dictionary Act has since 1947 provided the definition of "'person' " that courts use "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U. S. C. §1; see Rowland v. California Men's Colony, Unit II Men's Advisory Council, 506 U. S. 194, 199–200 (1993). The Act provides that the word "'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." §1. Notably absent from the list of "person[s]" is the Federal Government. See Mine Workers, 330 U. S., at 275 (reasoning that Congress' express inclusion of partnerships and corporations in §1 implies that Congress did not intend to include the Government). Thus, although the presumption is not a "hard and fast rule of exclusion," "it may be disregarded only upon some affirmative showing of statutory intent to the contrary."

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Chapter 15

Executive-Legislative Relationship

15.05 Congressional standing to obtain judicial review of disputes between and within branches

b) Supreme Court; No standing

Comments and Questions

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Add the following

c. In House of Representatives v. Mnuchin, ___ U.S.D.Ct. (D.C.) ___ (2019), 2019 WL 2343015, a Democratic-controlled House sued to block President Trump's spending of certain funds to build a border wall. (In Burwell, supra, the plaintiff House was controlled by Republicans). The court denied congressional standing. The House argued that Trump's spending plan was not authorized by legislation and therefore violated the Appropriations Clause of Constitution. The Trump administration argued that the court lacked standing precisely *because* the dispute contested the meaning of bills passed by Congress in the exercise of its Appropriations power. The court explained that the case lay somewhere between the Raines case (no standing for six members of Congress) and the Arizona State Legislature case (standing in both houses of the Arizona legislature to vindicate an institutional injury). Admitting that neither case addressed whether *one* House of Congress had standing to allege an institutional injury, it went on to deny the House standing."

The court distinguished *Burwell* this way. "[Burwell] distinguished 'constitutional violations,' which it found supported institutional standing, from 'statutory violations,' which it concluded did not. . . . As Burwell itself shows, it can be difficult to articulate a workable and consistent distinction between 'constitutional' and 'statutory' violations for legislative standing." But the court went on to quote Burwell to the effect that if "the invocation of Article I's general grant of legislative authority to Congress were enough to turn every instance of the Executive's statutory noncompliance into a constitutional violation, there would not be decades of precedent for the proposition that Congress lacks standing to affect the implementation of federal law." Conceding that this case presented a "close question," it denied congressional standing (although it stated that "the Court does not imply that Congress may never sue the Executive to protect its powers.")

There are three possible resolutions of the Burwell and Mnuchin cases: there is no congressional standing in either case; there is congressional standing in both cases; or there is standing in Burwell and no standing in Mnuchin, as the courts held. I think that the only plausible way for both Burwell and Mnuchin to be correct is to conclude that there is no plausible interpretation of the Obamacare law that could support spending the money to reimburse insurance companies in Burwell, but that Mnuchin is really about what is the best interpretation of appropriations legislation.

d. In Virginia House of Delegates v. Golden Bethune-Hill, 139 S.Ct. 1945 (2019), the Court (5-4) denied standing to the Virginia House of Delegates to appeal a lower court decision finding that the Virginia legislature's redistricting plan was unconstitutional. Ginsburg wrote for the majority (joined by Thomas, Sotomayor, Kagan and Gorsuch); Alito wrote the dissent (joined by Roberts, Breyer and Kavanaugh). The Court stated:

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Seeking to demonstrate its asserted injury, the House emphasizes its role in enacting redistricting legislation in particular. The House observes that, under Virginia law, "members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly." The House has standing, it contends, because it is "the legislative body that actually drew the redistricting plan," and because, the House asserts, any remedial order will transfer redistricting authority from it to the District Court. But the Virginia constitutional provision the House cites allocates redistricting authority to the "General Assembly," of which the House constitutes only a part. That fact distinguishes this case from Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 135 S.Ct. 2652 (2015), in which the Court recognized the standing of the Arizona House and Senate—acting together—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature's authority under the Federal Constitution over congressional redistricting. In contrast to this case, in Arizona State Legislature there was no mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority. Just as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.